The Human Rights Clause in the International Agreements of the European Community

Selected Issues under Public International Law, the Law of the European Community, and the Law of the World Trade Organization

Lorand Bartels

April 2002

Thesis submitted with a view to obtaining the title of Doctor of Laws of the European University Institute
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Introduction

Since the early 1990s, the European Community has adopted a policy of including a 'human rights clause' in new trade and co-operation agreements concluded with other countries and regional organisations. The result is that there are now human rights clauses in agreements with over 120 countries, and it may fairly be said that the human rights clause forms a central plank of the Community's external human rights policies.

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1 This thesis refers primarily to the 'European Community' as the legal entity that is party to international agreements. The term 'European Union' is used where relevant.


4 See, for instance, EU Council, European Union guidelines on human rights dialogues, 13 December 2001, http://europa.eu.int/comm/external_relations/human_rights/doc/ghd12_01.htm which divides the EU's human rights dialogue into four categories: (a) dialogues or discussions of a rather general nature based on regional or bilateral treaties, agreements or conventions

Footnote continued
The core of the human rights clause is an ‘essential elements’ clause, which states that respect for the principles of human rights and democracy inspires the policies of the parties and constitutes an essential element of the agreement. This is complemented by a ‘non-execution’ clause providing that the parties undertake to take all general and specific measures necessary to fulfil their obligations under the agreement, and that a failure to fulfil their obligations under the agreement will entitle the other party to respond with ‘appropriate measures’.

In practice, the human rights clause has been used primarily as a basis for the suspension of financial aid, although, in appropriate cases, it could be used as a basis for enacting other measures, including the suspension of any trade preferences granted under an agreement, and the enactment of other measures, which could include ‘social labelling,’ that might otherwise infringe obligations set out in these or other agreements.⁵

⁵ See COM (95) 216 final, n 2, Annex 2 (listing possible measures ranging from the suspension of cooperation to trade embargoes) and the European Parliament’s Interim Report on the proposal for a Council Decision on a framework procedure for implementing Article 366a of the Fourth Lomé Convention (COM (96)0069 C4-0045/97-96/0050(AVC), A4-0175/97, 21 May 1997, at p 22, (mentioning suspension of Lomé preferences, public procurement rights, cumulation of rules of origin rights, and rights relating to special commodity agreements).
This thesis is in four main parts. Part 1 provides a political and legal analysis to the role of the human rights clause in the external human rights policies of the European Community and the European Union. This establishes the basis for the main object of this thesis, which to analysis a number of legal questions concerning the operation of the human rights clause, and any 'appropriate measures' taken under the clause. Part 2 begins by analysing the operation of the human rights clause, and any 'appropriate measures' taken under the clause, under public international law, and in particular in terms of the law of treaties.


Footnote continued
Part 3 investigates whether the European Community has any legislative power to include a human rights clause in its external agreements or to take measures under the clause, or — in the language of Community law — whether there is any 'legal basis' for measures under the human rights clause. Finally, Part 4 analyses the question whether any trade measures taken under the clause would be in conformity with the General Agreement on Tariffs and Trade 1994, one of the primary agreements administered by the World Trade Organization. This

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8 See in particular Riedel and Will, n 7, (human rights clause supported by all relevant legal bases); Juliane Kokott and Frank Hoffmeister, 'Opinion 2/94 on the Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms' (1996) 90 AJIL 664 (human rights clause in development cooperation agreements supported by Article 181 but otherwise not by Article 308); Brandtner and Rosas, n 7, at 474-5 (no need for legal basis for the clause); Cremona, 'The European Union as an International Actor,' n 6, (not specifying); Hoffmeister, n 7, (no legal basis necessary for inclusion of clauses in agreements, through legal basis necessary for measures under the clause; see further at n 201 below); Duquette, n 7, (pointing out but not deciding on problems with the legal basis for human rights generally, and not expressing a view on the human rights clause); Bulterman, n 7, (sceptical of the use of Article 308, negative on Article 133, positive on Articles 181 and 310).

9 Other types of measures that could be taken under the clause, such as the suspension of transport or financial services or the placing of human rights conditions on government procurement contracts, could additionally involve the General Agreement on Trade in Services (GATS) or the plurilateral Agreement on Government Procurement (GPA).

10 This issue is mentioned, but not discussed in any detail, in Brandtner and Rosas, n 7, at 706, Cremona, 'Human Rights,' n 6, at 73, and Diego J. Liñan Nogueras and Luis M. Hinojosa Martinez, 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems' (2001) 7 Colum J Eur L 307, at 327-331. In its Resolution on the Communication from the Commission on the inclusion of respect for democratic principles and
last question is of increasing relevance, given that virtually all of the Community's trading partners either are or are applying to be WTO Members, and that third party WTO Members may also be adversely affected by any trade measures imposed under the clause.

human rights in agreements between the Community and third countries (COM (95)0216, C4-0197/95), A4-0212/96 [1996] OJ C320/71, the European Parliament requested the European Commission to produce 'a further communication, to address, inter alia, criteria, procedures, forms of sanctions, and their method of application, in particular with regard to the implementation of the democracy and human rights clause included in agreements with third countries [which] should also examine the relation in law between UN Security Council decisions, Council decisions and Member States' decisions on matters such as embargoes, and that it should also report on the legal obstacles to the imposition of political and economic sanctions, whether in the context of the GATT/WTO or in other areas of law'. Interestingly, no such communication was ever issued. Nor has the question of the WTO-legality of the human rights clause been raised within the WTO itself. See, for comparison, the Inventory of Non-Tariff Provisions in Regional Trade Agreements — Background Note by the Secretariat, WT/REG/W/26, 5 May 1998, which lists numerous similar trade restrictive provisions in regional trade agreements but fails to mention the human rights clause. The clause is also not mentioned in the Trade Policy Review – The European Union – Report by the Secretariat, WT/TPR/S/72, 14 June 2000, or by Members in the discussion on this report in Trade Policy Review – The European Union – Minutes of Meeting on 12 and 14 July 2000, WT/TPR/M/72, 26 October 2000 and Trade Policy Review – The European Union – Minutes of Meeting on 12 and 14 July 2000, WT/TPR/M/72/Add.1, 26 October 2000.

As at 1 January 2002, the WTO had 144 Members, including China, which acceded on 12 December 2001, and 27 applicants for Membership. For a list of current Members, see www.wto.org/english/ thewto_e/whatis_e/tif_e/org6_e.htm, and for a list of applicants, see http://www.wto.org/english/ thewto_e/acc_e/workingpart_e.htm.
Part 1

Outline of the Clause and Political Context

A. Introduction

The aim of this Part is to provide a legal and political background for the later legal analysis of the clause undertaken in this thesis. Section B first outlines the way in which the human rights clause is designed to operate, with particular attention to the administrative framework established by the relevant agreements in which it appears. Section C then provides a classification of the various agreements containing a human rights clause. This section also discusses conditionality clauses in the Community’s autonomous instruments for granting trade preferences and financial aid to developing countries, as well as similar clauses in the trade instruments of certain other international actors, namely, the European Free Trade Association (EFTA), and the United States. Finally, Section D discusses the scope of the human rights clause. This section addresses first the type of human rights protected under the essential elements clause, and, second, the nature of the ‘appropriate measures’ that can be applied under the non-execution clause in response to violations of those rights.

B. The operation of the human rights clause

The modern form of the human rights clause, which is sometimes called the ‘Bulgarian’ clause, after the 1993 agreement with Bulgaria in which it first...
appeared,\textsuperscript{12} was first set out in a systematic form in a 1995 Communication from the Commission.\textsuperscript{13} Since then, while it has been subject to a certain degree of variation in its wording, the basic structure of the human rights clause has remained relatively constant. It consists of three main provisions: an 'essential elements' clause establishing respect for the principles of human rights and democracy as an essential element of the agreement; a 'non-execution' clause providing that 'appropriate measures' may be taken in cases of a failure to fulfil the obligations in the agreement, following consultations with the other party (except in cases of special urgency); and a declaratory provision defining these 'cases of special urgency' and confirming that in such cases the 'appropriate

\textsuperscript{12} Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Bulgaria, of the other part [1993] OJ L323/2. A slightly earlier form of the non-execution clause provided that '[t]he parties reserve the right to suspend this agreement in whole or in part with immediate effect if a serious violation occurs of the essential provisions of the present Agreement.' This 'Baltic' clause was used in the following five agreements: the Agreement between the European Economic Community and the Republic of Albania, on trade and commercial and economic cooperation [1992] OJ L343/2; Agreement between the European Economic Community and the Republic of Estonia on trade and commercial and economic cooperation [1992] OJ L403/2; the Agreement between the European Economic Community and the Republic of Latvia on trade and commercial and economic cooperation [1992] OJ L403/11; the Agreement between the European Economic Community and the Republic of Lithuania on trade and commercial and economic cooperation [1992] OJ L403/20; and the Agreement between the Member States of the European Coal and Steel Community and the European Coal and Steel Community of the one part, and the Republic of Slovenia, of the other part [1993] OJ L287/2.

\textsuperscript{13} European Commission, Communication from the Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM (95) 216 final, 23 May 1995.
measures’ must be ‘taken in accordance with international law’. This declaratory provision has usually appeared in the form of a joint interpretive declaration, although in some recent agreements it has been included as part of the non-execution clause in the agreement itself.

In its model form, the essential elements clause reads as follows:

Respect for democratic principles and fundamental human rights [as defined in the Universal Declaration of Human Rights] inspires the domestic and external policies of the Community and of [the country or

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14 This declaratory provision was first contained in joint interpretive declarations in the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part [1994] OJ L360/2 and the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part [1994] OJ L359/2.

15 This difference is of legal significance. Where the provision is part of the treaty, it is binding as such, while, as an joint interpretive declaration, it is binding on both of the parties, if at all, on the basis of an estoppel. On this, see Nuclear Tests, Judgment, (Australia/France), [1974] ICJ Rep 253 (20 Dec), at para 43, in which a unilateral declaration was held binding on the party which had made the declaration. In addition, a joint declaration will be relevant to the interpretation of the agreement as an ‘instrument’ within the meaning of Article 31(2)(b) of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 331 (the ‘Vienna Convention’). Article 31(1) of this Convention states that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ Article 31(2)(b) states that ‘[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: ... any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.’
group of countries concerned] and constitutes an essential element of this Agreement.\textsuperscript{16}

The essential elements clause is granted operative legal effect by the non-execution clause, which states that:

The Contracting Parties shall take any general or specific measures required to fulfil their obligations under this Agreement. They shall see to it that the objectives of this Agreement are attained.

If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before so doing, 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 of 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.\textsuperscript{17}

\textsuperscript{16} Annex 1 of COM (95) 216 final, n 13. In practice, there are significant variations on the norms which are referred to in the essential elements clause, which will be discussed in more depth in Part 2.

\textsuperscript{17} Article 79 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3. Interestingly, the model non-execution clause in Annex 1 of Annex 1 of COM (95) 216 final, n 13, does not contain the first paragraph of this clause, which appears in all agreements. The significance of this paragraph is discussed below in Chapter 2.
Third, the declaratory provision defines ‘cases of special urgency’ as follows:

The Parties agree, for the purpose of the correct interpretation and practical application of this Agreement, that the term ‘cases of special urgency’ in [the non-execution clause] means a case of the material breach of the Agreement by one of the Parties. A material breach of the Agreement consists in:

(i) repudiation of the Agreement not sanctioned by the general rules of international law;

(ii) violation of essential elements of the Agreement, namely its [essential elements clause].

Whether or not this was intentional, the effect of this provision is to deem any violation of the essential elements clause to be a case of special urgency. Perhaps for this reason, the declaration to the non-execution clause in the agreement with South Africa further delimits cases of special urgency as those cases in which there is a serious infringement of human rights or where the matter is particularly ‘urgent’. This emphasis on the timeliness of a response is more consistent with the use of the term ‘cases of special urgency’ in Article

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18 Annex 1 of COM (95) 216 final, n 13.

19 The Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part [1999] OJ L311/32 contains a joint interpretive declaration stating that ‘[t]he Parties agree that the violation of the essential elements of the agreement referred to at Article 3(3) of this Agreement shall only consist of a grave violation of democratic principles or fundamental human rights or the serious interruption of the rule of law, creating an environment not conducive for consultations or where a delay would be detrimental to the objectives or interests of the Parties to this Agreement.’ Incidentally, Article 3(3) does not refer to the ‘violation of the essential elements of the agreement,’ but rather to the procedure to be followed in cases of ‘special urgency’.
65(2) of the Vienna Convention on the Law of Treaties, which codifies the rule that in cases of special urgency a contracting party may suspend the treaty without giving the usual three months' notice.20

Finally, although this is sometimes overlooked in studies on the human rights clause, it is important to note that many of the Community's agreements, including all of its association agreements, include a clause providing for dispute settlement in the event that the bilateral Council21 established under the agreement fails to find a political solution to any disputes relating to the agreement.22 This dispute settlement clause is generally in the following form:

20 Article 65(1) of the Vienna Convention, n 15, provides that '[a] party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.' Article 65(2) provides that '[i]f, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in Article 67 the measure which it has proposed.' On Article 65 see eg, Frederic L Kirgis Jr, 'Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties' (1989) 22 Cornell Int'l L J 551, at 568-9; Mohammed M Gomaa, Suspension or Termination of Treaties on Grounds of Breach, Martinus Nijhoff, The Hague/Boston/London, 1996, at 161; and Shabtai Rosenne, Developments in the Law of Treaties 1945-1986, Cambridge University Press, Cambridge, 1989, at 300.

21 The Association Council (also called a Joint Council or Joint Committee) takes decisions by common agreement between the parties (see, eg, Article 10 of Decision No 1/2000 of the EU-Israel Association Council of 13 June 2000 adopting its rules of procedure (2000/398/EC) [2000] OJ L151/12).

22 This dispute settlement procedure has only rarely been invoked and there has never been a case in which the procedure has been completed. See Decision No 3/96 of the Association Council Footnote continued
1. Either Party may refer to the Association Council any dispute relating to the application or interpretation of this Agreement.

2. The Association Council may settle the dispute by means of a decision.

3. Each Party shall be bound to take the measures involved in carrying out the decision referred to in paragraph 2.

4. In the event of it not being possible to settle the dispute in accordance with paragraph 2, either Party may notify the other of the appointment of an arbitrator; the other Party must then appoint a second arbitrator within two months. For the application of this procedure, the Community and the Member States shall be deemed to be one Party to the dispute.

The Association Council shall appoint a third arbitrator.

The arbitrators' decisions shall be taken by majority vote.

Each party to the dispute shall take the steps required to implement the decision of the arbitrators.\(^{23}\)

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Footnote continued

\(^{23}\) Article 86 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco,
From its wording, this dispute settlement clause would seem to apply to disputes concerning appropriate measures taken under the non-execution clause in response to violations of the essential elements clause. This is confirmed by certain of the declaratory provisions on procedures to be followed in ‘cases of special urgency’. The precise terms of these provisions vary according to the agreement at issue, but usually (and in their model form) they stipulate that, in cases of special urgency, ‘the other party may avail itself of the procedure relating to settlement of disputes’. The implication is that in other cases, too, the dispute settlement mechanism continues to be available to parties subjected to ‘appropriate measures’.

24 Annex 1 of COM (95) 216 final, n 13.

25 In rare cases, this provision merely provides for a right to ask for an ‘urgent meeting be called to bring the Parties together within 15 days’ (eg Article 17 of the Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the United Mexican States, of the other part [1998] OJ L226/25). This does not mean that the dispute settlement
In summary, it can be said that despite certain variations in wording, the basic operation of the human rights clauses is the same: a party that considers that the human rights norms set out in the essential elements clause have been violated may take appropriate measures, usually after consultations within the body established to administer the agreement, but also in serious cases without prior consultation. Furthermore, all such measures will be subject to dispute settlement where the agreement contains a dispute settlement clause.

C. Instruments containing the clause

This section offers a typology of the Community’s international agreements and autonomous instruments which contain a human rights clause. Its purpose is both to place the human rights clause in a legal and political context, and to establish an empirical basis for the theoretical questions addressed later in this thesis. To this end, the following classification emphasises the legal basis on which the Community’s agreements are concluded, as well as the extent to which these agreements provide for free trade or more limited trade preferences.

1. Bilateral agreements

Broadly speaking, the Community’s bilateral trade agreements may be divided into association agreements, trade agreements and cooperation agreements.

clause, where it exists, does not apply both to these cases of special urgency or to other appropriate measures under these agreements.
(a) Association agreements

Association agreements are concluded by the Community under Article 310.\(^{26}\) Although not necessary under this provision, in practice all association agreements take the form of mixed agreements concluded jointly by the Community and its Member States. Association agreements all provide for free trade between the Community and the respective third country. From a political point of view, these agreements may be further subdivided into the following categories:

*Association agreements with accession countries*

This category includes the 'Europe' agreements concluded with the ten Central and Eastern European countries. For these countries, the human rights clause may be considered a foretaste of Article 6 EU, which sets out the basis for human rights obligations binding on accession countries (Article 49 EU) and EU Member States (Article 7 EU).\(^{27}\)

\(^{26}\) Article 310 EC provides that 'the Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.'

\(^{27}\) These provisions are discussed below at p 158.
This category also includes the customs union agreements concluded with Cyprus and Malta, although these agreements do not have any human rights clauses.28

Association agreements with potential accession countries

This category includes the Stabilisation and Association Agreements (SAAs) negotiated or concluded with the five Balkan countries under the 1999 Stabilisation and Association Process.29 This category could also include Turkey, although there is no human rights clause in the customs union agreement with Turkey.30

Association agreements with non-accession countries

This category includes the nine ‘Euro-Mediterranean’ agreements concluded with Israel, the Palestinian Authority, and the Maghreb (Algeria, Morocco and

28 There is a human rights clause in eight of the ten ‘Europe’ association agreements with Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Romania, Slovakia, Slovenia, though not in the agreements with Poland or Hungary. See below at n 46.

29 Stabilisation and Association Agreements (SAAs) have so far been concluded with the Former Yugoslav Republic of Macedonia (FYROM) and Croatia. For current status, see www.europa.eu.int/comm/external_relations/see/index.htm.

Tunisia) and Mashreq (Egypt, Jordan, Lebanon and Syria) countries. This category also includes the Trade, Development and Cooperation Agreement with South Africa. All of these agreements contain human rights clauses, although not all are yet in force.

(b) Preferential trade agreements

Preferential trade agreements are understood to refer to all agreements other than association agreements, both pure and mixed, that provide for trade preferences between the contracting parties. These agreements are always concluded on the basis of Article 133 (common commercial policy), sometimes additionally on

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31 There is a human rights clause in each of the nine Euro-Mediterranean association agreements concluded with Tunisia (in force), Morocco (in force), Israel ([1996] L71/2; in force), Jordan (signed 24 November 1997), Egypt (signed 25 June 2001); Lebanon (initialled 10 January 2002; expected signature 23 April 2002), Algeria (19 December 2001), and in the Interim Association Agreement with the Palestinian Authority (in force). Negotiations are proceeding with Syria. For current status see www.europa.eu.int/comm/external_relations/search/regions.htm.


33 Article 133 provides that:

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. …

3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. …
the basis of other provisions. They can be classified into the following categories.

**Free trade agreements**

This category is so far comprised by the mixed free trade agreement with Mexico, which concluded on the basis of Article 133 together with a variety of other relevant legal bases.34

**Interim trade agreements**

These are pure Community agreements implementing the trade provisions of more comprehensive mixed agreements prior to ratification by the Member States. These agreements are often concluded on the basis of Article 133 alone,35 but sometimes they are also concluded together with other legal bases.36


including Article 181 (development cooperation). In one case, an interim agreement is based on Article 310 (association agreements).

Non-reciprocal trade agreements

Presently, the only agreement of this type is the Cotonou Agreement. This is a mixed agreement, concluded on a variety of legal bases, which applies to each of the seventy-seven African, Caribbean and Pacific countries (mainly ex-colonies) on a bilateral basis. It provides for unilateral trade preferences, as well as other forms of development cooperation. Because its trade preferences are non-

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37 Article 181, implementing the development cooperation policy set out in Title XX, states that:

Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.

The previous paragraph shall be without prejudice to Member States’ competence to negotiate in international bodies and to conclude international agreements.

reciprocal, in the WTO system it is treated differently from full free trade agreements.39

(c) Trade cooperation agreements

This category refers to agreements providing for some degree of trade liberalisation but without including any special trade preferences, as well as other forms of cooperation. It may be divided as follows.

Development cooperation agreements

This category consists of numerous pure Community agreements concluded on the basis of Article 181 together with other legal bases, usually including Article 133.40 These agreements provide for trade on a most-favoured-nation basis, which means, in practice, that trade is conducted on the same terms as with all WTO Members. Countries party to development cooperation agreements

39 In EEC – Import Regime for Bananas, DS38/R, unadopted, 18 January 1994, a panel rejected the Community’s claim that the Lomé Convention (the predecessor to the Cotonou Agreement) was valid under Article XXIV of GATT. The Cotonou Agreement is now authorised by a WTO waiver in European Communities – The ACP-EC Partnership Agreement – Decision of 14 November 2001, WT/L/436, 7 December 2001. See n 689 for the text of the waiver.

usually also benefit from the trade preferences granted to developing countries under the Community’s GSP program.

Mixed cooperation agreements

This category includes agreements that, like development cooperation agreements, provide for trade on a most-favoured-nation basis, the most notable being the eleven Partnership and Cooperation Agreements (PCAs) concluded with the former Soviet republics, which are mixed and concluded on a variety of legal bases. It also includes the agreements with South Korea and Mercosur.

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41 Partnership and Cooperation Agreements are based on Article 44(1) and the last sentence of Article 47(2) (right of establishment), Articles 55 (services), 57(2) (capital and payments), 71 and 80(2) (transport), 93 (taxation), 94 (approximation of laws), 133 (common commercial policy) and 308 (implied powers). See, eg, the Decision of the Council and the Commission (EC, ECSC, Euratom) No 602/99 of 31 May 1999 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part [1999] OJ L239/1. There is a human rights clause in the Partnership and Cooperation Agreements (PCAs) with Armenia, Azerbaijan, Belarus (not in force), Georgia, Kazakhstan, Kyrgyzstan, Moldova, the Russian Federation, Turkmenistan (signed; not in force), the Ukraine and Uzbekistan. For current information on PCAs see http://europa.eu.int/comm/external_relations/ceeca/pca/index.htm. See also Christophe Hillion, ‘Institutional Aspects of the Partnership between the European Union and the Newly Independent States of the former Soviet Union: Case Studies of Russia and Ukraine’ (2000) 37(5) CMLR 1211.

42 The Framework Agreement for Trade and Cooperation between the European Community and its Member States, on the one hand, and the Republic of Korea, on the other hand ([2001] OJ L90/46) is based on Articles 57(2), 71, 80(2), and Articles 133 and 308 (adopted [2001] OJ L90/45).

Insofar as the above typology emphasises the legal basis on which an agreement is adopted under Community law, it is primarily relevant to the question, addressed in Part 3, whether the Community has any legislative power to include a human rights clause in its international agreements. The question whether these agreements also provide for trade preferences is also relevant to the question, addressed in Part 4, of the WTO legality of any trade measures imposed under a human rights clause. Here it might be noted that, to the extent that appropriate measures under a human rights clause will take the form of the suspension of trade preferences, it is primarily those agreements providing for trade preferences – and therefore the possibility of suspending these preferences – that are likely to raise WTO issues. This means that WTO rules are of particular importance to trade measures taken under association agreements and preferential trade agreements (including the Cotonou Agreement). However, as will be discussed later in this Part, the human rights clause also authorises the use of other trade measures, such as ‘social labelling’ laws, which might raise other WTO issues, even in relation to agreements not providing for trade preferences.

2. Exceptions: agreements with no human rights clause

There are some notable exceptions to the Community’s general policy regarding the inclusion of human rights clauses in its international agreements. First, there are no human rights clauses in any of the agreements with the twenty-four most developed countries. By and large, this is because contractual relations between
the Community and these countries predate the Community's policy regarding human rights clauses. On the other hand, this in itself could in some cases be attributable to the Community's new policy. For instance, in 1997 both Australia and New Zealand refused to conclude cooperation agreements specifically on the grounds that they contained human rights clauses.

A second exception is that there are no human rights clauses in agreements with the accession countries of Poland, Hungary, Cyprus and Malta, or with Turkey. While the absence of a clause in these cases can partly be explained by the timing of the relevant agreements, it seems that in the case of Turkey, at least, it

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44 See also Council Regulation (EC) No 382/2001 of 26 February 2001 concerning the implementation of projects promoting cooperation and commercial relations between the European Union and the industrialised countries of North America, the Far East and Australasia and repealing Regulation (EC) No 1035/1999 [2001] OJ L57/10, which does not contain a human rights clause. Of the six most recent OECD members there are human rights clauses in the agreements with South Korea, Mexico, and the Czech and Slovak Republics, though not with Hungary or Poland. See n 46.


46 The association agreements with Hungary and Poland (and a now superseded agreement with Czechoslovakia) were concluded on 16 December 1991, though they only came into force in 1994, and therefore predate the Community's human rights clause policy. It has also been suggested that no clause was included in these agreements on the grounds that these States had applied for accession to the Council of Europe and to the European Convention of Human Rights: see Pieter Jan 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, Martinus Nijhoff, 1993 at 412.
was also political factors that dissuaded the Community from insisting on a human rights clause in the instrument establishing a customs union.\(^4\)\(^7\)

The third major gap in the Community's policy is that, with the exception of Cambodia, Laos and Vietnam (with which the Community has concluded separate cooperation agreements containing a human rights clause)\(^4\)\(^8\) and Myanmar (with which the Community has no bilateral relations),\(^4\)\(^9\) trade relations with the fifteen ASEAN countries take place under a 1980 Cooperation Agreement which does not contain a human rights clause.\(^5\)\(^0\) Correspondingly, the European Parliament has called for a renegotiation of this cooperation agreement.

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\(^4\)\(^7\) The customs union with Turkey was, technically speaking, in the form of a Decision under the earlier 1963 Association Agreement, but this does not entirely explain the absence of a clause in the Decision. On the political background, see Fierro, at n 45, Chapter 4.


\(^4\)\(^9\) ASEAN now includes Myanmar, but the EU has refused to negotiate an extension of this agreement to Myanmar as long as the situation as regards democracy and human rights in that country does not make significant progress. See http://europa.eu.int/comm/external_relations/asean/intro/index.htm..

\(^5\)\(^0\) The Cooperation Agreement between the European Economic Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand – member countries of the Association of South-East Asian Nations [1980] OJ L144/2 now applies to Brunei, Indonesia, Malaysia, Philippines, Singapore, and Thailand, Laos, Vietnam and Cambodia but not Myanmar.
specifically to bring in into line with the Community’s policy regarding human rights clauses.\(^5\)

A fourth exception is that there are no bilateral agreements, and therefore no human rights clauses, with China and Cuba.\(^2\)

Finally, there are no human rights clauses in the Community’s sectoral agreements, which relate mainly to fisheries and textiles. This is a particularly striking omission, given that many of these agreements are negotiated with precisely the same countries that are frequently cited for human rights violations.\(^3\)

3. Autonomous instruments

While this thesis is limited to human rights clauses in the external agreements of the European Community, it is worth noting that versions of the human rights clause appear in many of the Community’s autonomous instruments granting

\(^5\) Committee on External Economic Relations (Rapporteur: Mr Michael Hindley), Report on the proposal for a Council Decision concerning the conclusion of the Protocol on the extension of the Cooperation Agreement between the European Community and Brunei- Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand, member countries of the Association of South-East Asian Nations, to Vietnam, A4-0195/97, 28 May 1997.

\(^2\) Fierro, at n 45, Chapter 5 (Cuba and China).

\(^3\) For example, the Community concluded a one-year fisheries agreement with Equatorial Guinea applicable from 1 July 2000 ([2000] OJ L329/40), which did not contain a human rights clause, at virtually the same time as the UN Commission on Human Rights issued a critical Resolution 2000/19 on the ‘Situation of human rights in Equatorial Guinea and assistance in the field of human rights’ of 18 April 2000 (available at www.unhchr.ch).
trade preferences and financial aid to developing countries. The most important of these programs is the Community's Generalized System of Preferences (GSP), which provides for reduced preferences on most goods from 146 developing countries. Although it does not include a human rights clause in the same form as those found in the Community's international agreements, the GSP program does include conditionality clauses, inter alia, in relation to core labour standards. Interestingly, unlike the human rights clause, the clause in the GSP regulation takes both positive and negative forms. Positively, beneficiary


55 Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 [2001] OJ L346/1 (the 'GSP Regulation'). Most industrialised countries apply a system of generalised preferences. From a WTO perspective, these systems were originally authorised as an exception to Article I of GATT (most-favoured-nation treatment) by the Generalized System of Preferences, Decision of 25 June 1971, L/3545, BISD 18S/24 and currently by the Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, L/4903, BISD 26S/203 (also known as the 'Enabling Clause').

56 The GSP Regulation also has conditionality clauses for countries complying with certain environmental standards, and for countries decreed by the Commission to be engaged in a program to combat drug production and trafficking. For background, see the European Commission's Amended proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, COM (2001) 688 final, 14 November 2001.

countries are entitled to a further reduction in duties (under 'special incentive arrangements') if they can demonstrate compliance with core labour standards.\(^{58}\) Negatively, the Community reserves the right to withdraw all preferences in the event of a demonstrated failure to comply with such standards,\(^{59}\) and it has done so on one occasion, namely with respect to Myanmar (Burma).\(^{60}\)

\(^{58}\) Article 13(2) of the GSP Regulation, n 55, provides that: '[t]he special incentive arrangements for the protection of labour rights may be granted to a country the national legislation of which incorporates the substance of the standards laid down in ILO Conventions No 29 and No 105 on forced labour, No 87 and No 98 on the freedom of association and the right to collective bargaining, No 100 and No 111 on non-discrimination in respect of employment and occupation, and No 138 and No 182 on child labour...'. For the policy underlying 'positive measures' in the form of the special incentive arrangements see Proposal for a Council Regulation (EC) applying the special incentive arrangements concerning labour rights and environmental protection provided for in Articles 7 and 8 of Council Regulations (EC) No 3281/94 and 1256/96 applying the scheme of generalized tariff preferences in respect of certain industrial and agricultural products originating in developing countries, COM (97) 534 final, 97/0293(CNS) [1997] OJ C360/9, and also COM (2001) 688 final, n 56 above. To date only Moldova is in receipt of these benefits (see Annex I of COM (2001) 688 final, n 56 above).

\(^{59}\) Article 26(1) of GSP Regulation, n 55, states that: '[t]he preferential arrangements provided for in this Regulation may be temporarily withdrawn, in respect of all or of certain products, originating in a beneficiary country, for any of the following reasons: (a) practice of any form of slavery or forced labour as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956 and ILO Conventions No 29 and No 105; (b) serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation, or use of child labour, as defined in the relevant ILO Conventions; (c) export of goods made by prison labour; ...'.


Footnote continued
There is also a human rights clause in the autonomous instrument under which the Community grants trade preferences to its overseas countries and territories, and, finally, the Community maintains human rights clauses in regulations authorising financial aid programs, both bilaterally and regionally (the ALA Regulation for the Asian and Latin American countries, the MEDA program for aid to Mediterranean countries and the TACIS program for aid to countries of the former Soviet Union and Mongolia).


61 Council Decision (EC) No 822/2001 of 27 November 2001 on the association of the overseas countries and territories with the European Community (‘Overseas Association Decision’) [2001] OJ L314/L This regulation is based on Article 187 EC, which provides that ‘[t]he Council, acting unanimously, shall, on the basis of the experience acquired under the association of the countries and territories with the Community and of the principles set out in this Treaty, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Community.’

62 For instance, Article 3(2) of Council Regulation (EC) No 764/2000 of 10 April 2000 regarding the implementation of measures to intensify the EC-Turkey customs union [2000] OJ L 94/6 provides that: ‘[w]here an essential element for the continuation of assistance to Turkey is lacking, in particular in the case of violation of democratic principles, the rule of law, human rights and fundamental freedoms and international law, the Council, acting by qualified majority on a proposal from the Commission, may decide upon appropriate measures.’


64 Article 3 of Council Regulation (EC) No 1488/96 of 23 July 1996 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership [1996] OJ L189/1 provides that ‘[t]his Regulation is based on respect for democratic principles and the rule of law and also for human rights and fundamental freedoms, which constitute an essential element thereof, the violation of which element will justify the adoption of appropriate measures.’ See also Council Regulation (EC) No
4. Conditionality policies of other international actors

It is possible also to note certain similarities between the Community's human rights clause and the conditionality policies of certain other international actors. First, the European Free Trade Association (EFTA), which consists of Switzerland, Norway, Iceland and Liechtenstein, has included a type of human rights clause in a number of its agreements since 1992 stating that the agreement 'is based on trade relations between market economies and on the respect of democratic principles and human rights'.


Article 3(11) of Council Regulation (Euratom, EC) No 1279/96 of 25 June 1996 concerning the provision of assistance to economic reform and recovery in the New Independent States and Mongolia [1996] OJ L165/1 provides that '[w]hen an essential element for the continuation of cooperation through assistance is missing, in particular in cases of violation of democratic principles and human rights, the Council may, on a proposal from the Commission, acting by a qualified majority, decide upon appropriate measures concerning assistance to a partner State.' For an application of this provision, see the Amended proposal for a Council Decision on a Tacis civil society development programme for Belarus for 1997 [1997] OJ C384/10.

65 Romania (concluded 10 December 1992), Bulgaria (29 March 1993), Slovenia (1 July 1995), Latvia, Lithuania and Estonia (7 December 1995), Morocco (19 June 1997), Macedonia (19 June 2000), Jordan (21 June 2001), Croatia (21 June 2001). See www.efta.int for the text of these agreements. Interestingly, it seems that EFTA is not quite powerful enough to have also included a human rights clause in agreements with a host of other countries that agreed to a clause with the European Community. The agreements with the Czech and Slovak Republics (20 March 1992), Poland (10 December 1992), and Hungary (29 March 1993) state that the agreement 'is based on trade relations between market economies' but fail to mention human rights. However, the agreements with Turkey (10 December 1991), Israel (17 September 1992) and Mexico (27 November 2000) have no such clause.

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Second, the United States has introduced a degree of conditionality in some of its external agreements. The best known examples are probably the labour and environment side accords to the North American Free Trade Agreement (NAFTA), which require the parties to continue to enforce their existing labour and environmental standards. More recently, the United States concluded a free trade agreement with Jordan containing the following provision on labour standards:

Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in paragraph 6 and shall strive to improve those standards in that light.

The language of 'strive to ensure' in this provision is obviously much weaker than that of 'respecting' human rights in the Community's human rights clause,

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68 Article 6(3) of the Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, signed 24 October 2000, available at www.ustr.gov. Article 6(6) provides that '[f]or purposes of this Article, "labor laws" means statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.' Article 5 has equivalent language with respect to environmental obligations.
but it does represent a ‘best endeavours’ obligation nonetheless. Whether this clause will be replicated in future agreements remains to be seen.

The United States’ domestic trade legislation also contains conditionality provisions, with noticeably stronger language. Section 301(b) of the Trade Act 1974 authorises the United States Trade Representative (USTR) to take ‘discretionary action’ in the event of ‘unreasonable practices’ by any of the United States’ trading partners. These practices are defined, relevantly, to include any act that:

... constitutes a persistent pattern of conduct that—(I) denies workers the right of association, (II) denies workers the right to organize and bargain collectively, (III) permits any form of forced or compulsory labor, (IV) fails to provide a minimum age for the employment of children, or (V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.70

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70 Section 301(d)(3)(B)(iii) of the Trade Act 1974 (19 USC s 2411). However, under Section 301(d)(3)(C)(i), ‘[a]cts, policies, and practices of a foreign country ... shall not be treated as being unreasonable if the Trade Representative determines that—(I) the foreign country has
In such cases, the USTR is authorised to ‘suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country referred to in such subsection’ and to ‘impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country’.71

In a manner similar to that of the European Community, the United States also conditions its regime for autonomous trade preferences on compliance with workers’ rights. A country is not eligible to receive preferential treatment under the GSP program if it ‘has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country),’ although the President may still determine that ‘designation [as a beneficiary] will be in the rational economic interest of the United States’.72 In general, ‘[t]he President may withdraw, suspend, or limit the application of the duty-free treatment accorded under this subchapter with taken, or is taking, actions that demonstrate a significant and tangible overall advancement in providing throughout the foreign country (including any designated zone within the foreign country) the rights and other standards described in the subclauses of subparagraph (B)(iii), or (II) such acts, policies, and practices are not inconsistent with the level of economic development of the foreign country’ and under Section 301(d)(3)(D), ‘[f]or purposes of determining whether any act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account, to the extent appropriate.’

71 Section 301(c)(1)(A) and (B).
72 19 USC ss 2462(b)(2)(G) and (c)(7). See below at p 469 for an example of a withdrawal of benefits on these grounds.

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respect to any country'. The Andean Trade Preferences Act (ATPA) and the Caribbean Basin Initiative (CBI) provide for similar conditions.

D. **Scope of the human rights clause**

It is not necessary for the purpose of this thesis to explore the full range of the principles of human rights and democracy protected under the human rights clause. It is sufficient to note that within the European Union the clause has been cited in connection with rights including core labour standards, minority rights, democratic principles, child sex tourism, trafficking in women,

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73 19 USCS 2462(d)(1).
74 19 USCS 3202(c)(7).
75 19 USCS 2702(b)(7) and (c)(8).
76 Interestingly, though, the Council has stated that the reintroduction of the death penalty does not violate the terms of the clause. See Answer given on 22 (or 23) February 1999 by the Council to Written Question No B3295/98 by Mr Barros Moura (PSE) on the transfer of Macao to Chinese administration – death penalty [1999] EFPB, Doc 99/190.

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on the implementation of measures to combat child sex tourism, COM (1999) 262 final, 26 May 1999.

Opinion of the Committee on Civil Liberties and Internal Affairs, in European Parliament, Report on the Communication from the Commission to the Council and the European Parliament on ‘the European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond’ (COM (95) 0567 – C4-0568/95), A4-0409/98, 6 November 1998. On the other hand, in a recent resolution the Parliament ‘regretted the absence of express and separate provisions on respect for women’s rights, (as an essential condition) in the current association agreements with partner countries, even though a general clause on respect for human rights is always included’ (Point E in Motion for a European Parliament resolution on EU policy towards Mediterranean countries in relation to the promotion of women’s rights and equal opportunities in these countries (2001/2129(INI), contained in Committee on Women’s Rights and Equal Opportunities, Report on EU policy towards Mediterranean countries in relation to the promotion of women’s rights and equal opportunities in these countries, A5-0022/2002, 23 January 2002.
female genital mutilation,82 the right to travel, freedom of speech and the right to be politically active,83 and the treatment of detainees,84 dissidents85 and human rights activists.86

On the other hand, despite its potential for responding to these many situations, in the ten years since its first appearance the human rights clause has been applied with a noticeable degree of restraint. At most, the clause has been applied to suspend financial aid, and even this has occurred only in respect of the poorest of the Community’s trading partners.87 What has not occurred so far is the use of a human rights clause as an express basis for imposing trade measures. This is obviously an issue of some importance to the question addressed in Part 4

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85 Answer given on 18/19 January 1999 to Written Question B1478/99 by Leonie van Bladel (UPE) to the Council (1 September 1998) on ‘Exclusion of the Moroccan dissident Ibrahim Serfaty’ [1999] OJ C142/35.
86 Written Question B3521/00 by Olivier Dupuis (TDI) to the Commission on 13 November 2000 on ‘New charges against Mr Marzouki in Tunisia’ [2001] OJ C163E/150.
87 Correspondingly, the Community has never adopted appropriate measures under a human rights clause in agreements other than the Cotonou Agreement and its predecessor, the Lomé IV Convention. This has been criticised as discriminatory by the Committee on Development and Cooperation, Interim Report on the proposal for a Council Decision on a framework procedure for implementing Article 366a of the Fourth Lomé Convention (COM (96)0069 C4-0045/97-96/0050(AVC), A4-0175/97, 21 May 1997.
of this thesis, because until this occurs, this issue will remain primarily hypothetical.

Nevertheless, for a number of reasons, it is suggested here that it cannot be ruled out that trade measures will be applied under the human rights clause. The first reason is that, as was demonstrated by the response of the international community to Israel’s offensive in the occupied territories in April 2002, trade measures are still well-recognized as a tool for enforcing a State’s obligations under international law. To this extent, one may forecast that the human rights clause may be invoked for this purpose in an appropriate case in the future.

Any discussion of trade sanctions for human rights reasons must, however, mention the fact that the last decade has seen an increasing awareness of the ethical questions raised by the imposition of such measures – indeed, it has been argued that trade sanctions may themselves violate human rights norms. This

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has led to a preference for so-called 'smart' sanctions specific to certain products\(^9^0\) or services, and this preference is reflected in EU policy statements on the matter.\(^9^1\) This move towards 'smart' sanctions has also been demonstrated in the recent practice of the United Nations Security Council,\(^9^2\) which, with the


\(^9^1\) See EU, Statement to the United Nations Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, Working Group on Sanctions (Article 50), 13 April 1999, available as document 99/075 in European Foreign Policy Bulletin, www.iue.it/efpb, the Report on behalf of the Working Group on the impact of sanctions and, in particular, of embargoes on the people of the countries on which such measures are imposed (Rapporteur: Mr Richard Cheltenham (Barbados)), ACP-EU Joint Parliamentary Assembly, ACP-UE-3201/B/fin/2001, 10 October 2001 and the European Parliament’s Resolution on human rights in the world in 2000 and the European Union Human Rights Policy, 5 July 2001, para 16, in which the Parliament '[r]eiterates that the current policies of “blind” sanctions must be replaced by policies of “smart” sanctions more appropriate to the specific circumstances of each country; urges the Council and Commission to develop further tools and mechanisms to target assets illegally expropriated by corrupt heads of governments or their entourages and to promote coordinated international efforts to restore such assets to the country of origin as soon as a genuine process of democratisation has started'. The Commission has also recognised that 'negative measures, which may range from confidential or public approaches to suspension of the partnership, must not only be based on fair and objective criteria but also be appropriate to the wide variety of situations which occur, in the interests of keeping dialogue open and to avoid penalizing the people for the actions of their government.' (Answer given on 12 December 1996 to Written question No P-3053/96 on 'Abduction of two children to Tunisia' [1996] OJ C83/114).

\(^9^2\) The UN sanctions regimes are conveniently summarised in Office of the Spokesman of the Secretary General (OSSG), Use of Sanctions Under Chapter VII of the UN Charter, updated January 2002, available at www.un.org/News/ossg/sanction.htm
notable exceptions of Iraq and the former Yugoslavia, has targeted specific commodities (in particular oil93 and precious minerals such as ‘conflict diamonds’ and coltan94) and services (in particular transport services95).

A second reason is that trade measures have, in the past, been seen as particularly appropriate to violations of core labour standards in the production of goods.

This issue was particularly popular in the 1990s, with claims by many actors, not only in civil society, but also in government, that trade relations should be subject to a ‘social clause’.96

93 UN Security Council Resolution 864 (1993) (UNITA); Resolution 841 (1993) (Haiti); Resolution 1132 (1997) (Sierra Leone); note also Resolution 883 (1993) (Libya), which banned the provision to Libya of equipment for oil refining and transportation.


96 For a proposal for a ‘social clause’ see ICFTU, International Workers’ Rights and Trade: The Need for Dialogue, 1994, quoted in Halina Ward, ‘Common but Differentiated Debates: Environment, Labour and the World Trade Organization’ (1996) 45 ICLQ 592 at 622. In 1994 the European Parliament adopted a report supporting the inclusion of a social clause in its bilateral and multilateral trade relations: see the Report on the introduction of a social clause in the unilateral and multilateral trading system, A3-0007/94. Note also the optimistic Opinion of the European Parliament’s Committee on External Economic Relations, stating that ‘[t]he idea of the social clause will gradually gain ground but will take a long time to become accepted, especially in Asian countries’ in Report on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries (COM (95)0216 – C4-0197/95), A4-0212/96, 26 June 1996.
It must be conceded that, following the 1996 Singapore WTO Ministerial Conference, most countries publicly eschewed the use of express trade sanctions for the purpose of addressing violations of labour standards. At this Conference, under strong pressure from developing countries, all WTO Members agreed that the issue of labour standards was properly addressed in the forum of the International Labor Organization. The final Ministerial Declaration said that:

We renew our commitment to the observance of internationally recognized core labour standards. The [ILO] is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject 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.97

The extent to which this policy will bind the European Community is not entirely clear. On the one hand, the EU has said that:

With respect to the social issue, the EU was resolutely opposed to trade sanctions in the field of labour [and] the EU had not asked for the issue to be included in the agenda for a new round.98

98 Trade Policy Review – The European Union – Minutes of Meeting on 12 and 14 July 2000, WT/TPR/M/72, 26 October 2000, para 18 (Opening Statement by the Representative of the European Commission). See also Addressing the Challenges of Globalization: The Role of the
But for a number of reasons one may doubt whether this statement is based on principle or merely on a temporary pragmatism. The 'social clause' in the GSP regulation hardly supports a policy of 'resolute opposition' to the use of trade sanctions in the field of labour: indeed, the Community went so far as to grandfather the existing sanctions against Myanmar in the preamble to the regulation extending this program for three years from 2002. Moreover, if (contrary to its stated policy) the Community still maintains that, in principle, trade measures are an appropriate response to violations of labour standards, it may still attempt to pursue policies at a bilateral level that are considered inappropriate at a multilateral level. The mere existence of the human rights clause is a good demonstration of this feature of the international political scene, as are the conditionality clauses of other countries mentioned above. Finally, trade measures encompass more than merely the suspension of trade preferences. They also include non-tariff barriers such as 'social labelling,' which can take the form of a voluntary scheme whereby goods certified to have been produced in a certain manner are entitled to bear a label to this effect. Here it is relevant that

_WTO in Cooperation with Other International Organizations – Communication from the European Communities, WT/GC/W/391, 12 November 1999, where the Community stated that ‘we wish to reaffirm the EU firm opposition and rejection to any sanction-based approach or to any use of labour rights for protectionist purposes. Moreover, the comparative advantages of countries, particularly low-wage developing countries, must in no way be put into question.’_

the Commission has not only indicated its support of such measures, but could even be placed in the position, in practice, of defending a Belgian social labelling scheme with the stated aim of 'creating a label which companies can affix to their products if the latter meet criteria and standards recognized in particular by the International Labour Organization'. For all these reasons, the Singapore 'consensus' regarding the use of trade sanctions for human rights reasons may not be as strongly maintained by the EU as one might expect from its statements on the matter.

Another reason for not excluding the future use of trade measures under the human rights clause is that such a policy has the express support of the European Parliament and of certain sectors of civil society. Although the Parliament lacks any role in the application of the human rights clause, it has long been a

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101 Notification – Belgium, G/TBT/N/BEL/2, 16 January 2001 (Draft Law Aiming to Promote Socially Responsible Production). The proposed Belgian law has met with heated opposition within the WTO. See Committee on Technical Barriers to Trade, ASEAN Concerns Regarding the Proposed Belgian Law for the Promotion of Socially Responsible Production – Submission by the Asean Countries, G/TBT/W/159, 28 May 2001; also Committee on Technical Barriers to Trade, Minutes of Meeting held on 30 March 2001, G/TBT/M/23, 8 May 2001 Committee on Technical Barriers to Trade, Minutes of Meeting held on 29 June 2001, G/TBT/M/24, 14 August 2001.

102 For the current legal situation see n 214 below. For a history of the failed attempts by the Parliament to gain approval or consultation rights prior to the imposition of appropriate measures
supporter of trade sanctions for human right reasons. Speaking generally, the Parliament has expressed the view that:

... ratification is not sufficient: the above international human rights conventions must be observed and enforced, which means implementing the monitoring arrangements contained therein and, where necessary, imposing appropriate sanctions.\textsuperscript{103}

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\textsuperscript{103} \textit{Human rights in the world 1997-1998 and the European Union policy in the field of human rights}, A4-0410/98, 6 November 1998. Also typical is the following statement by Kreissl-Dörfler, MEP that 'in no area is the European Union as visible and influential internationally as in external economic relations. So there is hardly any other policy area through which it is so necessary to promote human rights and where there is so much chance of success ... [W]e can and must intervene on a regulatory basis, by addressing our partners in third countries and also the operators in the European Union, such as the European multinational companies. ... However, it is not enough to invoke the two human rights packages and the ILO conventions in the preambles to bi- and multilateral agreements, as in the most recent agreement with Mexico. We are calling, for example, for annual Commission reports on the human rights situation and, where necessary, concrete sanctions.' (\textit{Verbatim Report of Proceedings of the European Parliament, Sitting of Wednesday, 16 December 1998} at 42). See also the Opinion of the

Footnote continued
More specifically, the Parliament called for an oil embargo to be imposed on
Nigeria in 1996,104 and for restrictions on trade and investment in respect of
Myanmar in 1998.105 The Parliament also passed a resolution specifically on the
human rights clause in which it ‘consider[s] that it should also be possible for
sanctions to be imposed on the European Parliament’s initiative’.106 This may be
unlikely ever to occur, but it cannot be ruled out that the Parliament’s views may
become more relevant, either directly or indirectly, to the future use of the clause.

Related to this is the more recent ‘discovery’ of the human rights clause by non-
governmental organisations (NGOs), of which particular mention should be

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Committee on Institutional Affairs on the external dimension of human rights policy and the
European Union in European Parliament, Report on the Communication from the Commission to
the Council and the European Parliament on ‘the European Union and the external dimension of
human rights policy: from Rome to Maastricht and beyond’ (COM (95) 0567 – C4-0568/95), A4-
0409/98, 6 November 1998, at 37, stating that ‘[c]lear and vigorous measures should also be
adopted in the event of a breach of these ‘essential elements’ of the agreement as a result of a
violation of human rights.’

104 European Parliament, Resolution on Nigeria, B4-1256, 1282, 1302, 1312 and 1323/96 [1996]
OJ C362/261. The Parliament was supported by the ACP-EU Joint Assembly. See Resolutions

105 ‘[The Parliament] ... [c]alls on the Council to respond to Aung San Suu Kyi’s request for EU
economic sanctions against the SPDC by ending all links between the European Union and
Burma based on trade, tourism and investment in Burma by European companies; as a first step,
calls on the Council to expand the measures taken in the common position by ending trade
promotion and expanding the ban on entry visas ...’ . See European Parliament, Resolution on

106 European Parliament, Resolution on the Commission Communication entitled
‘Democratisation, the rule of law, respect for human rights and good governance: the challenges
of the partnership between the European Union and the ACP States’ (COM (98)0146 – C4-
made of the Euro-Mediterranean Human Rights Network.\textsuperscript{107} This development has also gained the support of the European Parliament, which in a recent resolution "calls for consideration of the possibility of granting individuals or groups who defend human rights the right to invoke the human rights clause'.\textsuperscript{108} One cannot therefore exclude the possibility that civil society may be effective in bringing pressure to bear on the Community, in appropriate cases, to impose trade measures in response to human rights abuses.

In summary, for these various reasons, despite a certain hesitancy in the current practice of the Community, it cannot be ruled out that the human rights clause is used in future as a basis for the imposition of trade measures, and that it may therefore become the focus of attention within the WTO.

E. Conclusion

In summary, it can be said that the human rights clause not only operates to protect a broad spectrum of human rights, including labour rights, but also that a violation of such rights can trigger a wide variety of 'appropriate measures' under the clause. These measures include not only – as presently – the withdrawal of financial aid to foreign governments, but also restrictions on the importation of certain products, including products produced in violation of core labour standards. Having said this, the clause does not have an entirely

\textsuperscript{107} See www.euromedrights.net/english/engelsk.html.

‘unilateral’ character. In its most widely used form, any party wishing to avail itself of ‘appropriate measures’ under the human rights clause must enter into consultations with the other party, except in cases of special urgency, and often the measures imposed are themselves subject to dispute settlement.

Against this background, Part 2 will now elaborate on certain aspects of the human rights clause under the law of treaties, before an analysis in Part 3 of its constitutional implications under Community law, and the discussion in Part 4 of the legality under WTO law of any trade measures imposed under the clause.
Part 2

The Human Rights Clause under
Public International Law

A. Introduction

The aim of this Part is to analyse the human rights clause from the perspective of public international law and, in particular, under the law of treaties. It begins in Section B by questioning whether the human rights clause does, in fact, establish any obligations on the parties or whether, alternatively, it expresses a condition of the agreement essential to its continuing validity. On the basis that at least some forms of the human rights clause do establish normative obligations, it analyses whether these obligations are 'positive' in the sense that they require the parties to ensure, if necessary, by legislative action, that human rights are respected according to the scope of their responsibilities under the agreement. This is of particular relevance to the question, addressed in Part 3, whether the Community has any legislative power to include human rights clauses in its international agreements.

Section C relates the human rights clause to the rules of customary international law governing respect for human rights. This section first challenges the view of the EU Council that the norms incorporated into the essential elements clause are a simple reflection of obligations binding on all international actors under customary international law. Second, this section contends that the enforcement rights granted under the non-execution clause exceed the ordinary rights of States, under the law of state responsibility, to enforce the human rights
obligations of other States. Again, this is relevant to the question of the Community's human rights powers, addressed later in this thesis.

Section D sets out to analyse the consequences of a violation of the norms set out in the essential elements clause. This section argues that the rules of customary international law governing the consequences of a material breach of an agreement, which are codified in Article 60(3) of the Vienna Convention on the Law of Treaties, do not apply in those cases in which the consequences of a breach of an obligation in the human rights clause are regulated by the non-execution clause. This section also stresses that 'appropriate measures' taken under the non-execution clause must in the first instance be chosen in the form of the suspension of benefits under the agreement without permanently suspending or terminating the agreement under international law. A clarification of these points is important not only for a better understanding of the operation of the clause, but also for the purposes of the issue, addressed in Part 4 of this thesis, of the WTO legality of any appropriate measures involving the suspension or termination of trade concessions under the human rights clause. In addition, this section also discusses the proper application of Article 60(3) of the Vienna Convention to those relatively rare cases in which the non-execution clause does apply. It notes here that the correct focus should be on any possible repudiation of the agreement rather than on the violation of a provision essential to the accomplishment of the object or purpose of the agreement.
B. Obligations under the human rights clause

1. Does the human rights clause establish any obligations?

While this might appear somewhat odd, it is not entirely certain that the human rights clause actually establishes any obligations requiring the parties, in a normative sense, to respect human rights. As noted above, the model essential elements clause states that:

Respect for democratic principles and fundamental human rights [as defined in the Universal Declaration of Human Rights] inspires the domestic and external policies of the Community and of [the country or group of countries concerned] and constitutes an essential element of this Agreement.109

This provision can be broken down into two parts. Abbreviating slightly, the first part states that respect for human rights inspires the policies of the parties, while the second states that respect for human rights constitutes an essential element of this agreement. In neither case do these phrases establish any normative obligation binding on the parties in the sense that they require or forbid any particular conduct. What they do, rather, is describe two assumptions - the first an assumption of fact and the second an assumption of law -

109 Article 1 of the Framework Cooperation Agreement leading ultimately to the establishment of a political and economic association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [1999] OJ L42/47 provides that ‘[r]espect for democratic principles and fundamental human rights as set out in the Universal Declaration of Human Rights is at the heart of both Parties' domestic and external policies’ (emphasis added).
representing conditions on the continuing validity of the agreement.\textsuperscript{110} Legally, this is quite significant: while the parties to the agreement will have an interest in ensuring that these conditions are met, this is quite different from saying that they are under a normative obligation to ensure respect for human rights.\textsuperscript{111}

In practice, however, quite a number of agreements deviate from the model form of the clause. In the first place, a number of human rights clauses are phrased in the imperative mood:

\textsuperscript{110} Another problem is that this phrasing amounts to a declaration that the contracting parties have, in fact, recognised each other's \textit{existing} policies as respecting democratic principles and fundamental human rights. This could lead to difficulties, insofar as a party might be prevented from triggering the clause unless the situation worsens from the \textit{status quo ante}. This problem was identified in \textit{Interim Report on the proposal for a Council Decision on a framework procedure for implementing Article 366a of the Fourth Lomé Convention (COM (96)0069 C4-0045/97-96/0050(AVC)), A4-175/97, 10 March 1997 at 18.}

\textsuperscript{111} These statements could also have an effect under the rules governing estoppel, insofar as both parties could be estopped from denying that their policies are based on human rights, but from a practical point of view this is of limited use to the other party. The same applies to any unilateral declarations, such as the unilateral declaration on the essential elements clause by Mexico in the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [2000] OJ L276/45, which provides that: 'Mexico's foreign policy is founded on the principles enshrined in its Constitution: Self determination of nations, Non-intervention, Peaceful settlement of disputes, Prohibition of the threat or use of force in international relations, Legal equality of States, International cooperation for development, The struggle for international peace and international security. ... Mexico declares, likewise, that the principles of coexistence of the international community, as expressed in the United Nations Charter, the principles enunciated in the Universal Declaration of Human Rights and democratic principles, are the permanent guide of its constructive participation in international affairs and are the framework for its relationship with the Community and its Member States, governed by this Agreement, and for its relationship with any other country or group of countries.' On the legal effect of declarations, see n 15.
Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the Community and of Morocco and shall constitute an essential element of this Agreement.\textsuperscript{112}

At least the first of the two sub-phrases in this clause establishes a normative obligation binding on the parties to ensure respect for human rights in their domestic and external policies. (The use of the imperative mood in the second sub-phrase, by contrast, has no additional normative effect.)

In addition, virtually all of the recent agreements containing a human rights clause contain a declaratory provision stating that, for the purpose of determining cases of 'special urgency', a 'violation of essential elements of the Agreement, namely its [essential elements clause]' is deemed to be a 'material breach' of the agreement. The main purpose of this declaratory provision is evidently to define

\textsuperscript{112} See, for instance, Article 2 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2. The shift from the indicative to the imperative can be seen in the difference in wording between Article 5 of the Lomé IV Convention ('Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of this Convention') and Article 9 of the Cotonou Agreement ('Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement') (emphasis added). See Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 [1991] OJ L229/3, as amended by the Agreement signed in Mauritius [1998] OJ L156/3 ('Lomé Convention') and the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L317/3 (the 'Cotonou Agreement').
the cases of 'special urgency' for the purposes of the special procedures applicable to appropriate measures taken in this limited set of cases. However, the references to a 'violation' of the essential elements clause and to 'material breach' can also be taken as an indication that, despite textual evidence to the contrary, the parties consider themselves to be under a normative obligation not to violate the essential elements clause.

In summary, the terms of the essential elements clause establish an obligation in two cases: when the clause is phrased in the imperative ('shall inspire the policies') and when there is declaratory provision deeming a violation of the essential elements clause to be a material breach of the agreement. By contrast, in cases where the essential elements clause is phrased in the indicative mood and where, simultaneously, there is no declaratory provision in the terms described above, it may be concluded that there is no actual obligation binding on the parties in a normative sense. In these cases, the essential elements clause takes the form of a condition on the continuing legality of the agreement.

In practice, agreements of this latter kind are no longer concluded, and they were even relatively rare to begin with. But there is one important exception in that the only human rights clause to have been considered by the European Court of Justice did meet this description.\footnote{Case C-268/94, Portugal v Council [1996] ECR I-6177. The agreement was the Cooperation Agreement between the European Community and the Republic of India on partnership and development [1994] OJ L223/24. The essential elements clause in that agreement provided that 'res[pect for human rights and democratic principles is the basis for the cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential}
statements of the Court in that case must be qualified by a recognition that the type of human rights clause with which it was concerned is not typical of the human rights clauses now customarily included in the Community's international agreements.

2. Positive obligations

Where the parties are under a normative obligation to respect the principles set out in the essential elements clause, they may also be under a specific obligation to implement the norms set out in the essential elements clause, if necessary, by positive action. This conclusion can be drawn tentatively from the essential elements clause, and more strongly from the first paragraph of the non-execution clause.\[1\]

As far as the essential elements clause is concerned, it must be conceded that there is an alternative view that the essential elements clause establishes no such 'positive obligations'. This alternative view is supported by the statement that the norms are intended merely to 'inspire the policies' of the parties. Indeed, even where the clause is in the imperative form ('shall inspire the policies') it might be argued that, in the absence of any existing policies, there is no requirement to maintain respect for human rights. Accordingly, the essential
declaration statement on the circumstances of 'special urgency.'

\[1\] It will be recalled that this first paragraph does not appear in the model form of the clause in Annex 1 of the Communication from the Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM (95) 216 final, 23 May 1995. See n 17.
elements clause only applies to existing or new policies enacted by the parties to the agreement.

But for two reasons this seems to be too limited a reading of the essential elements clause. First, it fails to account for the second sub-paragraph of the clause, which deems respect for human rights to be 'an essential element' of the agreement unqualified by any reference, express or implied, to the 'policies' or, for that matter, the powers of the contracting parties. The result is that, at least in those cases in which this second sub-phrase has been converted into an obligation binding on the parties by virtue of an applicable declaratory provision, the parties are under a positive obligation to ensure respect for human rights within the scope of their responsibilities under the agreement quite regardless of their existing policies or absence thereof.

This may require positive legislative action.\textsuperscript{115} It is well known in human rights law that, as Weiler and Fries have said, 'abstaining from taking action is ... just as likely to cause an obstruction to fundamental rights as would a positive law'\textsuperscript{115} See Frank Hoffmeister, Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft, Springer, Berlin, 1998 at 398, who takes a similar view, giving the examples of the right to a fair trial and of positive economic, social and economic rights. See also Juliane Kokott and Frank Hoffmeister, 'Opinion 2/94 on the Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms' (1996) 90 AJIL 664 at 667-8, who state that '[a] human rights catalog - contrary to human rights clauses in agreements with third states - would definitively concern only the 'lawfulness of Community acts' if it contained nothing but 'negative' rights, as 'positive' rights might create affirmative Community obligations.'
violative act'.\textsuperscript{116} This is confirmed by the positive obligations established by the European Court of Human Rights under that Convention\textsuperscript{117} and the positive obligations established in the EU Charter on Human Rights and Fundamental Freedoms.\textsuperscript{118}

It is also appropriate in this context to qualify the statement of the European Court of Justice in \textit{Portugal v Council} that, in the case of the essential elements clause in that case, 'the question of respect for human rights and democratic principles is not a specific field of cooperation provided for by the Agreement'.\textsuperscript{119}

While this may have been an accurate description of the essential elements clause in that case (which did not establish any obligations as such), this statement does not properly describe the operation of other forms of the human rights clause.

\begin{itemize}
\item \textsuperscript{118} See especially Articles 1, 8, 25-26, 28-37 of the Charter of Fundamental Rights of the European Union [2000] OJ C 364/1. Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37(6) CMLR 1307, at 1332 criticises the Charter because it 'neglects to take into consideration the fact that fundamental rights might need secondary legislation in order to be effective.'
\end{itemize}
The second reason why the human rights clause may be considered to impose positive obligations on the parties to the agreement is based on the first paragraph of the non-execution clause (which did not exist in the agreement in *Portugal v Council*). This paragraph obliges the parties to ‘take any general or specific measures required to fulfil their obligations under this Agreement’. This clearly seems to require the parties to take positive action to implement their human rights obligations under the essential elements clause.

One objection to this argument, from the perspective of Community law, is that in *Demirel*, the European Court of Justice gave an identical clause a more limited scope. After describing the clause, the Court said that:

> That provision does no more than impose on the contracting parties a general obligation to cooperate in order to achieve the aims of the Agreement and it cannot directly confer on individuals rights which are not already vested in them by other provisions of the Agreement.\(^2\)

As to this, however, it must be noted that the specific question before the Court was whether the provision had the effect of conferring individual rights on private persons under Community law. To a large degree, the Court’s statements on the nature of the obligations on the parties to the agreement may therefore be considered *obiter dicta*. But even so, it is not clear why the Court described the obligation imposed on the parties as ‘a general obligation to cooperate to achieve the aims of the Agreement’. In fact, they are each under a duty to do whatever it is that is required by the obligation, not only by joint cooperative action, but also

\(^{120}\) *Case 302/86, Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 24.
where necessary — by individual action. Furthermore, a reading of the non-execution clause as imposing positive obligations on the parties is, with appropriate qualifications, confirmed by the Court's jurisprudence on the equivalent provision (Article 10) of the EC Treaty, which states that:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

Article 10 has been interpreted in Community law as imposing an obligation 'to ensure the full implementation of Community law by creating positive obligations for member states'. In Factortame, the Court considered that this provision required a Member State 'to ensure the legal protection which persons derive from the direct effect of provisions of Community law', and in Francovich the Court read Article 10 as imposing a duty on the Member States to provide compensation to individuals for violations of Community law.


Of course, any parallel between the non-execution clause and a provision of the EC Treaty must be drawn with due regard to the different objectives of the agreements. In particular, as was pointed out in the above passage from Demirel, it would be impermissible to state that a non-execution clause gives individuals any subjectively enforceable rights. But even taking this into account, it still seems appropriate to confirm the above textual interpretation of the non-execution clause by reference to the Court’s references to positive obligations under Article 10.

For these two reasons, there are strong arguments in favour of the proposition that the human rights clause does, in fact, establish positive obligations binding on the parties to the clause to ensure respect for human rights within their scope of responsibilities.

C. The human rights clause and customary international law

Another question is the extent to which the human rights clause extends the norms of customary international law in relation to the protection of human rights. It seems that the drafters of the human rights clause intended to ensure that the clause did no more than codify existing obligations binding on the Community under customary international law. The Council advanced this view in its 1999 and 2000 Annual Reports on Human Rights (though not in 2001) when it said that:

The human rights clause does not transform the basic nature of agreements which are otherwise concerned with matters not directly related to the promotion of human rights. It simply constitutes a mutual reaffirmation of commonly shared values and principles, a precondition for economic and other cooperation under the agreements, and expressly allows for and regulates suspension in cases of non-compliance with these values. Such a clause thus does not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments which, as general international law, already bind all States as well as the EC in its capacity as a subject of international law.\textsuperscript{125}

As Allan Rosas has explained, this was for internal constitutional reasons:

... the recent Opinion of the Court of Justice denying competence for the Community to adhere, on the basis of Article 235 [now Article 308] of the EC Treaty, to the European Convention on Human Rights has probably reinforced an effort on the part of the Commission to avoid, in connection with the human rights clause to be inserted in bilateral agreements of a general nature, specific references to binding human rights conventions or the development of new standards in the field of human rights. The idea is to keep the human rights clause as a mere reaffirmation of general principles which constitute customary international law or general principles of law recognised by civilised nations already binding on the Community, so that the main legal

implication of the clause is to spell out a right of suspension in case of violation of such fundamental human rights.\textsuperscript{126}

As far as these constitutional reasons are concerned, Part 3 of this thesis argues that even if the human rights clause did merely reflect obligations already binding on the Community, this would not mean that the Community would necessarily have the power to include such a clause in its international agreements. But it is argued here that, in any case, the human rights clause does not merely reflect such obligations. This is for two reasons: first, the ‘standards’ or norms set out in the essential elements clause are often more onerous than the human rights obligations binding on the Community under customary international law, and, second, the possibilities for enforcing these norms under the human rights clause by far exceed the corresponding rights of parties to enforce human rights norms under the customary international law of state responsibility.

I. Standards in the essential elements clause

As noted above, the model essential elements clause states that:

Respect for democratic principles and fundamental human rights [as defined in the Universal Declaration of Human Rights] inspires the domestic and external policies of the Community and of [the country or group of countries concerned] and constitutes an essential element of this Agreement.

An initial question is whether this paragraph purports to incorporate all of the rights in the Universal Declaration on Human Rights into the human rights clause. This is significant because the general consensus is that not all of the rights expressed in the Universal Declaration — and certainly not ‘principles of democracy’ — have attained the status of customary international law.127

127 On the status of the ‘right’ to democracy, see Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1995) 25 Georgia Journal of International and Comparative Law 287 at 348 (‘Despite the arguments of some that a “right to democracy” may be emerging as a norm of international customary law, it is apparent that many states have not accepted article 21’s guarantee of the right to participate in the political life of one’s country’), James Crawford, ‘Democracy in International Law’ (1993) 64 BYIL 113 (sceptical), James Crawford, ‘Democracy and the body of international law’ in Gregory H Fox and Brad R Roth (ed), Democratic Governance and International Law, Cambridge University Press, Cambridge, 2000 (sceptical), Gregory H Fox and Brad R Roth, ‘Democracy and international law’ (2001) 27 Review of International Studies 327 (sceptical). Even those who support the ‘right’ characterise it as ‘emerging’. See, eg, Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46 at 91 (‘Both textually and in practice, the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance. The task is to perfect what has been so wondrously begun’). In Military and Paramilitary Activities in and against Nicaragua (Nicaragua/US), Merits, [1986] ICJ Rep 14 (27 Jun) at 131, para 259, the International Court of Justice considered a ‘democracy clause’ in the OAS Charter to represent a

Footnote continued
Consequently, if all of these rights were incorporated into the human rights clause, this would mean that the obligations set out in this clause would be more onerous than those binding on the European Community under customary international law.\textsuperscript{129}

\footnotesize

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political rather than a legal undertaking. This provision (Article 3(d)) stated that: 'The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.' More modestly, a right to political participation has been advocated, which could in theory be fulfilled even in a one party state: see Lori Damrosch, 'Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs' (1989) 83 \textit{AJIL} 1 at 40-1, citing, \textit{inter alia}, Henry Steiner, 'Political Participation as a Human Right' (1988) 1 \textit{Harvard Human Rights Yearbook} 77 at 129 n 175.

\textsuperscript{128} See Hannum, n 127, at 340 stating that '[t]hose who urge acceptance of the Declaration \textit{in toto} as customary law are in a clear minority, and there is insufficient state practice to support such a wide-ranging proposition at this date'; also Theodor Meron, 'On a Hierarchy of International Human Rights Norms' (1986) 80 \textit{AJIL} 1; E W Vierdag, 'Some Remarks about Special Features of Human Rights Treaties' (1994) 25 \textit{NYIL} 119, at 121 and Karl Josef Partsch, 'Article 55(c)' in Bruno Simma and Hermann Mosler (ed), \textit{The Charter of the United Nations: A Commentary}, Oxford University Press, Oxford, 1994, at 784, who criticises the wide view, stating that only the 'flagrant and systematic violations incompatible with certain fundamental provisions of the Universal Declaration ... may have gained the force of customary law based on this practice'. The contrary view is taken by other authors, notably Louis B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 \textit{American University Law Review} 1 at 16-7, who claims that '[t]he Declaration thus is now considered to be an authoritative interpretation of the UN Charter, spelling out in considerable detail the meaning of the phrase "human rights and fundamental freedoms," which Member States agreed in the Charter to promote and observe. The Universal Declaration has joined the Charter of the United Nations as part of the constitutional structure of the world community. The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations.'

\textsuperscript{129} Hoffmeister, \textit{Menschenrechtsklauseln}, n 115, Ch 7 and summarised (in English) at 607, stating that '[t]he level of protection is higher than under customary law.'
An alternative view is that the essential elements clause does not ‘incorporate’ all of the rights set out in the Universal Declaration, but only those rights which States are in any case obliged to respect under customary international law. This view would be supported by the fact that, under the law of treaties, treaty provisions must be interpreted in accordance with customary international law.\textsuperscript{130} On this view, the Universal Declaration serves merely as a reference for the interpretation of the more limited human rights which the parties are already bound to respect under customary international law.\textsuperscript{131}

It is probably not necessary to resolve these two views, but it does it appear unlikely that the essential elements clause, in this model form, should be taken to refer only to a subset of the human rights set out in the Universal Declaration. By way of comparison, it might be pointed out that Article 6(2) of the Treaty on European Union makes similar reference to the European Convention on Human Rights, and this provision has not generally been considered to exclude any of the rights contained in that instrument.\textsuperscript{132}

\textsuperscript{130} Article 31(3)(c) of the Vienna Convention, n 15, provides that that, for the purpose of interpreting an agreement, an interpreter must take into account as part of the context ‘any relevant rules of international law applicable in the relations between the parties.’ This provision is discussed further at n 696 and n 723.

\textsuperscript{131} Bulterman, \textit{Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?}, Intersentia, Hart, Antwerp, Goningen, Oxford, 2001, at 170, argues that ‘[r]eference is made to the UDHR in order to further clarify the reference to human rights, rather than to incorporate each and every individual provision of the UDHR in the bilateral relations of the contracting parties’.

\textsuperscript{132} Article 6(2) EU states that ‘[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in

\textit{Footnote continued}
But many of the essential elements clauses presently in force deviate from this model clause in any case. Some do so by expressly incorporating norms, and referring to documents, that do not reflect rules of customary international law.\textsuperscript{133} In this case the former view — full incorporation — seems unavoidable. Particularly striking in this regard are the essential elements clauses contained in agreements concluded with Member States of the Organization for Security and Cooperation in Europe (OSCE). For instance, the human rights clause in the agreement with Latvia states that:

Respect for democratic principles and human rights, established by the Helsinki Final Act and in the Charter of Paris for a New Europe, as well as the principles of market economy, inspire the domestic and external policies of the Parties and constitute essential elements of this Agreement.\textsuperscript{134}

This reference to OSCE instruments (the Helsinki Final Act, and the Paris and Bonn Declarations) is significant, because these instruments are themselves

\textsuperscript{133} The Cotonou Agreement, n 112, includes additional provisions. See Article 9(1)(2), quoted at p 86, and Article 9(3)(2), which provides that: ‘[g]ood governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement.’ However, this last provision also states that ‘[t]he Parties agree that only serious cases of corruption, including acts of bribery leading to such corruption, as defined in Article 97 constitute a violation of that element.’

\textsuperscript{134} Eg Article 2(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part [1998] OJ L26/3. Incidentally, this agreement was concluded well after \textit{Opinion 2/94}, [1996] ECR I-1759, referred to by Allan Rosas at p 58 above.
expressly declared not to have legal effect.\textsuperscript{135} Moreover, the obligation to respect the ‘principles of market economy’ clearly deviates from the ordinary rules of customary international law.\textsuperscript{136} Consequently, it is difficult to see how an essential elements clause of this type can be a ‘mere reaffirmation of general principles which constitute customary international law’.\textsuperscript{137}

In other cases, however, the essential elements clause merely refers to free-floating norms without any further textual reference at all. For instance, the essential elements clause in the agreement with Israel states that:

\begin{quote}
Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and
\end{quote}


\textsuperscript{136} At the very least this obligation is inconsistent with Article 1 of the Charter of Economic Rights and Duties of States, General Assembly Resolution 3281(XXIX), 12 December 1974, which provides that ‘[e]very State has the sovereign and inalienable right to choose its economic system ... in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever’.

\textsuperscript{137} Christopher Harding, ‘The Identity of European Law: Mapping out the European Legal Space’ (2000) 6 \textit{ELJ} 128, at 141 states that these instruments gain a new legal status by their incorporation in human rights clauses. The same author also notes the link with Article 11 EU, which states that the objectives of the CFSP shall be, inter alia, ‘to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders’.
democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.\textsuperscript{138}

In cases such as these, the latter view – that the essential elements clause is merely a reflection of the Community’s obligations under customary international law – seems to carry more weight.

As these examples indicate, it is impossible to answer in the abstract the question whether an essential elements clause merely reiterates standards already binding on the parties to the agreement. Each clause must be analysed having regard to its particular wording.

2. Enforcement rights under the law of state responsibility

But there is a more serious problem with the Council’s view that the human rights clause merely reiterates existing obligations binding on the parties. This arises from the fact that even if the primary obligations set out in the clause were identical to obligations binding under customary international law, these primary obligations would not necessarily be enforceable by the other party under the ordinary rules of state responsibility. That is to say, the enforcement rights granted under the human rights clause, and particularly under the non-execution clause, exceed the ordinary enforcement rights possessed by States under customary international law.

\textsuperscript{138} Eg Article 1 of the Interim agreement on trade and trade-related matters between the European Community and the European Coal and Steel Community, of the one part, and the State of Israel, of the other part [1996] OJ L71/2 See also Article 9 of the Cotonou Agreement, quoted at n 112.
On this point, the law has developed in recent years. In the 1986 version of the International Law Commission's draft articles on state responsibility, the general impression was that all States had a right to apply countermeasures to enforce all obligations owed to it by other States. But the new Articles adopted by the International Law Commission in December 2001, under the guidance of Professor James Crawford, give a radically different impression. These new Articles draw a distinction between 'injured States' entitled to take countermeasures and 'States other than an injured State', which are only entitled to claim cessation of the act, assurances of non-repetition, and performance of the obligation, but may not enforce this claim by resort to countermeasures.


\[140\] See especially Article 42 ('Invocation of responsibility by an injured State'), Article 48 ('Invocation of responsibility by a State other than an injured State') and Articles 49 to 54 of the International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/Res/56/83 (2001), available at www.un.org/law/cod/sixth/56/english/a_res_56_83e.pdf. See also the discussion in the International Law Commission's *Third Report on State Responsibility by Mr James Crawford, Special Rapporteur*, A/CN.4/507, 15 March 2000, which usefully summarises the situation in Table 2 at p 52, and the International Law Commission, *Fourth Report on State Responsibility by Mr James Crawford, Special Rapporteur*, A/CN.4/517, 2 April 2001, at paras 59 and 70-74. It has been said by one author who worked on the draft articles that, for instance, while States may be under an obligation owed *erga omnes* not to damage the global commons under the Montreal Protocol, this obligation probably only gives other States a secondary right to demand cessation of the activity and assurances and a guarantee of non-repetition; it would not entitle them to demand reparation or to impose countermeasures.

Thus, Article 42 now provides that:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or
(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
   (i) Specifically affects that State; or
   (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

As far as human rights obligations are concerned, it seems clear that not all human rights obligations will entitle other States to respond to violations by way of countermeasures. Indeed, even in the case of the former draft articles, which defined an ‘injured State’ very broadly to include all States in cases where ‘the right has been created or is established for the protection of human rights and fundamental freedoms,’ \(^{141}\) the commentary recognised that:

not every one of the rights enumerated in these instruments, nor every single act or omission attributable to a State which could be considered

as incompatible with the respect of such rights ... must necessarily be qualified as giving rise to the application of the present provision.142

On the other hand, it is clear that certain types of human rights violations will amount to a 'serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests' entitling all other States to take countermeasures in response. At the very least, this would include the obligations with respect to genocide, slavery and racial discrimination described by the International Court of Justice in *Barcelona Traction* as being '[b]y their very nature ... the concern of all States'.143 It might also include further obligations relating to the disappearance

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142 Commentary to Article 40 in *Ibid* (commentary adopted without amendment from the commentary to the former Draft Article 5). However, as James Crawford pointed out in International Law Commission, *Third Report on State Responsibility by Mr James Crawford, Special Rapporteur, A/CN.4/507*, 15 March 2000, at para 86, this qualification was not reflected in the text of the provision itself.

143 *Barcelona Traction, Light and Power Co (Belgium/Spain) (Second Phase)*, [1970] ICJ Rep 3 (5 Feb), para 33. See ILC, *Third Report on State Responsibility*, n 142, para 115, referring to the possibility of allowing countermeasures in the case of genocide (though not necessarily in the case of torture). In International Law Commission, *Third Report on State Responsibility by Mr James Crawford, Special Rapporteur, Addendum, A/CN.4/507/Add.4*, 4 August 2000 at para 398, Crawford notes that 'the mere existence of conventional frameworks including monitoring mechanisms (e.g. in the field of human rights) has not been treated as excluding recourse to countermeasures.' However, in James Crawford, 'The Relationship between Sanctions and Countermeasures,' 1999, available at www.law.cam.ac.uk/ RCIL/ILCSR/Statresp.htm, he takes a more conservative position: '[a]ccepting, on the basis of the *Barcelona Traction* dictum, the proposition that there is a legal interest of states at large in respect of violations of certain obligations, to conceive that legal interest in the same way as the subjective rights of an individual state in a bilateral relationship with another state seems a fundamental error. It has the effect, among others, of turning human rights first into collective state rights, and then into

*Footnote continued*
of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and a consistent pattern of gross violations of internationally recognized human rights, which in 1987 the American Law Institute considered to represent obligations under customary international law.\textsuperscript{144} But this does not mean that the remainder of the human rights set out in the human rights clause would also be enforceable by resort to countermeasures.\textsuperscript{145}

\begin{flushleft}
individual state powers of reaction, and of doing so a priori — which is all rather problematic' (at 9).

\textsuperscript{144} American Law Institute, \textit{Restatement, Third, the Foreign Relations Law of the United States}, American Law Institute, St Paul, Minnesota, 1987, § 702.

\textsuperscript{145} For the view that countermeasures should be available to enforce the \textit{jus cogens} norms set out in \textit{Barcelona Traction, Light and Power Co (Belgium/Spain) (Second Phase)}, [1970] ICJ Rep 3 (5 Feb), see Karin Oellers-Frahm, 'Comment: The \textit{erga omnes} Applicability of Human Rights' (1992) 30 \textit{Archiv des Völkerrechts} 28 at 31 and Pieter Jan Kuyper, 'International Legal Aspects of Economic Sanctions' in Petar Sarcevic and Hans van Houtte (ed), \textit{Legal Issues in International Trade}, Graham & Trotman/Martinus Nijhoff, 1990 at 152. For the contrary view that countermeasures are available to enforce all human rights, see, eg, Bruno Simma, 'Self-Contained Regimes' (1985) 16 \textit{NYIL} 111 at 133; Yoram Dinstein, 'The \textit{erga omnes} Applicability of Human Rights' (1992) 30 \textit{Archiv des Völkerrechts} 16 at 17-18 (arguing that all human rights are enforceable by countermeasures); and citing the Institute of International Law, 'Resolution on “The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States”' (1989) 63(2) \textit{Yearbook of the Institute of International Law} 339 at 343, Article 2 of which states that 'States, acting individually or collectively are entitled to take diplomatic, economic and other measures towards any other State that has violated the obligation set forth in Article 1, provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations'. For the much rarer view that human rights obligations may never be enforced by countermeasures, see Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 \textit{AJIL} 413 at 432-3.
\end{flushleft}
This situation contrasts markedly with the right of a party under the human rights clause to enforce the norms set out in the essential elements clause by way of 'appropriate measures'. For this reason also it may be concluded that the obligations binding on the parties under the human rights clause exceed those binding on them under customary international law.

D. Consequences of breach

It is commonly assumed that the human rights clause provides a trigger for the application of the rule, codified in Article 60(3) of the Vienna Convention, that a contracting party is entitled to terminate or suspend the treaty in the case of material breach of the agreement.146

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Article 60(3) of the Vienna Convention states that:

A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.\textsuperscript{147}

the Commission said that ‘... a clause defining democratic principles and human rights as an “essential element” of the agreements ... allows the parties to regard serious and persistent human rights violations and serious interruptions of democratic process as a “material breach” of the agreement in line with the Vienna Convention, n 15, constituting grounds for suspending the application of the agreement in whole or in part in line with the procedural conditions laid down in Article 65’. See also below at p 80.

\textsuperscript{147} In \textit{Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, [1971] ICJ Rep 16 (26 Jan), at para 94, the International Court of Justice stated that ‘[t]he rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject.’ In Case C-162/96, \textit{A Racke GmbH & Co and Hauptzollamt Mainz [1998] ECR I-3655 (Opinion), at para 73, Advocate General Jacobs said that ‘the Community is not a party to either of the Vienna Conventions, which are therefore not binding on the Community on the sole basis of Article 228(7) of the Treaty, which refers to agreements concluded by the Community. However, it is generally recognised that both Conventions, which in respect of termination and suspension of treaties contain identical provisions, are at least partly an expression of general international law in that they aim to codify rules of customary international law.’ See also Eric Stein, ‘Foreign Affairs Powers of an International Organization: The Case of the European Communities’ (1987) 81 ASIL Proc 354 at 355, stating that ‘[t]here is no question that the Convention on the Law of Treaties between States and International Organizations that was approved by a diplomatic conference in March 1986 in Vienna, contemplates to include the Community as an international organization. The basic rules of the convention apply to the Community’s agreements with third states or with other international organizations.’
However, Article 60(4) stipulates that:

The foregoing paragraphs [ie on material breach] are without prejudice to any provision in the treaty applicable in the event of a breach.

This would appear to rule out any use of the provisions of the Vienna Convention on material breach in cases where a non-execution clause is applicable. These clauses specifically state that "[i]f either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures". As we have seen, such an obligation exists in two situations: where the essential elements clause is phrased in the imperative ("shall inspire the policies") and where there is declaratory provision deeming a violation of the essential elements clause to be a material breach of the agreement. In such situations the non-execution clause will apply and Article 60(3) will be inapplicable.

It should be noted that this is not affected by the declaratory provision on cases of special urgency stating, relevantly, that:

The Parties agree, for the purpose of the correct interpretation and practical application of this Agreement, that the term 'cases of special urgency' in [the non-execution clause] means a case of the material breach of the Agreement by one of the Parties. A material breach of the Agreement consists in:

148 See also Hoffmeister, *Menschenrechtsklauseln*, n 115, at 376.

149 The Commission ignores this in COM (95) 216 final, n 114. The effect of the non-execution clause is described rather as a divergence from Article 65 of the Vienna Convention.

150 See p 51.
(i) repudiation of the Agreement not sanctioned by the general rules of international law;

(ii) violation of essential elements of the Agreement, namely its [essential elements clause].

Even in cases where, according to this provision, there is a 'material breach of the agreement', the consequences of such a breach are still regulated by the non-execution clause, and so, by operation of Article 60(4), Article 60(3) is inapplicable. On the other hand, Article 60(3) may still be applicable in cases where the non-execution clause does not apply, namely, when the essential elements clause is phrased in the indicative mood and at the same time there is no declaratory provision in the terms described above.

1. Application of the non-execution clause

Where the non-execution clause applies, one important question is the extent to which this clause allows for the full or partial suspension of the application of the agreement or the termination of the agreement. One might begin by noting that the language of 'suspension of the agreement', common in descriptions of the human rights clause, does not accurately reflect the nature of appropriate measures under the modern form of the non-execution clause.151 Not only does

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151 See, eg, EU Council, Annual Report on Human Rights, 1999, at para 4.2.5, stating that '[a]n important reason for including this standard clause in agreements with third countries is to spell out the rights of the Community to suspend or terminate an agreement for reasons connected with non-respect of human rights by the third country concerned'. (Interestingly, this paragraph is omitted from virtually identical surrounding language in EU Council, Annual Report on Human Rights, 2000, para 3.1.87). See also the Commission's Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century - challenges and options.
this clause avoid any mention of suspension or termination, but it specifically requires that ‘in the selection of measures, priority must be given to those which least disturb the functioning of this Agreement’.

This requirement can be explained by the fact that the non-execution clause, far from being a novelty specific to the human rights clause, has a venerable history in trade agreements dating from the early 1970s. Specifically, in these agreements the non-execution clause has the function of regulating the ‘appropriate measures’ which could be applied in cases of serious damage caused by imports or dumping (ie safeguard and anti-dumping measures).152 Whether or


152 Eg Article 11 of the Agreement between the European Economic Community and Spain [1970] OJ L182/2; Article 40 of the Cooperation Agreement between the European Economic Community and the Hashemite Kingdom of Jordan [1978] OJ L268/2; Article 55 of the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia [1983] OJ L41/2; and Article 11 of the Interim Agreement on trade and customs union between the European Economic Community and the Republic of San Marino [1992] OJ L359/14. These clauses in turn take their wording from Article 134 (ex Article 115) and ex Article 226 of the EC Treaty. Article 134 allows the Commission to authorise the Member States to impose emergency safeguard measures in relation to which priority must be given to those that ‘least disturb the functioning of the common market’. According to the Court, this was

Footnote continued
not this cut-and-paste drafting is suitable to a human rights clause is debatable.

As can be seen from its protectionist origins, the non-execution clause was
drafted as a defensive clause, while its rationale as part of a 'human rights
clause' is at least partly coercive (although to the extent that the clause can be
used to limit the involvement of one of the parties in human rights abuses in the
contracting States, it has a defensive aspect as well). It makes little sense to use a
clause designed to keep an agreement functional as a coercive tool for
suspending or terminating an agreement.153

Nevertheless, the language used in the non-execution clause is the applicable
treaty language and must be interpreted accordingly. In doing so, it seems
reasonable to propose that the most obvious way of protecting the 'functioning of
the agreement' is to ensure that the agreement remains in force wherever this is
possible. In practice, this means that, where the suspension of trade preferences
is concerned, measures 'least disturbing the functioning of the agreement'
should, in the first instance, be product-specific rather than comprehensive,154 and

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Footnote continued

153 See the European Parliament, Resolution on human rights throughout the world in 1995-1996
and the Union's human rights policy [1997] OJ C20/161 at para 19, where the Parliament ‘... regre[t]ed the ambiguity of the positions adopted by the Commission, which considers that, in
the event of non-execution by either party of the obligations under an agreement, appropriate
measures may be taken, but that, in the selection of measures, 'priority must be given to those
which least disturb the functioning of this Agreement.'

154 Speaking generally, Patricia Stirling, 'The Use of Trade Sanctions as an Enforcement
Mechanism for Basic Human Rights: a Proposal for Addition to the World Trade Organization'

Footnote continued
should avoid a full suspension or termination of the agreement. This is for the following reason: if the 'agreement' in this phrase is interpreted in terms of its object and purpose, any measures taken should minimise their impact on the objectives of the relevant agreements. As is discussed in more detail below, these objectives in most cases relate to trade liberalisation, with a view to improving the economic and social development of the population. These objectives are best protected by restricting any 'appropriate measures' to those that have a limited impact both on the objective of trade liberalisation and on the economic and social development of the population.

In this context, it is also relevant to recall the stipulation in the declaratory provision that '[t]he Parties agree that the 'appropriate measures' referred to in [the non-execution clause] are measures taken in accordance with international law'. This provision seems to incorporate certain elements of the law of state responsibility on the use of countermeasures into the meaning of 'appropriate

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(1996) 11 Am U Int'l L & Policy 1 has argued for product specific sanctions for human rights violations on administrative as well as proportionality grounds (at 43).

155 Compare Article 309 EC, which states that 'where the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1) of the Treaty on European Union has been determined in accordance with Article 7(1) of that Treaty, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.' Michael Hofstötter, 'Suspension of Rights by International Organisations — The European Union, the European Communities and Other International Organisations' in Vincent Kronenberger (ed), The European Union and the International Legal Order: Discord or Harmony?, TMC Asser, The Hague, 2001, at 43, notes that this wording differs from a draft text, which would have provided for the suspension of the Treaty itself.

156 See p 82 ff.
measures'. If this provision is read as an authorisation, it could mean that appropriate measures might include the suspension of rights under customary international law or under other agreements. Seen in this light, the non-execution clause, read together with this declaratory provision, might be considered an application of the type of agreement referred to in Article 58 of the Vienna Convention. This provision states that:

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

   (a) the possibility of such a suspension is provided for by the treaty; or

   (b) the suspension in question is not prohibited by the treaty and:

      (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

      (ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

However, the phrasing 'in accordance with' seems to reflect a condition limiting the range of permissible measures rather than an authorisation extending this range. Seen in this way, this provision has the somewhat different effect of
subjecting the choice of appropriate measures to the rules of proportionality in relation to countermeasures.\textsuperscript{157}

The result is that both by the terms of the non-execution clause, and under the applicable law of state responsibility, appropriate measures must be proportionate to the gravity of the violation and to the urgency of a response.\textsuperscript{158}

\textsuperscript{157} See also Hoffmeister, \textit{Menschenrechtsklauseln}, n 115, at 381-2. This may have been thought necessary because the question of proportionality in treaty law tends to be treated in terms of the materiality of the breach, rather than in terms of the proportionality of the response. See on this John Norton Moore, 'Enhancing Compliance with International Law: A Neglected Remedy' (1999) 39(4) \textit{Virginia Journal of International Law} 881, at 948, and compare Enzo Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12(5) \textit{EJIL} 889. Interestingly, both approaches (material breach and proportionate response) are evidence in the Joint Declaration in relation to non-execution, Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (1999] OJ L311/32, which provides that:

The Parties agree that the violation of the essential elements of the agreement referred to at Article 3(3) of this Agreement shall only consist of a grave violation of democratic principles or fundamental human rights or the serious interruption of the rule of law, creating an environment not conducive for consultations or where a delay would be detrimental to the objectives or interests of the Parties to this Agreement.

The Parties also agree that the appropriate measures referred to at Article 3(1), (3) and (5) of this Agreement must be proportional to the violation. In the selection and implementation of these measures, the Parties will pay particular attention to the circumstances of the most vulnerable groups of the population and will ensure that they are not unduly penalised.

\textsuperscript{158} The Commission said in an Answer given on 20 December 1996 to Written Question No E 2990/96 on 'Human rights clause' [1997] OJ C96/45 that 'If this clause makes human rights the subject of common interest, part of the dialogue and an instrument for analysing various positive measures. An additional clause enables the parties, where necessary, to take “restrictive measures in proportion” to the gravity of the offence. Specifically, any serious and persistent human rights violations or any serious interruptions of democratic process (a “material breach” of the
As far as trade measures are concerned, it follows also that any such measures must be targeted in the first instance at a limited range of products rather than entailing a comprehensive embargo.\textsuperscript{159} This is relevant to the question addressed in Part 4, which demonstrates that the imposition of trade sanctions on a limited range of products may violate not only the rights of the other contracting party, but also the rights of third parties under applicable WTO rules.\textsuperscript{160}

It is possible, of course, that an extreme case would still justify the suspension or termination of the agreement as a whole. This might be the case where there is a complete breakdown of the State or its institutions or of a situation of peace and security necessary for the continuation of a cooperative relationship between the Community and the third country. In \textit{Racke}, for instance, the Court determined on these grounds that the Community was justified in its view that there had been a fundamental change of circumstances justifying the termination, in 1991, of the 1980 cooperation agreement between the Community and Yugoslavia.\textsuperscript{161} But in most cases it will be difficult to justify such a harsh response. It is therefore

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\textsuperscript{159} Hoffmeister, \textit{Menschenrechtsklauseln}, n 115, at 381-2, agrees.

\textsuperscript{160} See p 299.

\textsuperscript{161} Case C-162/96, \textit{A Racke GmbH & Co and Hauptzollamt Mainz} [1998] ECR I-3655. The object of that agreement, as summarised by the Court, was ‘... to promote overall cooperation between the contracting parties with a view to contributing to the economic and social development of the Socialist Federal Republic of Yugoslavia and helping to strengthen relations between the parties’ (para 55).
probably safer to speak of the suspension of the application of the agreement than of the suspension or termination of the agreement itself.\textsuperscript{162}

2. Material breach

It will be recalled that, even where there is a non-execution clause, this clause cannot always be invoked in all of the cases in which the norms set out in the essential elements clause have been violated by the conduct of one of the parties. Rather, it can only be applicable when this conduct amounts to a violation of a normative obligation requiring the parties to comply with human rights. What this means is that Article 60(3) may have a residual application in cases when the agreement is not phrased in the imperative ("shall inspire the policies") and when there is no declaratory provision deeming a violation of the essential elements clause to be a material breach of the agreement.\textsuperscript{163}

\textsuperscript{162} This is done, for instance, in the Internal Agreement Between the Representatives of the Governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement [2000] OJ L317/376, the Annex of which states that "[i]f, on expiry of the deadlines set in Articles 96 and 97 of the ACP-EC Agreement for the consultations and despite all efforts, no solution has been found, or immediately in a case of urgency or refusal to hold consultations, the Council may, pursuant to those Articles, decide, on a proposal from the Commission, to take appropriate measures including partial suspension acting by a qualified majority. The Council shall act unanimously in case of a full suspension of application of the ACP-EC Agreement in relation to the ACP State concerned'.

\textsuperscript{163} The agreement with which the European Court of Justice was concerned in Portugal v Council was an agreement of this kind. Consequently, the Advocate General in that case was correct to state that: ‘[the human rights clause] is designed to allow the Community to exercise the right to terminate the Agreement, in accordance with Article 60 of the Vienna Convention, where the
What is less certain, however, is which of the two paragraphs of Article 60(3) are applicable in this case. The following therefore discusses the two alternatives: first, that a breach of an essential elements clause amounts to a violation of a provision essential to the accomplishment of the object or purpose of the agreements, and, second, that it amounts to a repudiation of the agreement.

(a) Breach of a provision ‘essential to the accomplishment of the object or purpose’ of the agreement

Article 60(3)(b) would apply if the essential elements clause is ‘essential to the accomplishment of the object or purpose’ of the agreements in which it is contained.\(^{164}\) This poses a problem, because it is readily apparent from the objectives clauses in most of the agreements containing the human rights clause that these agreements do not have the objective of promoting or protecting respect for human rights.\(^{165}\) With one important exception (the Cotonou non-member State has failed to respect human rights within its own legal system.’ (Case G-268/94, Portugal v Council [1996] ECR I-6177 (Opinion), at para 28).

\(^{164}\) The disjunctive term ‘object or purpose’ in Article 60(3) of the Vienna Convention, n 15, differs from its conjunctive form ‘object and purpose’ in many other provisions of the Convention. This may support the view, predominant in the French tradition, that there is a relevant distinction between the object of a treaty (its subject matter), and its purpose (the aims sought to be effected by the treaty). See on this Isabelle Buffard and Karl Zemanek, ‘The ‘Object and Purpose’ of a Treaty: An Enigma?’ (1998) 3 Austrian Review of International & European Law 311, at 325-8. In the case of Article 60(3)(b), any such distinction is rendered less important, given that the phrase ‘accomplishment of the object or purpose’ has in any case a teleological flavour.

\(^{165}\) This is not always recognised. See Written Question E2568/98 to the Council on ‘Aid to Namibia and fundamental rights’ (27 April 2001) [2001] OJ C364E/68, in which the view is expressed that ‘[t]he second priority of the agreement between the European Union and the
Agreement), their objectives have rather to do with trade, development or future association with the European Community. Indeed, the EU Council seems to have accepted as much when it stated in its 1999 and 2000 Reports on Human Rights that "[t]he human rights clause does not transform the basic nature of agreements which are otherwise concerned with matters not directly related to the promotion of human rights".166

The objectives of trade agreements are far removed from those of human rights. For instance, the agreement with Mexico contains an objectives clause providing that:

The object of this Agreement is to strengthen existing relations between the Parties on the basis of reciprocity and mutual interest. To this end, the Agreement shall institutionalise political dialogue, strengthen commercial and economic relations by means of the liberalisation of trade in conformity with the rules of the WTO and shall reinforce and broaden cooperation.167

Indeed, interim trade agreements implementing broader agreements lack any general objectives clauses at all, although the individual titles in the agreements have objectives of their own. For example, the interim trade agreement with

Namibian Government is the development and consolidation of democracy and the rule of law, as well as respect for human rights and fundamental freedoms.1


Mexico contains a title on trade liberalisation with the objective of ‘establish[ing] a framework to encourage the development of trade in goods and services, including a bilateral and preferential, progressive and reciprocal liberalisation of trade in goods, taking into account the sensitive nature of certain products and in accordance with the relevant World Trade Organization (WTO) rules’.

The situation is not much different for other types of agreements. The objectives of the 1999 Trade, Development and Cooperation with South Africa are:

(a) to provide an appropriate framework for dialogue between the parties, promoting the development of close relations in all areas covered by this Agreement; (b) to support the efforts made by South Africa to consolidate the economic and social foundations of its transition process; (c) to promote regional cooperation and economic integration in the southern African region to contribute to its harmonious and sustainable economic and social development; (d) to promote the expansion and reciprocal liberalisation of mutual trade in goods, services and capital; (e) to encourage the smooth and gradual integration of South Africa into the world economy; (f) to promote cooperation between the Community and South Africa within the bounds of their respective powers, in their mutual interest.


Nor is the situation much improved in development cooperation agreements. Representative of these is Article 1(2) of the 2001 Cooperation Agreement with India, which states that:

The principal objective of this Agreement is to enhance and develop, through dialogue and partnership, the various aspects of cooperation between the Contracting Parties in order to achieve a closer and upgraded relationship.

This cooperation will focus in particular on: further development and diversification of trade and investment in their mutual interest, taking into account their respective economic situations; facilitation of better mutual understanding and strengthening of ties between the two regions in respect of technical, economic and cultural matters; building up of India’s economic capability to interact more effectively with the Community; acceleration of the pace of India’s economic development, supporting India’s efforts in building up its economic capabilities, by way of provision of resources and technical assistance by the Community within the framework of its cooperation policies and regulations, in particular to improve the living conditions of the poorer sections of the population; development in their mutual interest of existing and new forms of economic cooperation directed at promoting and facilitating exchanges and connections between their business communities, taking into account the implementation of Indian economic reforms and opportunities for the creation of a suitable environment for investment; support of environmental protection and sustainable management of natural resources.¹⁷⁰

Even association agreements lack any specific reference to human rights. This is illustrated by the 1998 Europe Agreement with Estonia which states that the objectives of the association established under that agreement are:

[T]o provide an appropriate framework for the political dialogue between the Parties allowing the development of close political relations, to further develop a free trade area between the Community and Estonia covering substantially all trade between them, to promote the expansion of trade and the harmonious economic relations between the Parties and so to foster dynamic economic development and prosperity in the Community and Estonia, to provide a basis for economic, financial, cultural and social cooperation and cooperation in the prevention of illegal activities, as well as for the Community’s assistance to Estonia, to support Estonia’s efforts to develop its economy, to provide an appropriate framework for the gradual integration of Estonia into the European Union. Estonia shall work towards fulfilling the necessary requirements in this respect, to set up institutions suitable to make the association effective.171

The one major exception is the Cotonou Agreement, Article 1 of which (‘Objectives of the partnership’) states that:

The Community and its Member States, of the one part, and the ACP States, of the other part, hereinafter referred to as the ‘Parties’ hereby conclude this Agreement in order to promote and expedite the economic, cultural and social development of the ACP States, with a

171 Article 1 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part [1998] OJ L68/3.
view to contributing to peace and security and to promoting a stable and democratic political environment.

The partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy. ¹⁷²

This must be read together with Article 9(1)(2), which specifies that:

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. ¹⁷³

In principle, the stated objectives of an agreement are to be taken as primary evidence of its objects and purposes. ¹⁷⁴ This means that, with the exception of

¹⁷² Article 1 of the Cotonou Agreement, n 112, (emphasis added).

¹⁷³ Article 9(1)(2) of the Cotonou Agreement, n 112. It scarcely needs to be added that this is a reasonably broad definition of 'sustainable development'.

¹⁷⁴ See Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYIL 203, at 228, stating that '[a]lthough the objects of a treaty may be gathered from its operative clauses taken as a whole, the preamble is the normal place in which to embody, and the natural place in which to look for, an express or explicit general statement of the treaty's objects and purposes. Where these are stated in the preamble, the latter will, to that extent, govern the whole treaty.' Isabelle Buffard and Karl Zemanek, 'The 'Object and Purpose' of a Treaty: An Enigma?' (1998) 3 Austrian Review of International & European Law 311, at 332, state that '[i]t should be evident, from the authoritative sources as well as from the examined literature, that the title and the preamble of a treaty, and occasionally a programmatic article, are the prime indicators of the purpose of a treaty. Sometimes one may also find there a summary of the treaty's object; in other cases, however, the object is defined by the treaty provisions as a whole, which means that it must be

Footnote continued
the Cotonou Agreement, which has the specific objective of 'promoting a stable and democratic political environment' and of 'eradicating poverty consistent with the objectives of sustainable development, defined in terms of human rights, it is not possible to see the essential elements clauses in any of the agreements in which it is contained as 'essential to the accomplishment of the object or purpose' of the agreement.\textsuperscript{175}

It might be thought that a provision establishing an essential condition of an agreement can be seen as a provision essential to the accomplishment of the object or purpose of an agreement. However, there is an important difference between matters assumed in an agreement (whether stated or implied), and matters that are made the object and purpose of an agreement. This is demonstrated by the \textit{Morocco} case, in which the International Court of Justice held that an express objectives clause in an agreement could not be expanded by implication to include rights (of consular jurisdiction) even when 'the Convention presupposed the existence of such jurisdiction'.\textsuperscript{176} The Court said that:

\begin{quote}
established by interpretation. Interpretation may also be needed for clarifying an ambiguous purpose.'
\end{quote}

\textsuperscript{175} The Cotonou Agreement, n 112, contains a non-execution clause in a particularly elaborate form (Article 96), and so its exceptional reference to human rights objectives do not render it subject to an application of Article 60(3)(b) of the Vienna Convention. It is mentioned here purely for illustrative purposes.

\textsuperscript{176} \textit{Case Concerning Rights of Nationals of the United States of America in Morocco (France/USA)} [1952] ICJ Rep 176 (27 Aug), at p 196.
The purposes and objects of this Convention were stated in its Preamble in the following words: 'the necessity of establishing, on fixed and uniform bases, the exercise of the right of protection in Morocco and of settling certain questions connected therewith...'. In these circumstances, the Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects.177

Nor does the fact that a provision in an agreement might have been an inducement for a party to conclude the agreement make it essential to the object and purpose of the agreement.178 It follows from this that even an assumption that is deemed to be an essential condition of an agreement is not necessarily part of its object and purpose.179 Consequently, it must be concluded that compliance with the essential elements clause is not essential to the object and purpose of the agreements in which it is contained, especially in those rare cases in which Article 60(3)(b) might in principle be applicable.180

177 Ibid, at p 196.
179 On the other hand, a the fulfilment of a purpose may be a condition of further performance of a treaty. In Certain Expenses of the United Nations (Advisory Opinion), [1962] ICJ Rep 151 (20 Jul), at 168, the International Court of Justice commented on Article 1 of the UN Charter, which states that 'the Purposes of the United Nations are: ... to maintain international peace and security' by saying that 'the primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition' (emphasis added).
180 Hoffmeister, Menschenrechtsklauseln, n 115, at 256 reaches the same conclusion, though he notes an exception in cases where respect for human rights is made an objective of the agreement.
It is at this stage that the present interpretation of Article 60(3)(a) may have some utility. In other words, at least where the change in circumstances is the result of the conduct of one of the parties, Article 60(3)(a) makes it possible for a party to declare a material breach even where the change in circumstances is foreseen in the agreement. The result would be that Article 62 applies to changes in unforeseen factual situations, Article 60(3)(a) applies to changes in agreed (foreseen) factual circumstances as well as to breaches of obligations more generally, and Article 60(3)(b) applies to the specific case of obligations essential to the accomplishment of the object or purpose of the treaty.

As far as the human rights clause is concerned, the result of this analysis is that where the essential elements clause is phrased in the indicative mood ('respect for human rights inspires the policies of the parties and constitutes an essential element of the agreement'), and there is no statement that a violation of this clause amounts to a 'material breach' of the agreement, a violation of the norms set out in the clause may amount to a wrongful repudiation of the agreement under Article 60(3)(a). This will depend upon whether, in fact, the conduct can be said to be a complete repudiation of the agreement.  

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196 In Appeal Relating to the Jurisdiction of the ICAO Council (India/Pakistan), [1972] ICJ Rep 46 (18 Aug), Pakistan claimed that India had wrongfully repudiated various agreements providing for overflight rights by suspending such rights. The Court left the question for the merits (which were not decided on jurisdictional grounds), but it did say that: '[e]ven if the allegation, because of its generality, is to be regarded as one of conduct on the part of Pakistan amounting to a complete 'repudiation of the treaty' (see paragraph 3 (a) of Article 60 of the Vienna Convention), it would still be necessary to examine the Treaties in order to see whether, in relation to their provisions as a whole, and in particular those relating to the 'safety of air

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for the principles of human rights and democracy are declared to be an ‘essential element’ of the agreement clearly answers this question in the affirmative.

3. Summary

The results of this analysis can be summarised as follows: first, it follows from Article 60(4) that Article 60(3) cannot apply where there is a non-execution clause applicable in cases of a violation of the norms in the essential elements clause, namely, where the parties are under a normative obligation not to violate the principles set out in that clause. This occurs in two situations:

?? where there is a declaratory provision deeming a violation of the essential elements of the agreement to be a ‘material breach’ of the agreement, and/or

?? where the essential elements clause is in the imperative form (‘respect for human rights shall inspire the policies of the parties’).

In these situations, the parties are bound, under the terms of the non-execution clause, to choose appropriate measures that ‘least disturb the functioning of the agreement’. In most cases, this will rule out a permanent suspension or termination of the agreement. Rather, it will at most authorise the suspension of certain targeted benefits under the agreement.
By contrast, where there is no obligation as such, the proviso in Article 60(4) will not apply, because even though the agreement contains a provision concerning breach, this provision will be not ‘applicable’. This will be the case where there is a non-execution clause but no statement regarding ‘material breach’ and the essential elements clause is phrased in the indicative mood (‘respect for human rights inspires the policies of the parties’. These situations will not entitle the injured party to rely on Article 60(3)(b) of the Vienna Convention, because the essential elements clause is not essential to the object and purpose of the relevant agreements, but they may constitute a repudiation of the agreement within the meaning of Article 60(3)(a).

E. Conclusion

The conclusions reached in this Part are that, in most cases, the human rights clause establishes obligations on the parties requiring that human rights are respected by the parties to the agreement. These obligations, moreover, are more than a mere condition that the parties comply with human rights norms in the exercise of their existing powers; rather, they are ‘positive obligations’ to take whatever measures are necessary to ensure respect for human rights within the scope of the parties’ responsibilities under the agreement. Part 3 will address the implications of these positive obligations for the Community’s power to include a human rights clause in its agreements.

In addition, obligations imposed on the parties under the human rights clause are in excess of their obligations under customary international law, not only in terms of the human rights norms incorporated in the essential elements clause, but also by the fact that they are enforceable by the other party to an extent which
by far exceeds that party’s rights under the law of state responsibility. This is likewise relevant to the question addressed in the following Part, of the powers of the Community to include human rights clauses in its international agreements.

A further conclusion is that the rules of customary international law governing the consequences of a material breach of an agreement do not apply to most of the actual human rights clauses, this is because most agreements contain a non-execution clause which itself regulates the consequences of breach. Where there is such a clause, any party seeking to impose ‘appropriate measures’ is bound by an obligation to choose such measures as ‘least disturb the agreement’, which, in practice, means suspending benefits under the agreement without permanently suspending or terminating the agreement under international law. This point is relevant to the question addressed in Part 4 as to the legality under GATT of any appropriate measures involving the suspension or termination of trade concessions under the human rights clause.

The remainder of this Part considered the proper application of Article 60 of the Vienna Convention to those agreements unregulated by any applicable non-execution clause. The conclusion on this point is that a violation of the norms in an essential elements clause in an agreement of this type will amount to a repudiation of the agreement rather than the violation of a provision essential to the accomplishment of the object or purpose of the agreement.
Part 3

The Power of the Community to Include Human Rights Clauses in its International Agreements

A. Introduction

This Part considers whether the Community has any legislative power to include human rights clauses in its international agreements; or, to put it another way, whether there is any legal basis for the human rights clause. It begins in Section B with a refutation of the Council’s view that, under Community law, the question does not arise in the first place. Section C then considers the question whether the Community has any general human rights powers, in particular under the implied power in Article 308,197 that might justify the inclusion of a human rights clause in its international agreements. It concludes that there is no such general power, but that there is a subsidiary implied power, independent of Article 308, which enables the Community to ensure that its existing legislation (including its trade and development policies) do not violate general principles of Community law regarding respect for human rights. Section D then assesses how this power might be used to justify the inclusion of a human rights clause in the Community’s agreements at least for this internal dimension.

This does not, however, answer the question whether the Community is able to impose measures under the human rights clause for external reasons, namely to

197 All references are to the EC Treaty except when stated otherwise.
ensure that other countries comply with the human rights norms set out in the essential elements clause. This question is addressed in Section E, both in terms of whether there is an implied power to take countermeasures to enforce rights under international law, and in terms of express powers under the EC Treaty. Finally, Section F considers the problem that, despite the fact that otherwise the Community may have the power to include the human rights clause in its agreements, it may lack the power to subscribe to the obligations binding on it under the clause. This involves a discussion of the Community’s liabilities under international agreements generally, both in terms of pure Community agreements and under mixed agreements concluded jointly with the Member States. It also assesses the possibility that, notwithstanding any initial competence problems, the human rights clause might be justified under the doctrine of ‘ancillary clauses’.

B. Is there any need for a legal basis for the human rights clause?

The official view of the Council is that there is no need for a separate legal basis for human rights clauses or, presumably, for appropriate measures under these clauses.198 In a passage already quoted, the Council says that:

The human rights clause does not transform the basic nature of agreements which are otherwise concerned with matters not directly related to the promotion of human rights. It simply constitutes a mutual reaffirmation of commonly shared values and principles, a precondition for economic and other cooperation under the agreements, and expressly

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198 The practice of the Council, on the other hand, is quite different. See below at p 178.
allows for and regulates suspension in cases of non-compliance with these values. Such a clause thus does not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments which, as general international law, already bind all States as well as the EC in its capacity as a subject of international law.¹⁹⁹

Although it reads smoothly, this is a sophisticated argument. It can be divided into three separate limbs: the first is that the human rights clause does not add to the obligations of the Community under customary international law; the second – related to the first – is that the Community necessarily has the power to conclude agreements reiterating existing obligations under customary international law; and the third is that the Community in any case has the power to suspend agreements which it has concluded.²⁰⁰ These arguments have held up well in the literature; indeed, even the one author who considers that the Community lacks the power to enact appropriate measures under the clause does not consider that it lacks the power to include the clause in its agreements in the first place.²⁰¹ Nonetheless, it is suggested here that they each suffer from serious flaws.


²⁰¹ Frank Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft*, Springer, Berlin, 1998 at 390, says that ‘while the conclusion of the clause does not raise any questions, as the procedural provisions of

*Footnote continued*
1. The human rights clause and existing obligations under customary international law

As far as the first limb of the Council’s argument is concerned, we have already seen that the human rights clause often does far more than merely reiterate the obligations binding on the Community under customary international law. Not only does it impose positive obligations on the parties, but it does so on the basis of norms stricter than those binding on the Community under customary international law. In addition, the human rights clause subjects the Community to the possibility of countermeasures in response to a breach of these obligations that by far exceed the rights of third parties ordinarily available under the law of state responsibility.

From the Council’s point of view, the second limb of the argument — that the Community necessarily has the power to legislate with respect to obligations by which it is bound under customary international law — depends upon the validity of the first. However, it may be attacked from quite a different angle: it suffers

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the respective legal basis are applicable, the same is not true for the taking of unilateral implementing measures'. (Translation by author: ‘[w]ährend der Abschluß der Klausel keine Fragen aufwirft, da die Verfahrensvorschriften der jeweiligen Rechtsgrundlage gelten, ist dies bei der Ergreifung von einseitigen Maßnahmen zur Umsetzung derselben nicht der Fall’). The author is more sceptical view on the legal basis for the clause in Juliane Kokott and Frank Hoffmeister, ‘Opinion 2/94 on the Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (1996) 90 AJIL 664 at 667–8.

202 See p 52.
203 See p 61.
204 See p 65.
from the logical flaw that even if the human rights clause did reflect obligations binding on the Community (and on the other party) under customary international law, this would not of itself mean that the Community had any power to re-enact such obligations in treaty form. This may be illustrated by a contemporary example: customary international law requires the Community not to harbour terrorists. But this does not mean that the Community has any power to arrest terrorists, nor does it mean that the Community has any power to enforce the obligations of other States not to harbour terrorists, all it means is that in the exercise of its existing powers the Community must not infringe the rule against harbouring terrorists. Contrary to the assumption made by the Council, it is actually irrelevant to the question of Community powers whether the obligations binding on the Community under the human rights clause reflect those binding on the Community under customary international law.

2. Does the Community necessarily have the power to suspend agreements?

The Council's third argument is that the Community necessarily has the power to suspend agreements which it has the power to conclude, presumably on the same legal basis as the agreement was concluded. This argument is logically

205 In Case C-327/91, France v Commission [1994] ECR I-3641 at para 16, the Court said that 'exercise of the powers delegated to the Community institutions in international matters cannot escape judicial review, under Article 173 of the Treaty, of the legality of the acts adopted'. That the exercise of external powers is limited by customary international law was assumed in Case C-162/96, A Racks GmbH & Co and Hauptzollamt Mainz [1998] ECR I-3655.

206 See, eg, the Proposal for a Council Framework Decision on combating terrorism, COM (2001) 521 final, 19.9.2001, which is based on Articles 29, 31(e) and 34(2)(b) EU.
independent of the first two arguments. However, it wrongly assumes that a
decision by the Community to suspend an agreement is not subject to the usual
rule that every Community act must have an appropriate legal basis having
regard to its aim and content. As the Court said in Opinion 2/00:

It is settled case-law that the choice of the legal basis for a measure,
including one adopted in order to conclude an international agreement,
does not follow from its author’s conviction alone, but must rest on
objective factors which are amenable to judicial review. Those factors
include in particular the aim and the content of the measure (see
Portugal v Council, cited above, paragraph 22, Case C-269/97
Council, cited above, paragraph 58). 207

It is true that there have been some exceptional cases in which this rule has been
ignored in the past, but these cases are exceptional, and their continuing validity
is somewhat doubtful. 208 Moreover, the Court has specifically applied the rule
regarding choice of legal basis to measures that have as their primary purpose the
repeal of measures justified on a different legal basis. It has said that:

The fact that the Regulation replaces another act which was based on
Article 100 of the Treaty, relating to the approximation of the laws of
the Member States having a direct bearing on the establishment or
functioning of the common market, does not necessarily mean that the
Regulation must have recourse to Article 100 or Article 100a ... The


208 See below at p 196. These cases involve the use of Article 133 to support development
cooperation measures and trade sanctions for political reasons.
legal basis for an act must be determined having regard to its own aim and content.\textsuperscript{209}

This applies directly to the present case, which concerns measures with the purpose of suspending the operation of an international agreement. Furthermore, there is some relevant practice regarding the legal basis used for a measure suspending an international agreement: the regulation suspending the trade concessions provided for by the Cooperation Agreement with the Socialist Federal Republic of Yugoslavia was based on Article 113 (now Article 133)\textsuperscript{210} even though the legal basis of the agreement itself was Article 238 (now 310).\textsuperscript{211}

This should be sufficient to dispose of the Council’s argument that the Community necessarily has the power to suspend its agreements.\textsuperscript{212} On the other hand, it should also be considered whether paragraph 2 of Article 300(2), newly introduced by the Treaty of Amsterdam, has the effect of allowing the Council to suspend an agreement on the same basis as that on which the agreement was


\textsuperscript{212} It is suggested later at p 160 ff that the Community has a subsidiary implied power to repeal legislation in order to ensure its legality.
concluded, regardless of the particular aim and content of the suspending measure. Apparently intended to apply to measures under the human rights clause, Article 300(2)(2) establishes a dispensation to certain of the normal voting and notification rules for measures suspending international agreements, as well as for decisions by organs established by international agreements. In such cases, the Council is to use the same voting procedure as it used for concluding the agreement. Additionally, the new paragraph replaces the usual consultation and approval rights of the European Parliament established in Article 300(3) with a lesser right of subsequent notification.


2.4 Incidentally, Article 300(2)(2) draws no distinction between partial and full suspension, which undermines the distinction drawn in this respect by Barbara Brandtner and Allan Rosas, 'Trade Preferences and Human Rights' in Philip Alston (ed), The EU and Human Rights, Oxford University Press, Oxford, 1999, at 708. These authors state that the appropriate legal basis for 'appropriate measures' would be either the legal basis used when concluding the agreement (in cases of full suspension) or the legal basis relating to the subject matter of the measures, such as trade (in cases of partial suspension).

2.5 This is clear from the explanation of the proposed deletion of Article 300(2)(2) and (3) in Report on the European Parliament's proposals for the Intergovernmental Conference (14094/1999 - C5-0341/1999 – 1999/0825(CNS)), A5-0086/2000, 27 March 2000. For an

Footnote continued


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Because it necessary to discuss this provision in some detail, Article 300(2) must be quoted in full (the relevant clause is underlined):

Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional application before entry into force, and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310.

By way of derogation from the rules laid down in paragraph 3, the same procedures shall apply for a decision to suspend the application of an agreement, and for the purpose of establishing the positions to be adopted on behalf of the Community in a body set up by an agreement [based on Article 310], when that body is called upon to adopt decisions having legal effects, with the exception of decisions supplementing or amending the institutional framework of the agreement.

The European Parliament shall be immediately and fully informed on any decision under this paragraph concerning the provisional application

assessment of the procedural requirements applicable to the human rights clause prior to the Treaty of Amsterdam, see Point 2.2 of the Opinion of the Committee on Development and Cooperation, in Report on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries (COM (95)0216 – C4-0197/95), A4-0212/96, 26 June 1996.
or the suspension of agreements, or the establishment of the Community position in a body set up by an agreement [based on Article 310].\textsuperscript{216}

According to its own terms, Article 300(2)(2) seems to apply to \textit{all} measures suspending agreements, regardless of the legal basis of these measures. However, there is reason to believe that it applies only to decisions which can be supported on the same legal basis as was used for the decision to conclude the agreement. This would mean that Article 300(2)(2) is only available for measures suspending agreements for reasons related to the subject matter of the agreement (for example, a failure to liberalise in a free trade agreement), and not when the aim of the suspending measures is entirely different.

A limited application of Article 300(2)(2) is justified firstly on textual grounds. The rationale for this provision is to allow for an accelerated procedure in cases of special urgency. In such cases, it establishes a derogation from certain of the usual rules governing the conclusion of agreements (as set out in Article 300(3)). As a derogation, this provision must be given a limited reading. To infer from this provision an additional derogation from the usual rule regarding choice of legal basis would be to extend Article 300 beyond its merely procedural function, and would come close to converting this provision into an independent legal basis for legislative acts.\textsuperscript{217} It is relevant to note that Article 300(2)(2) is of

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\begin{itemize}
\item \textsuperscript{216} Bracketed phrases have been deleted by the Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [2001] OJ C 80/1 (the 'Treaty of Nice').
\item \textsuperscript{217} This procedural function is apparent from the opening phrase of Article 300, which states that 'where this Treaty provides for the conclusion of agreements between the Community and one
\end{itemize}
limited application even according to its own terms, to the extent that it does not apply to the termination (as opposed to suspension) of an agreement.\textsuperscript{218}

The context of Article 300(2)(2) also supports an interpretation that limits its application to measures adopted on the same legal basis as was chosen for the conclusion of the agreement. This is the most plausible solution to the untidy overlap between the relatively lenient suspension procedures set out in this provision and the more rigorous procedures set out in Article 301 for politically motivated trade sanctions.\textsuperscript{219} The overlap is problematic because under Article 301 the Council can take a decision only on the basis of a prior decision taken unanimously by the European Council within the Common Foreign and Security Policy (CFSP),\textsuperscript{220} while in the case of Article 300(2)(2) it could act by qualified majority. There are a number of possible solutions to this problem, none of them entirely satisfactory. One could firstly interpret Article 301 as applying to the suspension of an agreement pursuant to a relevant CFSP decision, but allow for

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\textsuperscript{218} Alex Biscaro, \textit{Das Genehmigungsverfahren beim Abschluss völkerrechtlicher Abkommen in der Europäischen Union}, Stämpfli (Swiss Papers on European Integration, No 18), Zürich, 1998, at 22.


\textsuperscript{220} For a discussion of Article 301 see p 184.
the use of Article 300(2)(2) in the absence of any such decision. The problem with this solution is that it undermines the unanimity rule required under the CFSP. Alternatively, one could read Article 301 as applying to all acts interrupting or reducing economic relations, and Article 300(2)(2) as applying to acts suspending agreements which do not have this effect. But given the difficulty of imagining a Community agreement which did not affect economic relations with a third country in one way or another, this would have the equally undesirable - and opposite - effect of hollowing out Article 300(2).

A third set of solutions would distinguish between the two provisions according to whether the instrument involved is an agreement or an autonomous measure. Here there are three possibilities: most broadly, Article 300(2)(2) could apply to the suspension of all agreements and Article 301 to all autonomous economic relations; alternatively, Article 300(2)(2) could apply to the suspension of agreements with a suspension clause, and Article 301 to autonomous instruments and to agreements without a suspension clause (as in Racke); finally, Article 300(2)(2) could apply to the suspension of agreements using the same legal basis as was used to conclude the agreement, and Article 301 to all other measures.

While each of these options is plausible, it is the last of these options that is suggested here as the most desirable solution, as it best reflects the character of Article 300(2)(2) as a limited delegation of power in the form of a dispensation

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221 Alex Biscaro, Das Genehmigungsverfahren beim Abschluss völkerrechtlicher Abkommen in der Europäischen Union, Stämpfli (Swiss Papers on European Integration, No 18), Zürich, 1998, at 22, considers that Article 301 prevails over Article 300 in all 'sanctions' cases.

222 This seems to be the view of Bulterman, n 131, at 241.
from the ordinary rules applicable in cases of special urgency. It must be conceded that this reading of Article 300(2)(2) somewhat undermines its application to the human rights clause, which may appear an unfortunate result if this provision was intended, among other things, to apply to measures under this clause. But this is not a relevant legal consideration.

To summarise, then, appropriate measures must be based on a proper legal basis regardless of whether they involve a partial or a full suspension, and Article 300(2)(2) must be confined to cases in which the same legal basis can be used for the suspension as for the conclusion of the agreement. There is nothing in this provision to suggest any derogation from the normal rule that a measure must be enacted on a proper legal basis having regard in particular to its aim and content.

C. The powers of the European Community to legislate with respect to human rights

Having demonstrated that the Council is incorrect to assume that the Community necessarily has the power to include a human rights clause in its international agreements, it remains to be ascertained if there is any actual basis on which this practice might be supported. This section discusses this question in terms of the Community's general legislative powers with respect to human rights.

1. Introduction

In Opinion 2/94, the Court held that '[n]o treaty provision confers on the Community institutions any general power to enact rules on human rights or to
conclude international conventions in this field'.223 This did not mean, of course, that human rights considerations are entirely absent from Community law. The Court was careful to reaffirm that 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures',224 that 'the importance of respect for human rights has been emphasized in various declarations of the Member States and of the Community institutions' and even that 'Article 130u(2) [now Article 177(2)] of the EU Treaty [sic] provides that Community policy in the area of development cooperation is to contribute to the objective of respecting human rights and fundamental freedoms'.225 Nonetheless, it was clear that the Community not only lacks any plenary legislative power to ensure respect for human rights within the territory of the European Union, but also that it has no express legislative power to ensure respect for human rights even within the field of Community law.

To some extent, the situation has changed since 1996, when this decision was handed down. The Treaty of Amsterdam added to the tasks of the Community the promotion of 'equality between men and women', and stated that in its activities 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women'.226 This was complemented by a new Article 13 authorising the Council, acting within its powers, to take appropriate action to combat discrimination 'based on sex, racial or ethnic origin, religion or belief,

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224 Ibid, at para 33.
225 Ibid, at para 32. It is Article 130u of the EC Treaty.
226 Articles 2 and 3(2) respectively.
disability, age or sexual orientation'. Various provisions also strengthened the powers of the Community in relation to the principle of equality between men and women in the field of employment. On the judicial side, the European Court of Justice was now expressly directed to apply the human rights principles set out in Article 6(2) EU when exercising its powers under the EC Treaty, although whether this changed the existing situation is still a matter of debate.

There have also been a number of more recent changes at the peripheries of Community law. The most prominent of these was the advent of the Charter of Fundamental Rights of the European Union, which establishes a 'Bill of Rights' applicable to 'the institutions and bodies of the Union ... and to the Member States only when they are implementing Union law'. It was made clear, however, that '[t]his Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'. This insulation of the Community from the human rights obligations of the European Union recalls the Treaty of Maastricht, which shielded Community law

227 Article 13 (ex Article 6a) provides that '[w]ithout prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

228 Articles 137(1) and 141(1).

229 See below at p 126 ff.


231 Article 51(2) of the Ibid.
from any unintended consequences of the Treaty on European Union.\(^{232}\)

Nevertheless, despite the fact that it has limited legal weight, the Charter is certain to be recognised by the Court as a source of inspiration for the general principles of law regarding fundamental rights. It has already been referred to by Advocate General Tizzano as ‘a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context’.\(^{233}\)

The Treaty of Nice also proposes various improvements to the Community’s human rights powers, but most of these are relatively modest.\(^{234}\) One significant change, however, is a proposed Article 181a specifying that when the Community carries out, within its spheres of competence, economic, financial and technical cooperation measures with third countries, its policies ‘shall

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\(^{232}\) Article 47 EU is quoted and discussed at p 158.

\(^{233}\) Case G-173/99, R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) [2001] ECR I-0000, [2001] 3 CMLR 7 (Opinion), at para 28. The Advocate General continued, ‘[a]ccordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right’ (para 28). In its decision the Court did not refer to the Charter. In Case T-112/98, Mannesmannröhren-Werke AG v Commission [2000] ECR II-0729, at para 76, the Court of First Instance clearly accepted (\textit{a contrario}) that the Charter could have some relevance when ‘it must be borne in mind that that Charter was proclaimed by the European Parliament, the Council and the Commission on 7 December 2000. It can therefore be of no consequence for the purpose of review of the contested measure, which was adopted prior to that date’. The Charter was also referred to in C-377/98, \textit{Netherlands v Parliament and Council} [2001] ECR I-0000 (Opinion), at para 197.

\(^{234}\) This is to some extent indicated by the fact that the minor increments to the Community’s powers in the field of labour rights (in proposed Article 137(5)) ‘shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs’. See the Treaty of Nice, n 216.
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 phrase is taken directly from Article 177(2), which applies the same human rights objective to the Community’s development policies. Both of these provisions will be discussed below.235

In summary, it may be concluded that despite these minor improvements, there is still no secure legal basis for a ‘human rights policy’ that would guarantee that human rights are respected within the Community legal order as a whole, nor for any comprehensive external human rights policy with respect to all – and not just developing – third countries.

2. Human rights in the Community legal order

This lacuna in the Community’s legislative competence with respect to human rights has prompted a number of commentators to postulate various reasons why such a power might be inferred from the structure of the Community legal order. The two most prominent of these arguments are, firstly, that a power may be derived from an unwritten ‘transversal’ human rights principle in the EC Treaty, and, second, that there is a ‘Community objective’ to protect fundamental rights, which may justify the use of the Community’s implied power under Article 308.

235 See p 194.
A third approach has been proposed by Anthony Arnall, who, speaking of *Opinion 2/94*, suggested that:

The Court's description of respect for fundamental rights as 'a condition of the lawfulness of Community acts' is significant. It seems to mean not only that Community acts adopted under specific powers must ensure respect for human rights but that such powers can be used as the basis for provisions designed to achieve that objective.²³⁶

While this seems to be reading slightly too much into the Court's decision, it is suggested that, in fact, it is something similar to this approach that might offer the most hope for a Community power with respect to human rights. Specifically, the proposal advanced below is that the Community has an implied 'indispensable' power to enact legislation for the purpose of ensuring the legality of its legislative acts, and that it is on this power (which is distinct from the Community's implied powers under Article 308) that the Community can base at least some human rights legislation, and, importantly in the present context, at least certain types of measures under the human rights clause. Before coming to this, however, it is necessary first to discuss in more detail the current position of human rights in the Community legal order. This will be done by addressing

first the Community’s judicial powers and then its legislative powers in the field of human rights.

(a) Judicial powers

As noted, the Court reiterated in *Opinion 2/94* that ‘fundamental rights form an integral part of the general principles of law whose observance the Court ensures’.

This raises a number of questions relating to the addressees of these rights, the basis on which the Court derives its power to ensure that they are observed, and their source.

The answer to the first of these questions is relatively clear: the addressees of the fundamental rights are the Community institutions and the Member States when acting in the field of Community law, which they do not only when they are implementing but also when they are derogating from Community law, including under the unwritten rule of reason exceptions.


The answer to the second question is slightly more complicated. The starting point is Article 220, which provides that:

The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.

Article 220 is an 'applicable law' provision, in the sense that it determines the 'law' to be applied in the exercise of the Court's jurisdiction. This is quite distinct from the concept of jurisdiction itself, which concerns the type of claims on which the Court has the power to render decisions.\(^{239}\) The Court's jurisdiction under the EC Treaty is set out primarily in two other provisions: Article 230, under which the Court has jurisdiction to review the legality of Community acts, and Article 234, under which the Court has jurisdiction to give preliminary rulings on the Treaty and on the legality of Community acts.\(^{240}\) Putting together the two concepts of jurisdiction and applicable law, the result is that, in

\(^{239}\) On the difference between jurisdiction and applicable law, see Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35(3) JWT 499 and Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 AJIL 535, at 560-1. Interestingly, this difference is emphasised in the proposed revision of Article 220 by the Treaty of Nice, n 216, according to which '[t]he Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed'.

\(^{240}\) Article 230 grants the Court jurisdiction 'to review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties'. Article 234 grants it jurisdiction to give 'preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide'. See also n 256.
exercising its jurisdiction under Articles 230 and 234, the Court is obliged under Article 220 to ensure that the ‘law’ is observed.

What this ‘law’ is, both generally and in any given case, are two different questions. The first is a question of the applicable ‘sources of law’. Unlike Article 38 of the Statute of the International Court of Justice, the EC Treaty does not specify any particular sources of law. The determination of these sources has therefore been left to the Court as a matter of interpreting the ‘law’ under Article 220 which must be applied by the Court in the exercise of its jurisdiction. These sources clearly include all primary and secondary Community law, as well as the case law of the Court itself. This latter source of law can have potent consequences when it comes to ‘constitutional doctrines’, such as the supremacy of Community law over that of the Member States and the direct effect of certain provisions of Community law, in the sense of granting enforceable rights to individuals.\(^\text{241}\) The Court has also determined that ‘general principles of law’ are an applicable source of law under Article 220,\(^\text{242}\) and among these is the general

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\(^{241}\) While the Court uses the terms ‘direct applicability’ and ‘direct effect’ interchangeably, the term ‘direct effect’ is used here to mean that a rule confers subjective rights on an individual, and the term ‘direct applicability’ is used to mean that one rule prevails over another rule. The distinction is explained in Ilona Cheyne, ‘Haegeman, Demirel and their Progeny’ in Alan Dashwood (ed), *EC External Relations Law: New Perspectives*, Sweet & Maxwell, London, 2000, at 22 n 10. Cf however Bruno de Witte, ‘Direct Effect, Supremacy, and the Nature of the Legal Order’ in Paul Craig and Gráinne De Búrca (ed), *The Evolution of EU Law*, 1999, at 187-8.

principle of law that the legality of acts in the field of Community law must respect for fundamental rights. It might be added that it is no accident that the Court consistently refers to its duty to ensure that such acts observe fundamental rights in terms drawn from Article 220.

The second question is how to determine which of these sources of law applies in any given case. Properly speaking, this is a question of the relative hierarchy of


243 See Case T-45/90, Speybrouck v Parliament [1992] ECR II-0033, at para 47, where the Court of First Instance said that 'the principle of equal treatment for men and women in matters of employment and, at the same time, the principle of the prohibition of any direct or indirect discrimination on grounds of sex form part of the fundamental rights the observance of which the Court of Justice and the Court of First Instance must ensure pursuant to Article 164 EEC', cited in Case C-13/94, PUK v S and Cornwall County Council [1996] ECR I-2143 (Opinion) at para 22, n 27. This is also accepted by Koen Lenaerts, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union' (2000) 6(1) Colum J Eur L 1, at 5.

the generally applicable sources of law. As far as ‘legislative’ sources are concerned, it seems that primary Community law ranks highest, followed by international agreements and secondary Community legislation. There is an exception, however, in connection with certain international agreements (of which the WTO agreements are the best known example): first, when the agreement expresses an intention that it is not to be opposable to secondary Community legislation, and, second, when it is necessary to grant the Community’s legislative and executive organs a measure of discretion in matters

245 See Joined Cases 21 to 24/72, International Fruit Co NV v Produktschap voor Groenten en Fruit [1972] ECR 1219 (Opinion), at para 8 and Case C-149/96, Portugal v Council [1999] ECR I-8395 (Opinion) at para 15, where the Advocate General said that ‘[w]hen the institutions adopt acts of secondary legislation, they must therefore comply with the rules contained in agreements, from the time when the international agreements are concluded. Any conflict between a Community source and a source contained in an agreement generally constitutes a defect in the Community measure which justifies its annulment’. Regarding the superiority of agreements to Member State legislation, see Karl Meessen, ‘The Application of Rules of Public International Law within Community Law’ (1976) 13 CMLR 485 at 500; Ronald A. Brand, ‘Direct Effect of International Economic Law in the United States and the European Union’ (1997) 17(2,3) Northwestern Journal of International Law & Business 556 at 600-1, states that ‘the consensus position is that international agreements hold a position in Community law that, while below that of the EC Treaty itself, is superior to secondary Community legislation as well as national law’.

246 See Case C-280/93, Germany v Council [1994] ECR I-4973, para 109 and Joined Cases 21 to 24/72, International Fruit Co NV v Produktschap voor Groenten en Fruit [1972] ECR 1219, paras 20-1 and 27 (GATT not justiciable). Earlier doubts as to whether this principle was limited to the GATT, which was not formally concluded by the Community in accordance with Article 300, were laid to rest with Case 87/75, Bresciani [1976] ECR 129, para 16 (Yaoundé Convention justiciable) and Case 104/81, Hauptzollamt Mainz v Kupferberg [1982] ECR 3659, para 17 (EEC-Portugal association agreement justiciable). As noted by Ilona Cheyne, ‘Haegeman, Demirel and their Progeny’ in Alan Dashwood (ed), EC External Relations Law: New Perspectives, Sweet & Maxwell, London, 2000, at 26, this exception allows the legislative organs to exclude the justiciability of an agreement, though not to exclude the Court’s jurisdiction to determine the question (as was seen in Opinion 2/91, [1993] ECR I-1061).
of foreign affairs. On the other hand, even these agreements have some effect in Community law, insofar as they govern the legality of Member State legislation and also, of secondary legislation that expressly refers to or purports to implement such obligations. As far as the ranking of general principles of law is concerned, it seems that these principles prevail over secondary legislation, but it is not certain that they necessarily prevail over the primary law, and entirely unclear whether they prevail over such other sources as judicial decisions, international agreements, or customary international law. The

247 In Case G149/96, Portugal v Council [1999] ECR I-8395, at para 40, the Court that 'to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis'. The 'memorandum' refers to the WTO Dispute Settlement Understanding.


249 Case 69/89, Nakajima All Precision Co v Council [1991] ECR I-2069 (implementing the GATT) and Case 70/87, Fediol v Commission [1989] ECR 1781 (regulation including a reference to trade practices 'which are incompatible with international law or with generally accepted rules'). See also Case C-280/93, Germany v Council [1994] ECR I-4973, para 111.

250 General principles of law are frequently used to annul secondary legislation. On whether 'institutional principles' have the same effect, see Bruno de Witte, 'Institutional Principles: A Special Category of General Principles of EC Law' in Ulf Bernitz and Joakim Nergelius (ed), General Principles of European Community Law, Kluwer Law International, 2000, at 156-7, discussing Case C-135/96, UEAPME v Council [1998] ECR II-2335, in which the Court of First Instance indicated that a breach of the principle of democracy should be considered a possible ground for the annulment of a directive in an action brought by a private party.

situation is also unsettled with respect to judicial decisions. To the extent that primary law is interpreted by the Court in the form of decisions, it could be said that these decisions (themselves naturally authorised by the primary law) outrank the primary law (as interpreted, for instance, by the executive). It might finally be added that within each source of applicable law, other general rules of interpretation apply, such as the principle that the later law (from the same source) prevails over the earlier (*lex posterior*), and the exception to this rule, that the specific law prevails over the general (*lex specialis*). Seen in these terms, it should also be clear that the question of the ‘law’ applied by the Court (under Article 220) in the exercise of its jurisdiction to hear certain types of claims (under Articles 230 and 234) is different from that of the direct effect of this ‘law’. The source of the doctrine of direct effect is the jurisprudence of the Court, itself an interpretation of the primary law. It might be added that, as the law currently stands, direct effect may be granted to secondary legislation, primary treaty law, international agreements concluded by the Community, but not to customary international law or, for that matter, general law.

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Footnote continued

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Footnote continued
principles of law. Naturally, where those general principles of law are phrased in terms of individual rights, as many are, the result will be the same, but strictly speaking, the doctrine of direct effect does not apply.\footnote[253]{253} Furthermore, just because direct effect \textit{may} be granted to certain sources of law, this does not mean that it will be granted in any given case. For instance, it is clear that direct effect cannot at present be granted to the European Convention on Human Rights, as it is not one of the sources of law \textquoteleft applicable\textquoteright{} by the Court under Article 220.\footnote[254]{254} But even if the Community did accede to the Convention, however, it seems that

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\footnote[253]{253}{Cases C-89/99, \textit{Schieving-Nijstad vof and Others} [2001] ECR I-0000, at paras 54-55, discussing TRIPs.}

\footnote[254]{254}{In Case C-159/90, \textit{Society for the Protection of Unborn Children Ireland Ltd v Grogan} [1991] ECR I-4685, (Opinion), at para 30, Advocate General Van Gerven said of the Court's jurisprudence on applicable human rights agreements concluded by the Community that \textquoteleft[a] feature of this case-law is that it does not confer direct effect in the Community legal order on the provisions of the abovementioned international treaties [including the European Convention on Human Rights] but regards those treaties, together with the constitutional traditions common to the Member States, as helping to determine the content of the general principles of Community law. This stance enables the court, in establishing general principles in the particular (socio-economic) context of Community law, also to take into account the imperatives of the fundamental freedoms and of the Community market organizations, which are intended to bring about the integration of the market. However, it does not prevent the court from enforcing these fundamental rights and freedoms introduced into Community law in the form of general principles in the same way as it enforces specific provisions where it is a question of assessing acts of the Community institutions in the light of those principles and declaring those acts void or invalid if the court finds that they are incompatible therewith.}

\end{quote}
the Convention would continue to lack direct effect, despite the fact that the human rights listed in that Convention would seem perfect candidates for the application of the doctrine.

These considerations do not appear to have been affected by the more recent application to the Community legal order of Articles 6(2) and 46(d) EU. Article 46 reinforces the Court's existing duty under Article 220 (as interpreted by the Court) to ensure respect for fundamental rights in cases falling within its jurisdiction. It states, relevantly, that:

The provisions of the Treaty establishing the European Community ... concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty: ... (d) Article 6(2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty; (e) Articles 46 to 53.

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Article 6(2) EU, to which the relevant provisions of the EC Treaty concerning the powers of the Court now apply, provides that:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

This provision has the effect of anchoring the principle of respect for 'fundamental rights ... as general principles of Community law' as the primary law of the European Union, but it is not entirely clear what these provisions contribute (or even purport to contribute) to the judicial protection of fundamental rights in the legal order of the European Community.\(^\text{256}\) It is conceivable that the two provisions together have the effect of deeming the

\(^{256}\) Note that the obligation in Article 6(2) EU is expressed entirely with respect to the European Union, and not the Community, which remains a third party to the Treaty on European Union, and as such a bearer of neither rights nor obligations under the TEU. See Article 34 of the Vienna Convention, n 15, which states that '[a] treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization'. It might be added that under Article 46 the Court is not expressly empowered to apply Article 6(2) EU in the exercise of its jurisdiction under other agreements. The Court has been given such additional jurisdiction under Article 111(3) of the EEA Agreement, as well as under Article 35 EU (in relation to Title VI EU), under the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (granted under a Protocol to that Convention [1975] OJ L 204/28) and under the Rome Convention on the law applicable to contractual obligations (likewise granted under a Protocol [1989] OJ L 48/1). Interestingly, in Case C-7/98, *Krombach v Bamberski* [2000] ECR I-1935, the Court read the public policy exception in the Brussels Convention in light of its fundamental rights jurisprudence, and in particular to the right to a fair legal process (at paras 24-6), and referred in this context (without actually applying it) to Article 6(2) EU (at para 27).
Convention and the ‘constitutional traditions common to the Member States’ to be sources of applicable law for the purposes of Article 220 (though in the subsidiary sense that these two sources are only to be ‘applied’ for the purpose of determining the definition of the ‘fundamental rights’ that must be respected as a general principle of Community law). But, given that this provision itself merely incorporates other existing sources of law, Article 6(2) EU does not

257 On this, see the discussion of the status of general principles of law as a source of law at n 242. These two subsidiary sources are only a subset of the sources applied by the Court for the purposes of defining these rights under Article 220. As the Court said in Ibid, at para 25, for the purpose of determining these rights ‘the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms ... has particular significance...’. For a list of the other sources of human rights law adopted by the Court see Lars Bondo Krogsgaard, ‘Fundamental Rights in the European Community After Maastricht’ (1993) 20(1) Legal Issues of European Integration 99 and John P. Flaherty and Maureen E Lally-Green, ‘Fundamental Rights in the European Union’ (1998) 38 Duquesne University Law Review 249 at 275. Article 6(2) EU also does not include the EU Charter on Fundamental Rights, which, as noted above at n 233, has been taken as a statement of certain rights in Community law, and it is more limited than the Court’s fundamental rights jurisprudence in terms of the addressees of the rights to which it refers, insofar as it only applies to the acts of Community and not to the Member States when acting in the field of Community law. Compare on this point the EU Charter on Fundamental Rights and Freedoms, which applies to the acts of Member States implementing Community law.

itself constitute a new source of law for the respect for fundamental rights, and therefore does not really change the existing situation. It is also possible that Article 46 EU has the effect of *mandating* the Court to apply the principles set out in Article 6(2) EU as the 'law' for the purposes of Article 220, but, again, seeing as the Court already imposes this duty on itself, it is also questionable whether the provision changes the existing situation.²⁵⁹ It may, however, prevent the Court from later abandoning its fundamental rights jurisprudence.²⁶⁰ On the other hand, it is probably fortunate that Articles 6(2) and 46 EU have such limited effects on the Community legal order. One might otherwise have to ask the question whether, by adding to the tasks of the Court, these provisions amend the EC Treaty in violation of Article 47 EU.²⁶¹

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²⁵⁹ See n 244.


²⁶¹ Article 47 EU is quoted and discussed at p 158. By analogy, one might refer to *Opinion 1/92*, [1992] ECR 1-2821, at para 32, in which the Court said that '[t]he powers conferred on the Court by the [EEC] Treaty may be modified pursuant only to the procedure provided for in Article 236 EEC. However, an international agreement concluded by the Community may confer new powers on the Court, provided that in so doing it does not change the nature of the function of the Court as conceived in the EEC Treaty’. The Treaty of Maastricht repealed ex Article 236, which was
(b) Legislative powers

In addition to these judicial powers, the Community enjoys express and implied legislative powers in many areas of human rights concern. It has the express power to ensure the protection of human rights as a secondary objective of its development cooperation policies, to bring about the freedom of movement of workers, to attain freedom of establishment as regards a particular activity, and, concurrently with the Member States, to protect labour rights, which includes rights of equal treatment of men and women. Further, under amendments made by the Treaty of Amsterdam, the Council also has the power to suspend the voting rights and other rights of a Member State under the EC Treaty for a serious and persistent breach by a Member State of 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 set out in

not (as seem indicated by the consolidated version of the EC Treaty) replaced by new Article 309. On a strict reading of Article 47 EU, Article 6(2) EU could not therefore be 'applied' in the exercise of the Court's jurisdiction under treaties other than the TEU. It would follow that, under Community law, the Court cannot be mandated, as such, to take Article 6(2) EU into account in its review of the 'acts of the institutions' in the exercise of their powers under the EC Treaty.

262 Article 177(2). The nature of this secondary objective is discussed further at p 189.
263 Article 40. Free movement of workers is defined in Article 39.
264 Article 44. Freedom of establishment is defined in Article 43.
265 Article 137.
266 Article 141.
267 Article 309(1).
268 Article 309(2).
269 It has been argued by Manfred Nowak, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU' in Philip Alston (ed), The EU and Human Rights, Oxford

Footnote continued
Article 6(1) of the Treaty on European Union. The Amsterdam Treaty also granted the Community a new power to combat discrimination on various grounds (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation) within the scope of its existing powers, although, interestingly, this power exists independently of any actual prohibition of discrimination on these grounds. This is unlike the power in Article 12, which implements a (directly effective) prohibition against discrimination on the grounds of nationality.

University Press, Oxford, 1999 at 691, that the term ‘human rights and fundamental freedoms’ in Article 6(1) goes beyond the more narrow term ‘fundamental rights’ in Article 6(2) and, in principle, includes all human rights presently recognized by EU Member States in the context of the United Nations, the OSCE and the Council of Europe.

270 The question whether Article 6(1) EU represents an objective of the EU is discussed at p 155.

271 The decision to suspend the voting rights depends upon a prior decision (under Article 7(2) EU) by the Council to suspend the voting rights of the Member State under the Treaty on European Union and both this decision and the decision to suspend other rights under the EC Treaty depend upon a prior determination by the Council (under Article 7(1) EU), meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, that there has been a ‘serious and persistent breach’ of the principles set out in Article 6(1) EU. See, generally, Amaryllis Verhoeven, ‘How Democratic Need European Union Members Be? Some Thoughts After Amsterdam’ (1998) 23(3) ELR 217. Note that the Treaty of Nice, n 216, proposes certain amendments to Article 7 EU, and grants the Court a limited jurisdiction with respect to the purely procedural stipulations of this provision under a new paragraph (e) in Article 46 EU.

272 See below at p 202.

273 Arnell, ‘Left To Its Own Devices’, n 236, at 74. It has been concluded from this that the provision lacks direct effect: Lenaerts, ‘Fundamental Rights’, n 243, at 579; Leo Flynn, ‘The Implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination be More Equal than Others?’ (1999) 36(6) CMLR 1127, at 1132, stating that ‘[i]t is the absence of direct effect, effectively, by the most remarkable feature of Article 13 EC, namely, that it sets out no substantive norm whatsoever in relation to discrimination’.
These express powers are accompanied by an implied power, under Article 308, to act in pursuance of the Community’s objectives. This has prompted numerous commentators to hypothesise that, notwithstanding Opinion 2/94, the Community enjoys an implied power under this provision to enact legislation for the protection of human rights. Because this is a sensitive and difficult area, it is appropriate first to make some introductory remarks on the difference between the notion of human rights as an objective of legislative action, and that of human rights as a condition on the legality of legislative action, and the implications of this difference for the separation of powers between the Community’s legislative and judicial organs.

3. Objectives and conditions

It is important to maintain a conceptual distinction between the protection of human rights as a legislative objective and the protection of human rights as a condition governing the legality of Community acts. Not all of the Community’s powers must be exercised with the objective of protecting human rights, although this is the case for certain of its powers. A notable example is Article 13, which provides that ‘the Council ... may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. In addition, the there are certain powers

274 The two may overlap in various ways. For instance, legislation with human rights objectives must sometimes comply with human rights conditions (eg Article 309(2)). A distinction should also be drawn between a condition of the legality of an act, and a factual condition, which may be the end result of another purpose, necessary for other purposes to be realised. See n 179.
which have subsidiary human rights objectives, such as Article 3(2), which provides that ‘[i]n all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women’ and Article 177(2), which provides that ‘Community policy in this area [development cooperation] shall 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’.\textsuperscript{275} Where there is such an objective, it is appropriate to speak of a duty to exercise a power for the objective of protecting human rights (to the limited extent that the objective reflects human rights norms).

However, any such duty must be kept distinct from any ‘duty’ of the Community not to violate human rights principles – or, to put it another way – to ensure that its acts comply with the condition of respecting human rights principles. This is not a duty, in the terms described here, because it has nothing to do with the exercise of legislative powers for a particular purpose. Rather, it is merely a function of the disability of the Community to act in a manner that infringes certain freedoms.\textsuperscript{276} This ‘duty’ to respect human rights principles, to the extent that it exists, must be exercised on the basis of existing powers. Logically, a duty cannot itself justify the exercise of further legislative powers.

\textsuperscript{275} Emphasis added in both cases.

\textsuperscript{276} Much of this discussion draws on Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 \textit{Yale Law Journal} 16. Hohfeld called these ‘immunities’.
The dangers of confusing legislative duties (based on legislative powers) with a mere recognition of a disability limiting legislative powers can be illustrated by the argument of Weiler and Fries that the Community has a legislative power to enact rules on human rights because it is under an institutional duty, binding all Community institutions, to respect human rights. This argument deserves to be reviewed at length, not only for this reason, but also because it represents an argument additional to one based on Article 308 to justify why the Community has a legislative power to enact rules on human rights.

In their article, Weiler and Fries begin by describing the Court's 'move from norms to institutional duty, from substance to procedure, from *ius* to *remedium*'. As an example of the first of these three dichotomies, the authors refer to a case in which the Court held France liable for failing to prevent a violation of the free movement of goods on the grounds that France had a *duty* to prevent the violation of the freedom (Step A). Similarly, they say – and with this one may agree – that 'abstaining from taking action is ... just as likely to violate fundamental rights as would a positive violative act' (Step B). The

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authors then note that in Cinéthèque the Court imposed upon itself a duty to respect human rights (Step C), and continue (Step D) by saying:

... it seems to us as following from the Court's overall jurisprudence to suggest that it is not only the Court, as one of the institutions of the Community, that has a duty to ensure the observance of fundamental rights in the field of Community law, but that such a duty rests, inherently, on all of the Institutions of the Community exercising their competences within the field of Community law.

From this duty, they conclude (Step E) that the legislative institutions have the power to discharge this duty by 'legislating to do just that' – though still, of course, within the field of Community law.

On the basis of the comments made above, we can identify certain problems with this reasoning. The first point to make is that the duty of France (Step A) is based on a pre-existing power to prevent violations of a freedom (of movement). The same can be said of the duty of the Court to prevent violations of freedoms, namely fundamental rights (Step C), with derives from the Court's judicial power under Article 220 to apply 'the law' in the exercise of its jurisdiction to hear claims under Articles 230 and 234. But it is wrong to equate these legislative duties, which are based on these existing powers, with the much more limited disability duties of the other Community institutions not to violate fundamental freedoms (Step D). It is therefore also wrong, though it follows logically from

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this earlier error, to read a general legislative power out of this far more limited disability duty (Step E).

Finally, it might be noted that it is certainly true that an omission may violate a freedom as much as commission (Step B), and, therefore, where there is a power, it will be possible for the Court to determine that the legislature is under a positive obligation to act so as to avoid a violation of fundamental rights. But one cannot presume that there is any power to prevent this from occurring.

To sum up, any legislative power to enact rules on human rights must have an independent basis; it cannot be justified on the grounds of a limitation on legislative power.

4. The separation of powers

These considerations should also be placed in the context of the separation of powers between the Community legislative organs and the European Court of Justice.280 It is unchallenged that the legislative organs of the Community have no power to determine the extent of their own powers: they possess no Kompetenz-Kompetenz. The power to determine the limits of legislative power, both vertically (vis-à-vis the Member States) and horizontally (between the legislative organs)281 is held solely by the European Court of Justice.282 Thus, the

281 Article 7 EC provides that '[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty'. For an example of 'horizontal' competence problems in the human rights field, see Case C-106/96, United Kingdom v Commission [1998] ECR I-2729. As

Footnote continued
Court has declared that it alone possesses the exclusive jurisdiction to interpret Community acts\(^{282}\) and to declare their invalidity.\(^{284}\)

In this context, it is useful to compare the situation in the United States, where, by contrast, the legislature does possess an express legislative power with respect

\(^{282}\) See J H H Weiler and Sybilla C Fries, ‘A Human Rights Policy for the European Union and Community: A Question of Competences’ in Philip Alston (ed), *The EU and Human Rights*, Oxford University Press, Oxford, 1999, at 147, this case ‘eschewed the principle issue of competences. What exercised the plaintiffs and the Court were the respective institutional competences of Commission and Council’. In the external sphere, see *Case C-327/91, France v Commission* [1994] ECR 1-3641, where the Commission was found to have exceeded its power to conclude an agreement on competition policy with the United States. Following this case, the Council (and the Commission on behalf of the ECSC) approved the agreement by a Decision. For a discussion of this case, see James Kingston, ‘External Relations of the European Community – External Capacity versus Internal Competence’ (1995) 44 *ICLQ* 659. See, generally, Werner Schroeder, ‘Zu eingebildeten und realen Gefahren durch kompetenzüberschreitende Rechtsakte der Europäischen Gemeinschaft’ (1999) 34 *Europarecht* 452, at 457.


\(^{284}\) See *Opinion 1/91*, [1991] ECR 1-6084, at para 35. Speaking of the proposed EEA Court, the Court objected that ‘[t]o confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 [Article 220] of the EEC Treaty’. The Court added that under ‘Article 219 [Article 292] of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein’.

\(^{285}\) See *Case 314/85, Foto Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, at 4231, where the Court cited Articles 230 and 234 for the proposition that national courts have no power to declare Community acts invalid. See, generally, Schroeder, n 281, at 458.
to the human rights guarantees set out in the Constitution.\textsuperscript{285} This power is contained in the so-called 'enforcement clause' in Section 5 of the Fourteenth Amendment to the United States Constitution, which grants the federal Congress the power 'to enforce, by appropriate legislation' most of the Bill of Rights established in the various Amendments to the Constitution.\textsuperscript{286} That this 'enforcement clause' could contain dangers for the principle of the separation of powers became apparent in \textit{Boerne v Flores}, in which the Supreme Court invalidated legislation expressly reversing a prior decision of the Court on the meaning of the free exercise of religion.\textsuperscript{287} In this case, the Court said that:

Congress' power under § 5 ... extends only to 'enforce[ing]' the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial' ... Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress

\textsuperscript{285} Naturally, any reference to the United States in a constitutional context must be qualified by the fact that the rights guaranteed in the US Constitution include the States in all spheres of competence, whereas in the European Community fundamental rights only apply to the Member States when they are acting in the field of Community law.

\textsuperscript{286} The Fourteenth Amendment provides, relevantly, that: '[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'. This Amendment has been interpreted by the Supreme Court as 'selectively' incorporating relevant protections of the first eight amendments to the Constitution in addition to the textual guarantees in the Fourteenth Amendments of due process and equal protection. An earlier view that the entire Bill of Rights was incorporated (and made applicable to the States) by virtue of the Fourteenth Amendment has been abandoned. See, generally, Donald T. Kramer, \textit{American Jurisprudence}, Second Edition ed, 1998, § 404. The Thirteenth and Fifteenth Amendments also have independent enforcement clauses.

does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce', not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment]'. While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.288

Underlining the implications of this ruling for the separation of powers, the Court also referred to Marbury v Madison, stating that:

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means'. It would be 'on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it'.289

288 City of Boerne v Flores (1997) 521 US 507, at 519. The Court cautioned (at 527-8) against too wide a reading of the controversial earlier case of Morgan v Katzenbach (1964) 384 US 641, in which the Supreme Court upheld a provision essentially barring the enforcement of New York's English literacy requirement against otherwise qualified voters who are educated in Puerto Rico, despite the fact that seven years earlier it had decided that such literacy tests did not violate the fourteenth and fifteenth amendments.

The present significance of this case is that even in a jurisdiction in which the legislature has an express power to enforce human rights, the Court denied the legislature the power to define those rights in a manner that would infringe on its exercise of judicial power. It should be stressed that this had nothing to do with the delimitation of vertical powers between the Congress and the States. In this respect, the Court in *Boerne* had no difficulty in finding that the enforcement power exceeds the usual powers granted to the Congress:

... legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States'.

But this federal issue, which is significantly different in the Community context, must be kept separate from the issue of the separation of powers. In this respect, the absolute ban on Congress infringing the exclusive jurisdiction of the Court has direct application to the Community context. If Congress cannot 'define its own powers' by erasing disabilities on its power, then neither can the legislative organs of the Community.

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290 See n 285.

5. The protection of human rights as a Community objective

(a) Article 308

Against this background, it is possible to analyse the question whether the protection of human rights constitutes a Community objective sufficient to justify a use of the implied power set out in Article 308. This provision states that:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

This provision thereby establishes three conditions on the use of the implied power: it must be demonstrated that (a) no other provision provides the necessary powers, (b) the action is necessary to attain one of the objectives of the Community, and (c) the need to act arises in the course of the operation of the common market. These conditions have traditionally been interpreted by the Court with a substantial degree of deference to the opinion of the legislative institutions. In particular, the Court has shown little interest in determining whether a measure is 'necessary' to attain a Community objective, or whether the need for the measure arises 'in the course of the operation of the common market'.

seriously, as Alan Dashwood has proposed, but so far there is little indication that this has occurred. And even if it did, it is doubtful whether this would constitute a serious limitation on the scope of Article 308, given broad reach, at least internally, of matters ‘related to the common market’.

The EC Treaty is also less than clear on what constitutes ‘one of the objectives of the Community’ which could trigger the application of Article 308. This has led to a significant debate in the literature, but the view is taken here that these objectives must be taken from the tasks of the Community set out in Article 2, as well as the activities of the Community set out in Article 3, and the specific tasks

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293 Alan Dashwood, ‘The Limits of European Community Powers’ (1996) 21 ELR 113, at 123; Arnulf, ‘Left To Its Own Devices’, n 236, at 71 considers that the emphasis of the Court in Opinion 2/94, [1996] ECR I-759 on the principle of conferred powers also indicates that a stricter approach will be adopted with respect to this condition.

294 Even the observance of human rights by the Member States has been considered in this light. See on this Case C-168/91, Konstantinidis v Stadt Altensteig, Standesamt, and Landratsamt Calw, Ordnungsamt [1993] ECR I–1191 (Opinion), at para 46, where Advocate General Jacobs said that ‘[i]n my opinion, a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say “civis europaeus sum” and to invoke that status in order to oppose any violation of his fundamental rights’. For the same parallel between this Opinion and Article 308, see Gráinne de Búrca, Reappraising Subsidiarity’s Significance after Amsterdam, Jean Monnet Working Paper No 7/99, available at www.jeanmonnet.org, at text to n 40. It should be noted that the remarks of Advocate General Jacobs in Konstantinidis were disapproved by Advocate General Gulmann in Case C-2/92, The Queen v MAFF, ex parte Bostock [1994] ECR I-955, at para 31 n 11.
granted to the Community in the remainder of the EC Treaty.\textsuperscript{295} The political, economic, social and development ‘expectations’ found, above all, in the preamble of the EC Treaty, but also in Article 2, may not be taken as evidence of Community objectives, although these may be relevant to the interpretation of the Community’s tasks and therefore objectives.\textsuperscript{296} This is supported by the case of\textit{Jippes}, in which the Court rejected the claim that animal welfare constitutes a Community objective. The Court said that:

It should be borne in mind, at the outset, that ensuring the welfare of animals does not form part of the objectives of the Treaty, as defined in Article 2 EC, and that no such requirement is mentioned in Article 33 EC, which sets out the objectives of the common agricultural policy'.\textsuperscript{297}

These provisions do not mention fundamental rights in any direct sense, although they do make various references to areas of human rights concern. Article 2 allocates to the Community the task of promoting ‘a high level of employment

\textsuperscript{295} For the view that, under international law, the objectives of a treaty cannot be expanded beyond an express objectives clause see p 87 above.


\textsuperscript{297} Case C-189/01, \textit{Jippes v Minister van Landbouw, Natuurbeheer en Visserij} [2001] ECR I-0000 (12 Jul), at para 71. Prior to this case it might still have been possible to argue that the Community’s objectives were not limited to Articles 2 and 3 on the basis, particularly, that the Court did not specify this in \textit{Opinion 2/94}, [1996] ECR I-1759. See, for this wide view, Cullen and Charlesworth at 1258.
and of social protection, equality between men and women, a high level of protection and improvement of the quality of the environment' and 'the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States' and Article 3 provides, *inter alia*, that in the carrying out of its activities in pursuit of these and other tasks, 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women'. However, these references are far from a comprehensive statement of human rights objectives. In addition, it is relevant that the objectives of the Community, as set out in Article 2, are domestic in character: it is 'throughout the Community' that the various objectives set out in this provision to be realised. Clearly, these Community objectives have since been specifically widened in certain areas, particularly in the area of development cooperation, but some caution still seems indicated for any proposal to extend the international reach of Article 2 itself.

(b) *Opinion 2/94*

It is now possible to turn to the proposition advanced by some authors that the protection of human rights can be seen as an objective of the Community, thereby triggering a broader use of Article 308.298 The starting point for such an investigation is *Opinion 2/94*, which concerned the proposed accession of the

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Community to the European Convention on Human Rights. In this case, the European Court of Justice denied that there was any general Community competence to enact rules on human rights or to conclude conventions in this field. The Court said that there is neither any express treaty provision nor any implied power entitling the Community institutions to enact rules on human rights or to conclude international conventions in this field. As far as Article 308 was concerned, the Court said that accession would amount to a modification of the system for the protection of human rights in the Community insofar as it would entail (a) the entry of the Community into a distinct international institutional system and (b) the integration of all the provisions of the Convention into the Community legal order. Such modification of the system for the protection of human rights would be of 'constitutional significance'.

This highly compressed judgment raises many complicated issues. It is clear, on the one hand, that the institutional aspects of accession were of an impermissible 'constitutional significance' and much commentary has focused on this aspect of the judgment. In this regard, most authors have stressed the Court's disapproval of the Community entering into a distinct international institutional system. As

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300 Ibid, paras 27 and 28.
301 Ibid, para 28.
302 Ibid, para 34.
303 Ibid, para 35.
304 Eg Arnell, 'Left To Its Own Devices', n 236, at 71-2; Barbara Brandtner and Allan Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 *EJIL* 468 at 471-2; Bruno Simma, Jo Beatrix Aschenbrenner and

*Footnote continued*
Giorgio Gaja has pointed out, this was seen as problematic for two main reasons. Not only would the requirement of the exhaustion of domestic remedies under the Convention have required an applicant first to apply to the European Court of Justice and then to the European Court of Human Rights (which would have amounted to a type of appellate review of the decisions of the former court by the latter), but this would have been compounded by the new obligation of the Community, following a negative decision by the European Court of Human Rights, to enact legislation overturning the effect of the ECJ judgment.305

What remains unclear is the extent to which the Court considered the protection of human rights to constitute a Community objective.306 In this respect, it should


306 For an argument that the Court implicitly approved the notion that the protection of human rights constitutes a Community objective, see Arnulf, 'Left To Its Own Devices', n 236, at 71.

Footnote continued
not be overlooked that it was not just because of its institutional implications that Court determined that accession would have been an impermissible ‘modification of the system for the protection of human rights’ and therefore of ‘constitutional significance’. It was also because this would have entailed the ‘integration of all the provisions of the Convention into the Community legal order’. On the assumption that the ‘distinct institutional system’ to which the Court referred related to the mechanism of the Convention, it may be presumed that these ‘provisions’ referred to the substantive provisions of the Convention. It is consequently arguable that the integration of these provisions into the Community legal order, by way of a convention or legislation, was itself taken to be an impermissible modification of the system for the protection of human rights. This would support the conclusion that the protection of human rights does not constitute a Community objective.307 But the Court did not specifically

Arnulf notes the three conditions of the use of Article 308 and, emphasising the Court’s focus on the requirement that no other provision be available, reasons that ‘[s]ince failure to meet either of those [other two] conditions would have reinforced, or provided an alternative ground for, the Court’s conclusion that accession to the European Convention could not be based on Article 308, it may be inferred that the Court accepted that the protection of fundamental rights is one of the Community’s objectives which it is necessary to attain in the course of the operation of the common market. That view is entirely consistent with the Court’s description of respect for human rights as “a condition of the lawfulness of Community acts”’. But the fact that the Court did not need to address other problems does not mean that they have vanished: it is simply not convincing to argue a contrario from a silence in a judgment that exists for reasons of judicial economy. Moreover, it is self-evident that a human rights objective is consistent with a human rights condition. The proper question is whether the latter can be derived from the former.

307 Toth, ‘Human Rights’, n 242, at 79, emphasises the Court’s reference to an impermissible widening of the scope of Community powers beyond the provisions that define the tasks and activities of the Community (in para 30), and argues on this basis that ‘[s]ince these latter

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describe as disjunctive these two grounds on which accession would have been a ‘modification of the system for the protection of human rights’, and it cannot therefore be excluded that it was the institutional problems alone that established the ratio decidendi of the decision.\(^{308}\) Given this ambiguity, it cannot be concluded other than that the matter was left open, perhaps strategically so.\(^{309}\)

(c) Human rights as a ‘transverse’ objective

It is therefore necessary to look elsewhere for support for the proposition that the protection of human rights is a Community objective. The main argument in favour of this proposition is, as the Commission argued in Opinion 2/94, that ‘respect for human rights [is] a transverse objective forming an integral part of the Community’s objectives’.\(^{310}\) The argument has been put in some detail by Rosas and Brandtner as follows:

provisions to which the Court refers are those which determine the Community’s objectives, it follows that to enact rules on human rights would go beyond the objectives of the Community’.

\(^{308}\) For further support for this interpretation, see below at n 531.

\(^{309}\) Compare Arnell, ‘Opinion 2/94’, n 236, at 7, who says that ‘[t]he Court conspicuously does not say that respect for human rights is not an objective of the Community for the purposes of that article [ie Article 308]’. It is probably going too far, however, to say, as do Philip Alston and Joseph H H Weiler, ‘An “Ever Closer Union” in Need of a Human Rights Policy’ (1998) 9 European Journal of International Law 658 at 24-5, that ‘[a]t no point in that Opinion [ie Opinion 2/94] did the Court suggest that the protection of human rights was not an objective of the Community, nor did it say that the Community lacked competence to legislate in the field of human rights’.

[I]t is submitted that the combined effect of the human rights declarations made by the Community institutions, the Preamble of the SEA, the Preamble and provisions of the EU, including Article F(2) [Article 6(2)], and the case law of the ECJ on human rights as part of the general principles of Community law, is to make human rights a 'transverse' objective of the Community. This view may be corroborated by the very wording of Article 130u [Article 177] of the ECT, which qualifies this area as a 'general objective'. In any event, taking into account the increased emphasis on human rights in the Treaty of Amsterdam, including the submission of Article F(2) [Article 6(2)] to the jurisdiction of the ECJ, it seems more and more difficult to argue that human rights are not an objective of the EC.311

In addressing this argument, one might begin by noting the irrelevance to the issue at hand of the various human rights declarations made by the Community institutions mentioned in this passage. It is axiomatic that no legislative institution is able to recite itself into power, and indeed the Court has made it

quite clear that the practice of Community institutions (which could easily include such declarations) cannot affect Community competences.\textsuperscript{312}

But this does not detract from the potential applicability of the other sources of law mentioned here. In assessing the relevance of these sources, it must be said that, in principle, the notion of a transverse objective may be used at least to identify at least a \textit{subordinate} legislative objective. In \textit{Portugal v Council}, Advocate General La Pergola said that:

Article 128(3) provides for clear international scope for Community action in this field by laying down that: ‘The Community and the Member States shall foster cooperation with third countries ... in the sphere of culture’. Culture is therefore a ‘transversal’ Community objective which influences individual sectoral policies and leaves its mark on the Community’s international activity, including action in the field of development cooperation.\textsuperscript{313}


\textsuperscript{313} Case C-268/94, \textit{Portugal v Council} [1996] ECR I-6177 (Opinion), at para 34. The Advocate General referred in the same case to Article 129 EC, which states, \textit{inter alia}, that ‘[h]ealth protection requirements shall form a constituent part of the Community’s other policies’ and stated that ‘[b]y indicating the importance that must be attached to the protection of health (and therefore combating drug dependence as well) as part of Community action, it seems to me that the provisions in questions establish the “transversal” nature of that policy also in relation also to development cooperation measures’. (\textit{ibid} at para 51).
However, the transverse objective identified by the Advocate General differs from the objective of protecting human rights both in its legal status and in its origins.

As far as the legal status of this objective is concerned, the Advocate General merely identified a secondary legislative objective (culture) additional to a primary legislative objective (development cooperation). It is far from certain that the notion of transverse objective extends to the primary objective required to support an implied power under Article 308.

As to its origins, it is to be noted that the Advocate General identified the transverse objective on the basis of an existing primary legislative objective (Article 151(3)). By contrast, in our case there is not a single provision of the EC Treaty that can be said to have the protection of human rights, generally speaking, as a primary legislative objective. There is one legislative power where the protection of all human rights is itself a secondary objective (Article 177(2)14 and proposed Article 181a), various other provisions where the protection of some human rights is a secondary objective (Articles 3(2) together with Article 308), and certain provisions where the protection of some human rights as a primary objective (Article 141(3) and Article 13). Applying the logic of the Opinion in Portugal v Council, this might be sufficient to support the protection of some human rights as a secondary objective of other existing Community powers. But even in such a case, it is unlikely that one could also

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14 For an argument in favour of broadly deriving from this provision a human rights objective for the Community, see Barbara Brandtner and Allan Rosas, ‘Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice’ (1998) 9 EJIL 468 at 472.
claim that the existence of such a provision could support the existence of a
primary objective capable of itself establishing a power to protect human rights
more generally. At most, if there were a provision with the primary objective of
protecting all human rights, then it could perhaps be argued that the protection of
all human rights constitutes a secondary objective of other existing Community
powers. It seems, in conclusion, that Article 308 cannot be read as Rosas and
Brandtner have proposed. 315

However, for some, the conclusion reached here might seem premature, as there
are at least two other important sources of law which have been called in aid of
the 'transverse' objective of the protection of human rights in the Community.
The first of these, to which Brandtner and Rosas also refer, is the fundamental
rights jurisprudence of the Court, now partially codified in Article 6(2) EU. 316
Indeed, for some authors this source of law is conclusive. Thus, Riedel and Will
say (with reference to Opinion 2/94) that:

... the Court specifically pointed out that fundamental rights belong to
the general principles of law, which the Court must protect and that
human rights represent crucial preconditions for the legality of
Community actions. The result of this is that the protection of human

315 It follows from this (as well as from the fact that Article 2 has an exclusively domestic
flavour) that Article 308 is wrongly used to support Council Regulation (EC) No 976/1999 of 29
April 1999 laying down the requirements for the implementation of Community operations, other
than those of development cooperation, which, within the framework of Community cooperation
policy, 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 in third countries
[1999] OJ L120/8, one of the two so-called 'human rights regulations'. See, further, n 394.
316 Article 6(2) EU is quoted and discussed at p 126.
rights has indeed become an unwritten general objective of the Community. 317

But there is a simple objection to using this source of law for the purpose of justifying a legislative power: it violates the principle of the separation of powers. It will be recalled from the discussion above that the general principles of law regarding respect for human rights function as a disability on the Community’s legislative power. To allow these principles themselves to establish legislative power would amount to a grant of legislative Kompetenz-Kompetenz to the legislative organs of the Community. 318 Whether general principles of law can ever support a legislative power is a question on which

317 Eibe Riedel and Martin Will, ‘Human Rights Clauses in External Agreements of the EC’ in Philip Alston (ed), The EU and Human Rights, Oxford University Press, Oxford, 1999 at 736. Cf also Juliane Kokott and Frank Hoffmeister, ‘Opinion 2/94 on the Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (1996) 90 AJIL 664 at 668 (‘... since according to its longstanding case law the Court considers fundamental rights to be an integral part of the general principles of Community law, making the Court competent to ensure the protection of those rights, the Community as such must also have that competence, and thus the competence to adopt a human rights catalog to ensure the lawfulness of Community acts.’) But see Gráinne de Búrea, Reappraising Subsidiarity’s Significance after Amsterdam, Jean Monnet Working Paper No 7/99, available at www.jeannotmonnet.org, stating that ‘[i]t could be argued ... that protection for human rights is, as reflected more specifically in the development policy provisions of Article 177 (previously Article 130u) EC and more generally in the umbrella provision of Article 6 (formerly Article F) EU, an objective of the Community. But it would also be possible to make an argument that this is not so, and that while it is a condition for the lawfulness of other Community action, protection for human rights has not in itself acquired the status of an independent, positive Community objective, but remains primarily within the sphere of competence of the Member States’.

318 See above at n 282.
commentators have divided, but what is certain is that at least those general principles of law that limit legislative power can never justify a legislative power.

Some authors have wondered where the Court derives its power to determine the limits of Community legislative power by reference to general principles of law regarding human rights, given the absence of any equivalent legislative power to determine rules in this field. For example, in the article discussed above, Weiler and Fries argue that "[r]espect for and protection of human rights were, thus, conceived as an integral, inherent, transverse principle forming part of all objectives, functions and powers of the Community*. 'Otherwise', they ask, 'whence the jurisdiction of the Court to ensure, in the entire field of Community law, the observance of fundamental rights?' In fact, this question is relatively easily answered. As we have seen, and as the Court has made quite clear, its

319 See Marise Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy' in Paul Craig and Gráinne De Búrca (ed), The Evolution of EU Law, 1999, at 150 and Elizabeth Shaver Duquette, 'Human Rights in the European Union: Internal Versus External Objectives' (2001) 34 Cornell Int'l L J 363, at 370 (general principles of law do not justify a legislative power); Contra, Andreas Haratsch, 'Zur Dogmatik von Rücknahme und Widerruf von Rechtsakten der Europäischen Gemeinschaft' (1998) 33 Europarecht 387, at 397. Haratsch proposes that general principles of law developed by the Court in the context of the repeal of Community acts can justify a legislative power to repeal ultra vires acts. Haratsch's concern is to avoid the logical gap invoked by such a possibility. However, this concern can easily be taken into account by application of the implied powers doctrine discussed below at p 160.

320 Weiler and Fries, 'A Human Rights Policy', n 277, at 156-7. On the difference between 'jurisdiction' and 'applicable law' see n 239.
power to apply general principles of law, including these, is a function of its
judicial power to apply 'the law' under Article 220.321

Interestingly, A G Toth makes the same initial equation between legislative and
judicial powers as Weiler and Fries, but comes to precisely the opposite
conclusion. Toth argues that if the legislative organs have no human rights
powers, then – as another Community institution – neither should the Court322
Consequently, he says, the Court is infringing its own prohibition on enacting
rules on human rights by 'arrogating to itself a power, which does not seem to
have been conferred upon it by the Treaty'.323 Toth is, of course, correct to say
that as a Community institution the Court is itself under a duty to respect human
rights. Indeed, taking the point, the Court has reviewed the procedure of the
Court of First Instance for compliance with the right to a fair trial as set out in the
European Convention on Human Rights.324 But this should not lead to the

321 See also Noreen Burrows, 'Question of Community Accession to the European Convention
Determined' (1997) 22 ELR 58, at 62, stating that '[w]hat the Court did in Opinion 2/94 was to
draw a line between the development of law by way of legislation and its development by way of
interpretation, drawing a sort of distinction between statutory law (made by the political
institutions) and common law (enunciated by the court). It then appears to argue that the political
organs in their legislative role require a legal base for internal action (and hence external action)
but in the latter case the court, in recognizing general principles of law, has a sufficient legal base
to do so internally in Article 164 but that this cannot be a sufficient legal base for action in
external relations'; see, for a similar argument, Christoph Vedder, 'Die ‘verfassungsrechtliche
Dimension’ – die bisher unbekannte Grenze für Gemeinschaftshandeln? Anmerkung zum


323 Toth, 'Human Rights', n 242, at 80.

324 Case C-185/95, Baustahlgewebe GmbH v Commission [1998] ECR I-8417, especially at paras

Footnote continued

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conclusion that the Court has arrogated to itself any power of review. To reiterate: this power is an aspect of the Court's power to 'apply the law' under Article 220.

A second source of law which has been proposed as support for a Community objective to protect human rights is Article 6(1) EU, which provides 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.

The argument based on this provision has two steps: first, Article 6(1) makes the protection of human rights an objective of the European Union, and second, the

where the applicant claimed unsuccessfully that the Court of First Instance had infringed the rights of the defence and the principle of equality of arms, and also Case C-7/98, Krombach v Bamberski [2000] ECR I-1935, where the Court applied its fundamental rights jurisprudence to the national courts in the context of the public policy exception in the Brussels Convention.

See Communication from the Commission to the Council and the European Parliament - The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, COM (2001) 252 final, 8 May 2001, at 3, stating that '[t]he protection of such rights [universal human rights]', together with the promotion of pluralistic democracy and effective guarantees for the rule of law and the fight against poverty, are among the European Union's essential objectives'. Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37(6) CMLR 1307, at 1335 states, ambiguously on this point, that 'human rights do not figure among the objectives either of Article 2 EU, or Articles 2 and 3 EC, and Article 6(2) EU lays down limits, but not objectives. However, Article 6(1) EU might support an understanding which attributes a more central position to fundamental rights'. He concludes, however, that '[t]he core objectives of the Union should, for the moment at least, remain peace, wealth and an ever closer union among its peoples. Human rights, though important, should not be understood as the raison d'être of the Union' (at 1338).

See also the Opinion of the Committee on Development and Cooperation (9 January 2001), in European Parliament, Report on the Communication from the Commission on EU Election
objectives of the Union are ‘common’ to those of the Community. The result would be that Article 308 is again supported on the basis of this new ‘Community objective’. However, both of these steps are problematic.

The problem with the first step is that the objectives of the Union, as established in Article 2 EU, do not contain any reference to human rights per se, other than the usual statements about the raising of standards of living, and the ‘protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union’. We have already seen that, both under international law and under Community law, one must be careful of

\[\text{Assistance and Observation (COM (2000) 191 – C5-0259/2000 – 2000/2137 (COS)), AS-0060/2001, 14 February 2001 at 37, referring to Article 6(1) and stating that ‘[t]hese criteria are also reflected in the EU’s development goals, as set out in the Treaty of Maastricht, and reiterated in the Treaty of Amsterdam, Titles XVII and XX respectively. The promotion of these ideals is also one of the objectives of the EU’s Common Foreign and Security Policy, Title V, Article 11’. (emphasis added). Some caution might also be indicated in relation to claims that Article 6(1) establishes a ‘principle’ of the European Union. The report commissioned by the European Union by the European University Institute and Robert Schuman Centre for Advanced Studies, A Basic Treaty for the European Union – A Study of the Reorganisation of the Treaties, Florence, EUI, 2000 allocated Article 6(1) (and Article 6(3)) to a new Clause 2, entitled ‘Principles of the Union’, preceding a new Clause 3, entitled ‘General Objectives of the Union’. This precedes a new Clause 4, entitled ‘Fundamental Rights’, comprising Article 6(2) along with an equivalent mandate to Article 13 EC on non-discrimination measures. The location and title of the new Clause 2 (‘Principles’) reflects a view that Article 6(1) is an objective, while Article 6(2), located in new Clause 4 (‘Fundamental Rights’) is a condition. On the other hand, this is undermined by the fact that Clause 2 (‘Principles’) also includes Article 6(3), which states in language similar to that of Article 6(2) that ‘The Union shall respect the national identities of its Member States’.

326 See p 87.
327 See p 142.\]
implying further objectives in a treaty containing an express objectives clause. The same rationale undoubtedly applies here.

Indeed, it is in any case doubtful whether, even according to its own terms, Article 6(1) EU can be read as establishing objectives. In this respect, it is of some interest to note the similarities between this provision ('the Union is founded on the principles ...') and the second sub phrase of the essential elements clause ('respect for human rights constitutes an essential element of the agreement'). In that context, it was argued that according to the strict wording of this sub phrase, it merely established a condition of the continuing validity of the agreement in which it is contained, not an obligation binding on the parties in a normative sense. While it was not necessary in that context to ascertain whether this sub phrase established an objective of the agreement, it is clear from the analysis elsewhere in this Part that it could not.328 The same reasoning applies here with respect to Article 6(1) EU (and, it might be noted, with respect to Article 6(2) EU).329

It might be noted that there can also be no objection that such a result would remove all legal effect from Article 6(1).330 While Article 6(1) does not itself

328 See p 131.
329 See Bogdandy, n 325, at 1335. Contra, Marise Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy' in Paul Craig and Gráinne De Búrca (ed), The Evolution of EU Law, 1999, at 151, states that 'it might appear to follows from Article F.2 TEU ... [that] one can identify the protection of fundamental rights as one of the Community's objectives'.
330 There is also no reason to suppose that the Union would lack legislative power to repeal any acts found to violate Article 6(1), or, for that matter, Article 6(2). In line with the principle of

Footnote continued
operate to establish a condition on the legality of the acts of the European Union, which would overlap with Article 6(2), it serves the quite specific purpose of establishing the standards for the admission (Article 49 EU) and the suspension of voting rights, though not expulsion, (Article 7 EU) of Member States from the Union.  

The problem with the second step in the argument is that even if, contrary to the above argument, Article 6(1) did constitute an objective of the European Union, it is not the case that this objective can simply be transplanted into the legal order of the European Community. The Community is not signatory to the Treaty on European Union, and as such it remains a ‘third party’ to the treaty in the traditional sense of being neither a bearer of obligations nor a holder of rights under that agreement. Furthermore, Article 47 EU precludes the EC Treaty from being affected in any respect other than where this has been expressly stated:

Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European

implied ‘indispensable’ powers discussed at p 160 in the context of the legislative powers of the European Community, the legislative institutions of the Union should necessarily be empowered to ‘preserve the basis’ of the Union by acting to remove any ‘illegal’ acts where this becomes necessary.

Another question is whether a violation of Article 6(1) would amount to a repudiation of the agreement amounting to material breach in accordance with Article 60(3)(a) of the Vienna Convention, as argued above in relation to the human rights clause. See p 89.

Article 34 of the Vienna Convention, n 15, states that ‘[a] treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization’.
Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.

The wording of this provision seems to be a clear reference to Title II (Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community), Title III (id the ECSC) and Title IV (id the EAEC). Article 6 EU, by contrast, is contained in Title I ('Common Provisions'). It has been argued that the name of this title should be taken to mean that, notwithstanding Article 47 EU, the provisions in that Title are 'common' to the EC Treaty. This might have been supportable if the term 'common provisions' were unique to the Treaty on European Union. But in fact this is the usual name given to titles of a treaty that applies to all other titles in the treaty (in this case the three 'pillars' of the EU Treaty); it does not mean that the provisions in that title are 'common' to another treaty entirely.

On the basis of these considerations, it may therefore be concluded that the Community has no 'transverse objective' of protecting human rights sufficient to justify the use of the implied power under Article 308.

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333 See Kris Pollet, 'Human Rights Clauses in Agreements between the European Union and Central and Eastern European Countries' (1997) Revue des Affaires européennes 290, at 290, stating that '[t]he inclusion of this Article in the common provisions of the Treaty on European Union (TEU) is important. It indicates that human rights and democratic principles govern all constituent parts of the TEU, the amended EC Treaty as well as the Second and Third pillars'.

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6. Implied ‘indispensable’ powers

But even if the Community has no implied power under Article 308 with respect to the protection of human rights, it is argued here that it has a more limited subsidiary implied power to do whatever is indispensable to ensure the legality of Community acts. Generally speaking, this would allow the Community to repeal any legislation that it has enacted *ultra vires*, so long as there is no other legal basis on which this could be done. In our case, this implied ‘indispensable’ power would allow the Community legislative organs to do whatever is ‘indispensable’ to ensure that their legislative acts comply with the general principles of Community law on fundamental rights. The following will explore the origins of this subsidiary implied power before discussing its practical implications.

The origins of the subsidiary implied power are found in the early case of *Fédération Charbonnière de Belgique*. Here, the Court said as follows:

The Court considers that without having recourse to a wide interpretation it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which *the rules laid down by an international Treaty or a law presuppose the rules without which that Treaty or law would have no meaning or could not be reasonably and usefully applied*. Furthermore, under the terms of Article 8 of the Treaty it shall be the duty of the High Authority to ensure that the objectives set out in that Treaty are attained in accordance with the provisions thereof. It must be concluded from that provision, which is the guiding principle for the powers of the High Authority defined in Chapter I of the Treaty, that *it enjoys a certain independence in determining the implementing measures necessary for the attainment of the objectives referred to in the Treaty or in the*
convention which forms an integral part thereof. As, in this instance, it is necessary to achieve the aim of Article 26 of the Convention, the High Authority has the power, if not the duty, to adopt — within the limits laid down by that provision — measures to reduce the prices of Belgian coal.334

In this case, the Court referred to two different types of implied power: first, an implied power 'necessary to achieve the aim of Article 26 of the Convention' and second, an implied power 'necessary for the attainment of the objectives referred to in the Treaty or in the Convention which forms an integral part thereof'. The distinction between these two types of implied power has been discussed at some length by Sigmar Stadlmeier, who describes them in terms of subsidiary (untergeordnete) implied powers, which are indispensable powers based on express treaty provisions, and ancillary (nebengeordnete) implied powers, which are derived from the treaty objectives. According to Stadlmeier, subsidiary implied powers exist in the Community order, while ancillary implied powers do not exist in Community law independently of Article 308.335 A similar conclusion is reached by Alan Dashwood, who has said that (at least internally) there are only necessary implied powers: '[t]he rule is that the Treaty must be
interpreted as conferring any powers that are really indispensable for carrying out the tasks it prescribes'.

The latter type of subsidiary implied power was further approved by the Court in the so-called Migration Policy Cases, where it said that:

... where an article of the EEC Treaty – in this Case Article 118 – confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task.

These comments were later described by the Advocate General in the Erasmus case as an expression of effet utile (the need to give full effect to a legislative provision). In the case before him, the Advocate General accepted that the principle applied equally to all Community institutions but he rejected the proposition that it could 'result in the practical means of taking action for which it [Article 128] makes express provision being replaced or added to by other

337 Joined Cases 281, 283 and 287/85, Germany v Commission [1987] ECR 3203, at para 28. In this case the Court accepted that the Commission had the power to oblige Member States to take part in consultations which it had decided to arrange (para 28) although it could not determine in advance the result to be achieved in those consultations or prevent the Member States from implementing drafts, agreements or measures which it might consider not to be in conformity with Community policies and actions' (para 34). This summary is taken from the Opinion of Advocate General Mischö in Case 242/87, Commission v Council (Re: Erasmus) [1989] ECR 1425 (Opinion), at para 31.
means of a different kind, even if the latter would enable the objectives pursued
to be attained more easily and more effectively*. He commented that:

It is precisely in order to remedy such lacunae and to enable the
Community to achieve fully its objectives, even where the Treaty has
not invested it with the necessary powers of action, that Article 235
[Article 308] was formulated.339

In other words, the Advocate General agreed with the view of Stadlmeier and
Dashwood that the EC Treaty recognises a subsidiary implied power but not an
ancillary implied power independently of Article 308.

The subsidiary implied power bears a close resemblance to the Community’s
implied powers in the external sphere.340 This type of implied power was
described in a well known passage in Opinion 1/76:

... authority to enter into international commitments may not only arise
from an express attribution by the Treaty, but equally may flow
implicitly from its provisions. The Court has concluded inter alia that
whenever Community law has created for the institutions of the
Community powers within its internal system for the purpose of
attaining a specific objective, the Community has authority to enter into
the international commitments necessary for the attainment of that

339 Ibid, para 30.
340 Compare Sigmar Stadlmeier, ‘Die “Implied Powers” der Europäischen Gemeinschaften’
objective even in the absence of an express provision in that connection.\textsuperscript{341}

As Dashwood has pointed out, \textit{Opinion 1/76} was concerned with the \textit{existence} of implied external powers, while the earlier \textit{ERTA} case (refined in \textit{Opinion 2/91}) stands primarily for the proposition that the external implied powers of the Community may be \textit{exclusive} (although an additional \textit{ERTA} ‘principle’ holds that implied external powers may exist on the basis of secondary Community legislation).\textsuperscript{342} Dashwood has also argued that the Court’s use of the term \textit{necessary} in the passage quoted above should be taken in the broader sense of ‘tending to facilitate’ the objective of the express treaty provision when the question is the existence of powers. By contrast, he says, for an external implied

\textsuperscript{341} \textit{Opinion 1/76}, [1977] ECR 741, [1977] 2 CMLR 279, para 3. It is important to note that the ‘specific objective’ referred to in this passage relates to the objective of an express power granted under the EC Treaty. It is quite different from the ‘Community objectives’ which are derived from the ‘tasks’ of the Community in Article 2.

power to be exclusive (in the \textit{ERTA} sense), it must be ‘indispensable’ to the achievement of the objective of the relevant treaty provision.\textsuperscript{343}

This partly explains why the subsidiary implied power expressed in the \textit{Migration Policy Cases} has received no attention in the external sphere. While \textit{Opinion 1/76} merely requires that the use of an implied power ‘tend to facilitate’ the objective of the express power, the subsidiary implied power is subject to the stricter test of being indispensable to the objective of the express power. In this regard, the test is more similar to the test applicable in determining whether a power is exclusive under the \textit{ERTA} doctrine. This leads to the following result: in the case of an internal power, the subsidiary implied power must be ‘indispensable’ to carrying out an express task (\textit{Migration Policy Cases}), while in the case of an external power, it must ‘tend to facilitate’ the objective of an express power (\textit{Opinion 1/76}).\textsuperscript{344}

Having said this, a further distinction needs to be made between two different applications of the subsidiary implied power. In the \textit{Migration Policy Cases} the purpose of this power was to enable a Community institution to fulfil the


\textsuperscript{344} Two other points should be made. First, the fact that the indispensability test is also used to determine the exclusivity of a power is merely coincidental. Second, Dashwood also considers that the Community’s external powers need not be based on any doctrine of implied powers at all; rather, he says, the silence of the treaty texts on external powers does not mean that only internal powers were expressly conferred on the Community, but rather that external powers were included in the express grant of power (Dashwood, ‘The Attribution of External Relations Competence,’ n 217, at 136-138; Alan Dashwood, ‘The Limits of European Community Powers’ (1996) 21 \textit{ELR} 113 at 125; Dashwood, ‘Implied External Competence,’ n 342, at 123).
objectives of a certain power. To give an example relevant to an issue discussed later in this thesis, it would be on this basis that the Community would be entitled to issue a declaration as to the division of competences between the Community and the Member States for the purpose of obtaining the consent of third parties to an international agreement. But the subsidiary implied power also serves another purpose: to secure the legality of measures enacted under those powers by ensuring that they comply with the condition of respecting fundamental rights. It is evident that this is a novel application of the power which has not yet been tested before the Court, but it is submitted here as a logical extension of the Court’s statements to date. This would lead to implied powers being available in the following situation:

?? In the case of external powers, when this ‘tends to facilitate’ the achievement of an objective of an express power (Opinion 1/76)

?? In the case of internal powers, when this is indispensable to the achievement of the objective of an express power (Migration Policy Cases)

345 Arguably Article 308 is not available in such cases, because this provision is only available when no other treaty provision is available. This would be the case if the ‘other treaty provision’ included the implied indispensable power attaching to such provisions.

346 See n 455. Interestingly, Claus-Dieter Ehlermann, ‘Mixed Agreements: A List of Problems’ in David O’Keeffe and Henry G Schermers (ed), Mixed Agreements, Kluwer, Deventer, 1983, at 17, states that ‘[t]he Council will decide this issue on the basis of those provisions which are to be used for the conclusion of the agreement by the Community’.
In the case of internal and external powers, when this is necessary to ensure that the power is exercised intra vires (Migration Policy Cases)

On this basis, we may return to Opinion 2/94, where, at first sight, it seems that the Court denied the Community any implied power to legislate or to conclude conventions in the field of human rights. As a preliminary matter, it is probably worth pointing out — perhaps somewhat pedantically — that in this case the Court at most denied the existence of an implied power for the purpose of concluding conventions in the field of human rights, and not for the purpose of enacting rules on human rights.\textsuperscript{347} The Court said that ‘[n]o treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field’.\textsuperscript{348} So when the Court refers in the next paragraph to ‘the absence of express or implied powers for this purpose’,\textsuperscript{349} it could reasonably be taken as referring merely to the second of these purposes (the conclusion of international conventions in this field) and not to the first (enacting rules on human rights). That there is a difference between these two acts is clear from the latter parts of the judgment, where the Court states that the conclusion of an international convention can entail both the integration of rules on human rights into the Community legal order (which is identical in effect to the enactment of rules on human rights) and the various

\textsuperscript{347} The Court made no exception for association agreements under Article 310. See below at p 469 f.


\textsuperscript{349} Ibid, paragraph 28 (emphasis added).
institutional implications of concluding an international agreement. It is therefore possible that the Court accepted that the Community an implied power to enact rules on human rights, so long as this does not involve the 'purpose' of concluding an agreement in the field of human rights. Consequently, while there is no express treaty provision from which it may be inferred that there is a general power to enact rules on human rights, the Court did not therefore rule out the existence of subsidiary implied powers for the enactment of rules on human rights. If this is plausible, then the Community should have whatever powers it needs to ensure that the general principle of law regarding the respect for human rights is applied by the addressees of those rules (which in our case includes the Community and the Member States acting in the field of Community law).

In determining the scope of the subsidiary implied power for human rights purposes, some guidance might be obtained from the jurisprudence of the Supreme Court of the United States on the enforcement clause in the US Constitution. As we saw, the Supreme Court prohibits the legislature from defining rights in a manner which would interfere with its exclusive power to interpret the Constitution. This is also a fundamental limitation on any implied 'indispensable' power regarding compliance with fundamental rights. On the other hand, legislation setting out a catalogue of fundamental rights would not

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350 In particular, *Ibid*, paras 34 and 35.

351 Weiler and Fries, 'A Human Rights Policy', n 277, at 160, put forward the view that the scope of a legislative human rights power should be equal to that of the scope of the Court's judicial power to review acts.

352 See p 137 f.
infringe on the Court’s exclusive jurisdiction to determine these rights (and therefore the limits of legislative power), so long as this catalogue was merely provisional in effect.

But the reach of the indispensable implied power can arguably go even further. The Supreme Court permitted measures designed to prevent and remedy violations of rights by the addressees of the constitutional guarantees so long as there was ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end’.353 In our case, the test must be stricter: such measures will have to be ‘indispensable’ rather than ‘proportionate’ to the prevention or remedy of a violation of fundamental rights. But even according to this stricter test, this ‘indispensable’ power could arguably support the imposition of sanctions and procedures for the redress of rights by affected individuals (as set out in the new directives based on Article 13), on the basis that the such possibilities for redress are an indispensable means of ensuring that Community acts do not violate fundamental rights. In this regard, it would be relevant that the rules on standing under Article 230, which govern the right of private applicants to seek the annulment of Community acts, may be too strict to guarantee that someone who claims his fundamental rights have been infringed by a Community institution can have recourse to Community courts.354

353 See n 288 above.
On the other hand, it would probably not entirely support the ‘human rights policy’ proposed by Philip Alston and J H H Weiler,\textsuperscript{355} which involved the establishment of a new Directorate-General, a human rights monitoring function, and a specialist human rights unit within the framework of the Common Foreign and Security Policy.\textsuperscript{356} It is probably worth stressing that the implied indispensable power may not be used in any way to substantially to expand the scope of the Community’s existing legislative powers. Its sole function is to ensure that those powers are exercised in a manner that will survive scrutiny by the Court.

\textsuperscript{355} For scepticism as to the need for such a policy, see Armin von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’ (2000) 37(6) CMLR 1307, at 1316-1318.

\textsuperscript{356} Philip Alston and Joseph H H Weiler, ‘An “Ever Closer Union” in Need of a Human Rights Policy’ (1998) 9 European Journal of International Law 658, at 25-6, arguing that various aspects of the policy could be supported under Article 255 (public access to Community documents), the ‘human rights’ treaty provisions mentioned above (eg Articles 13 and 141) and, for the cross-cutting aspects of the policy, Article 308. A further basis in Article 95 EC (harmonization) is advocated in Weiler and Fries, ‘A Human Rights Policy’, n 277, at 158. Interestingly, in J H H Weiler, ‘The EU: Enlargement, Constitutionalism and Democracy,’ available at www.rewi.hu-berlin.de/whi/deutsch/fce, at para 75, Weiler is less sanguine about the scope of Article 308 after \textit{Opinion 2/94}, saying that: ‘[o]ne reason we do not have a policy is because the Court, in its wisdom, announced in \textit{Opinion 2/94} that protection of human rights is not one of the policy objectives of the Community and thus cannot be subject for a proactive policy’. He therefore suggests that ‘[f]ar more important than a Charter for the effective vindication of human rights rather than for public relations on human rights would be a simple Treaty amendment which made the active protection of human rights one of the policies of the Community alongside other policies and objectives in Article 3 EC Treaty and a commitment to take all measures to give teeth to such a policy expeditiously’.
7. Summary

The results of the preceding analysis are as follows: while the EC Treaty includes certain individual express powers in areas of human rights concern, and while human rights are made an express secondary objective of much legislation, the Community still lacks any general legislative powers in the field of human rights. This cannot be remedied by resorting to a principle of ‘institutional duty,’ as to do so mischaracterises the nature of the ‘duty’ incumbent upon the legislative institutions to comply with human rights norms. Nor can it be remedied by treating the protection of human rights as a ‘Community objective’. Not only is it uncertain whether the notion of transverse objectives extends to primary objectives sufficient to grant the Community a legislative power under Article 308, but there is in any case is no legislative power in which the protection of human rights, generally speaking, is a primary objective, which is a basic minimum condition for the application of the law, as it currently stands, on horizontal objectives. In this respect, it is also relevant that the fundamental rights jurisprudence of the Court cannot support any objectives or legislative powers because this would infringe the doctrine of the separation of powers. Nor can Article 6(1) EU apply, not only because this provision does not establish the protection of human rights as an objective of the European Union, but also because even if it did, it would be an impermissible amendment of the EC Treaty to transplant such an objective to the European Community.

However, even if Article 308 cannot be used to support a legislative power with respect to human rights, the Community may have a subsidiary implied power to ensure the continuing legality of its legislative acts. The scope of this subsidiary
implied power may extend to the drawing up of a provisional catalogue of fundamental rights, and possibly also to the enactment of effective means of redress by EU citizens for the infringement of their rights by actors in the field of Community law. On the other hand, it cannot be used to expand the scope of the Community’s existing powers beyond those that are expressly set out in the EC Treaty. Whether it also authorises the inclusion of a human rights clause in international agreements designed to guarantee the legality of Community acts in the external sphere is the subject of the next section.

D. The human rights clause as a guarantee of the legality of Community acts

By way of introduction, it must be recalled that the preceding analysis of the human rights clause has emphasised the function of the human rights clause under international law as a means of ensuring that third countries (and international organisations) comply with human rights norms. Given its obvious international dimension, this is an understandable focus. For present purposes, however, however, it is necessary to stress that the clause has an additional function as an instrument at the international level enabling the Community to ensure compliance with the condition, imposed under Community law, that its external policies do not violate fundamental human rights.
This aspect of the human rights clause has been largely overlooked to date. In *Portugal v Council*, the only case so far to have considered the human rights clause, the Court emphasised the external dimensions of the clause when it said, referring to an essential elements clause, that:

... a provision such as Article 1(1) of the Agreement may be, amongst other things, an important factor for the exercise of the right to have a development cooperation agreement suspended or terminated where the non-member country has violated human rights.

From the present perspective, however, the importance of the clause is not as a means of responding to a violation of human rights by the non-member country, but rather as a means of limiting the Community's own involvement in human rights violations in third countries. On this point, the Advocate General in this case was more attuned to this aspect of the human rights clause. He said that:

... the democracy clause must indeed be deemed necessary if development cooperation policy is to be lawfully pursued. I might venture to add that it would be the failure to adopt a clause of that type that would compromise the legality of Community action, because

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359 For the purposes of assessing the legality of trade measures under Article XX of the GATT, a similar distinction is made in Part 4 between the enforcement of the human rights obligations of a third country and the 'interests' of the regulating country in not being itself involved in human rights abuses. See below at p 391.
compliance with the specific wording of Article 130u [now Article 177] would no longer be guaranteed.360

This statement presumed that the Community had the power to include the clause in the agreement at issue. It is therefore relevant to note that the agreement in that case was a development cooperation agreement based on Article 181, which specifically provides for the secondary objective of promoting human rights. Whether this provision establishes a proper basis for the inclusion of human rights clauses in development cooperation agreements, as was held in Portugal v Council, will be addressed below.361 For present purposes, however, the statement is relevant more generally as an illustration of the type of measure that is suited to an application of the subsidiary implied power. It may be concluded that, regardless of the legal basis on which the agreement is concluded, the Community has an implied power to include a clause in its agreements for the purpose of enabling the Community to ensure the legality of its external policies. Furthermore, the Community has an implied power to adopt ‘appropriate measures’ under the clause with the aim of ensuring that its existing legislation remains in conformity with the requirement to comply with fundamental rights under Community law.

Given the wide scope of the human rights clause, and the fact that its point of reference is international law and not Community law, it must however be asked whether the clause necessarily goes beyond these limited aims. It would be

361 See p 186.
impermissible, for instance, for the clause to purport to grant direct effect to individual human rights so long as the Community lacks the power to do this under Community law, but the human rights clause does not have this effect. What is more, it is questionable whether the Community is entitled to use the clause to repeal legislation for reasons, justified in human rights terms, which would not invalidate such legislation under Community law. If the Community merely has an implied power to ensure the legality of its acts, it is probably prevented from legislating to invalidate acts on an improper basis. However, even though the extensive norms set out in the human rights clause may purport to authorise the Community to repeal existing legislation by way of ‘appropriate measures’ for reasons that would not be legitimate under Community law, the clause itself does not operate to invalidate existing legislation. All it does is to provide the means to do so, under international law, by the enactment of further legislative acts in the future. The question whether these later acts are ultra vires needs only to be determined when they are enacted. In conclusion, it can be said that the human rights clause has the potential for authorising acts that might exceed the legislative power of the Community, but it does not itself amount to such an excess of power, nor does it mandate such future acts. To this extent, the incorporation of the human rights clause in the Community’s external agreements is a valid exercise of the subsidiary implied power designed to ensure

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362 In common law systems, the legislature is prevented from fettering its own powers. See, eg, Attorney-General (NSW) v Trethowan (1931) 44 CLR 394, where McTiernan J said that '[t]he Legislature cannot deprive itself of any part of the power confirmed to it by sec 5 of the Colonial Laws Validity Act' (at 441-2).
that Community legislation complies with the condition that it not violate general principles of Community law requiring that acts in the field of Community law respect fundamental rights.

But even though this conclusion is sufficient, on a preliminary basis, to support the inclusion of the human rights clause in the international agreements of the Community, it does not fully exhaust all of the implications of the human rights clause. In the first place, there is still a question as to the legality of appropriate measures taken under the human rights clause. It has already been established that measures designed to secure the legality of Community acts will be within the Community's power if they are indispensable to the legality of such acts. However, where there is an express legal basis for such measures, the causal link between the measure and the objective is less strict. In these cases, appropriate measures will need only to be proportionate to the objective of ensuring respect for human rights. In determining whether the measure achieves this aim, the Court may become involved in some difficult political decisions, but this is simply unavoidable.

A second question is the extent of the Community's power to impose appropriate measures with the purpose of influencing other countries to comply with the human rights norms set out in the essential elements clause. This will be discussed in Section E. Thirdly, there is a crucial issue as to whether the Community has the legislative power to bind itself to the obligations set out in the human rights clause. If it is determined that the Community lacks power in this regard, this will nullify the provisional assessment reached in this section regarding one potential basis on which the Community could be entitled to
include a human rights clause in its international agreements. That question will be considered in Section F.

**E. The human rights clause as a means of enforcing the human rights obligations of third countries**

1. Introduction

In assessing the Community’s legislative powers to enact measures designed to enforce human rights obligations of other countries, it must be recalled that, from the perspective of Community law, the relevant question is whether there is any legal basis for such appropriate measures, having regard to their aim and content.\(^3\) The above discussion has already established that the Community lacks any general power to enact rules on human rights, whether internally or externally.\(^4\) Furthermore, the Community is under no domestic obligation to ensure that other countries comply with human rights norms, and so the subsidiary implied power will be inapplicable to such measures. On the other hand, there may be express legal bases available for at least some measures designed to enforce compliance with a subset of human rights norms. In addition, there is the possibility that the Community may be able to rely on an independent implied power to impose countermeasures on third countries for this purpose.\(^5\) Before addressing these two possibilities, however, it is appropriate

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\(^3\) See p 104.
\(^4\) See p 159.
\(^5\) Countermeasures may take the form of the suspension of treaties. See p 430 f below.
to make some remarks on the current practice of the Community in relation to its choice of legal basis for appropriate measures under the non-execution clause.

2. Practice of the Community with respect to appropriate measures

Most of the Community's existing practice in taking 'appropriate measures' under the human rights clause consists of measures taken under Article 96 of the Cotonou Agreement (and prior to that under Article 366a of the Lomé Convention). In each of these cases, the appropriate measures are adopted both on the basis of the Treaty (though without specifying any particular legal basis) as well as on the human rights clause itself. One typical example of the form of appropriate measures under the Cotonou Convention is the Council Decision of 25 June 2001 concluding consultations with Côte d'Ivoire under Article 96 of the ACP-EC Partnership Agreement. The legal basis for this decision was expressed as follows:

The Council of the European Union,

Having regard to the Treaty establishing the European Community,

Having regard to the ACP-EC Partnership Agreement signed at Cotonou (Benin) on 23 June 2000 as already put into anticipated application by Decision 1/2000 of the ACP-EC Council of Ministers,


Having regard to the internal agreement on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement, as put into provisional application by Decision of the representatives of the Governments of the Member States, meeting within the Council, of 18 September 2000, and, in particular, Article 3 thereof...

Article 2 of this Decision stated that:

The measures specified in the attached draft letter are hereby adopted as appropriate measures within the meaning of Article 96(2)(c) of the ACP-EC Partnership Agreement.

This letter described the consultations that had taken place, and various undertakings made by the government of the Cote d'Ivoire government. It then stated as follows:

In the light of these undertakings, and the present assessment of their implementation, the Council of the European Union is prepared to conclude the consultations under Article 96 of the ACP-EC Partnership Agreement. Given that significant measures have already been taken, although some are still to be implemented, the Council has decided to resume cooperation gradually, by adopting the following measures as appropriate steps within the meaning of Article 96(2)(c) of the ACP-EC Partnership Agreement.

(i) With the conclusion of the consultations, cooperation may resume. The initial disbursements will focus on social themes, institutional support and the private sector. Support for measures implemented by the authorities in fulfilment of their undertakings may be considered. You will be notified of the allocation of resources under the ninth EDF, and preparations for the use of resources covered by the Commission Decisions of 24 July and 27
December 2000 concerning Stabex transfers for the 1998 and 1999 years of application will be launched ...

It is notable that the legal basis chosen for the appropriate measures in this example, the disbursement of development aid, was not specifically mentioned in the text of this decision. The preamble to the decision offers three legal bases: the EC Treaty, the Cotonou Agreement (as put into anticipated application by Decision 1/2000 of the ACP-EC Council of Ministers)\(^{368}\) and Article 3 of the internal agreement on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement\(^{369}\) as put into provisional application by Decision of the representatives of the Governments of the Member States.\(^{370}\) In principle, there is nothing wrong with this choice of multiple legal bases. There is no obstacle to the use of an international agreement as an intermediate legal basis for further implementing measures\(^ {371}\)


\(^{369}\) Internal Agreement Between the Representatives of the Governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement [2000] OJ L317/376.

\(^{370}\) Decision (EC) No 771/2000 of the Representatives of the Governments of the Member States, meeting within the Council, of 18 September 2000 on the provisional application of the Internal Agreement between the on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement [2000] OJ L317/375.

\(^{371}\) In Ruling 1/78, [1978] ECR 2151 at para 36, the Court held that 't]he relevant provisions of the Treaty, together with the provisions of the Convention itself, which, once it has been concluded by the Community, will form an integral part of Community law, will provide an appropriate legal basis for the necessary implementing measures'. In Case 30/88, Greece v Commission [1989] ECR 3711, at para 16, the Court held that a decision of the EEC-Turkey
and it is also unproblematic to have multiple legal bases for Community legislation.\textsuperscript{372} However, the reference simply to ‘the Treaty establishing the European Community’ at the very least indicates a lack of confidence in the proposition, discussed above, that no legal basis is required for appropriate measures under the clause, as well as in the alternative proposition that the same legal basis can be chosen for the suspension of an agreement as for its conclusion,\textsuperscript{373} regardless of whether such a vague reference is in any case sufficient under Community law.

\begin{flushleft} 
Association Council provided a sufficient legal basis for a distribution of aid to Turkey without the need for a separate implementing regulation.
\end{flushleft}

\textsuperscript{372} Case C-187/93, \textit{Parliament v Council} [1994] ECR I-2857, at para 17. The Court made an exception for cases where one of the potential legal bases provides for the participation of the European Parliament. See also \textit{Opinion 2/00}, [2001] ECR I-0000, para 23, where the Court stated that:

\begin{quote}
If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component (see the \textit{Waste Directive} judgment, paragraphs 19 and 21, Case C42/97 \textit{Parliament v Council} [1999] ECR I-869, paragraphs 39 and 40, and \textit{Spain v Council}, cited above, paragraph 59). By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases (see, to that effect, the \textit{Titanium Dioxide} judgment, paragraphs 13 and 17, and Case C-42/97 \textit{Parliament v Council}, paragraph 38).
\end{quote}

There is no necessary priority between different legal bases, even when one of them is an international agreement. See Case 40/72, \textit{Schroeder v Germany} [1973] ECR 125, at para 32, where the Court said that there was no priority as a legal basis between an Association Agreement and a Regulation when both provided for applicable safeguard measures.

\textsuperscript{373} See p 103.
3. **Implied power to impose countermeasures**

It has been suggested by various authors that the Community has the power to impose countermeasures on other States for violations of human rights norms. Thus, Christian Tomuschat has argued that the 'interests of the international community in the restitution of a lawful situation' mean that the Community has the power to impose countermeasures in the case of international crimes.\(^{374}\)

Specifically with reference to the human rights clause, Rosas and Brandtner have argued that 'one could envisage suspension not of the agreement itself (as a treaty-law measure), but of the preferences granted to the third state as a unilateral countermeasure'.\(^{375}\) One problem with this is that, as noted in Part 2, it is highly unlikely that most human rights violations can be enforced by resort to countermeasures.\(^{376}\) Another is the problem of a potential overlap with Article 11(1) EU, under which the European Union has the power, under its Common

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\(^{374}\) Christian Tomuschat, 'Völkerrechtliche Grundlagen der Drittlandsbeziehungen der EG' in Meinhard Hilf and Christian Tomuschat (ed), *EG und Drittstaatsbeziehungen nach 1992*, Nomos, Baden-Baden, 1990, at 152-155 (translation by author: 'Interesse der internationalen Gemeinschaft an der Wiederherstellung rechtmäßiger Zustände'). Tomuschat also considers, however, that this does not apply where it is only the rights of a Member State that have been infringed. *Contra*, Pieter Jan Kuyper, 'Community Sanctions against Argentina: Lawfulness under Community and International law' in David O'Keeffe and Henry Schermers (ed), *Essays in European Law and Integration*, Kluwer, Deventer, 1982, at 165, who considers that 'if one of its Member States has been attacked by that state ... [t]he Community must be deemed to have the capacity to take economic measures in the exercise of the inherent right of self-defence'.


\(^{376}\) See above at p 65.
Foreign and Security Policy, to act with the objective of the objectives of which are specifically stated in to be ‘... to develop[ing] and consolidat[ing] democracy and the rule of law, and respect for human rights and fundamental freedoms’.377

However, this section assumes that these issues are not in themselves obstacles to the existence of a Community power to impose countermeasures for human rights reasons. In analysing this proposition, one must begin by recalling that the Community possesses international legal personality under Article 210. It follows from this that, in principle, the Community is entitled to act as other international actors, not only by concluding agreements, but also by claiming other prerogatives to which States are normally entitled under international law.378 In some cases, the Community’s power to act in this way can be implied from Article 210, perhaps on the basis of the effet utile rationale for the subsidiary implied power discussed above.379 This probably explains the ruling of the Court of First Instance that the Community is entitled to grant diplomatic protection to Community nationals.380 In most cases, however, the Community’s


379 See p 162.

power to act on the international plane is derived from its express legislative powers under the EC Treaty. This is seen most obviously in the case of international agreements, which the Community may only conclude when it has been given an express mandate to achieve an objective by these means, or when this 'tends to facilitate' the achievement of the objective of power granted to the Community.381 At a regulatory level, it has also been held that 'as regards the high seas, the Community has the same regulatory powers, in areas falling within its authority, as are recognized under international law to the State whose flag the vessel flies or in which it is registered'.382 But the Community does not have any general power to legislate for the protection of human rights in other States. For this reason alone, it must be concluded that the Community has any power to enforce the human rights obligations of other States by way of countermeasures.

4. Express powers

This leads directly to the question whether there is are specific provisions in the Treaty that would justify a power to enforce other States' human rights obligations.

(a) Sanctions (Articles 301 and 60)

The most likely basis for measures designed to enforce a third country's human rights obligations is Article 301, which provides for economic sanctions for

381 See p 165.
political reasons (the equivalent for financial sanctions is Article 60). Article 301 states that:

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

Read together with the Treaty on European Union, the result is that the Council may impose appropriate measures following a decision taken unanimously (though with the possibility of a constructive abstention not affecting the result) by the European Council\(^3\) within the Common Foreign and Security Policy (CFSP).\(^4\) It is unquestionable that, subject to the proper procedures being observed, this provision can support appropriate measures designed to enforce the human rights obligations of third countries. Again subject to the proper CFSP authority, it may also authorise the inclusion of a human rights clause in

\(^3\) The European Council is defined in Article 4 EU as comprising the Member States as well as the Commission. Fabrizio Pagani, 'A New Gear in the CFSP Machinery: Integration of the Petersburg Tasks in the Treaty on European Union' (1998) 9(4) EJIL 737 at 743 points out that the European Council does not hold any formal decision-making power, and that this makes the legal status of common strategies unclear.

\(^4\) See Article 23 EU. See, eg, Claus-Dieter Ehlermann, 'Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty' (1998) 4(3) ELJ 246, at 264 who says '[b]y Article J.13(2), the Council shall exceptionally decide by qualified majority where it: on the basis of a common strategy, adopts joint actions, lays down common positions or takes other decisions; takes a decision implementing a joint action or a common position'.
international agreements, under which the Community would have a delegated power to suspend international agreements without need for a specific CFSP decision pertaining to the issue at hand. But this is not the basis on which the human rights clause has currently been included in the Community’s international agreements. In the absence of any CFSP decision, Article 301 cannot therefore provide the basis for the imposition of any ‘appropriate measures’ under the non-execution clause designed to enforce the obligations of third States under the essential elements clause.

(b) Development cooperation (Articles 179 and 181)

Another basis on which measures under the human rights clause might be supported is Article 179, which authorises the Community to adopt measures ‘necessary to further the objectives referred to in Article 177. These objectives are set out in Article 177 as follows:

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385 Article 179(3) states that ‘[t]he provisions of this Article (ie Article 179) shall not affect cooperation with the African, Caribbean and Pacific countries in the framework of the ACP-EC Convention’. As pointed out by Karin Arts, Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention, Kluwer Law International, The Hague, 2000, at 142, the wording of this exception implies that the Cotonou Convention is immune from the objectives set out in Article 177(2). Arts notes that this provision could also mean that the conclusion of the Cotonou Agreement is not subject to the normal qualified majority voting procedure usual for development cooperation agreements (at 158). However, she considers that this provision was included to keep the European Development Fund separate from normal budget procedures which are financed by the Member States are therefore not subject to the control of the Parliament and the Commission (ibid, at 142). See also Bernd Martenczuk, ‘From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective’ (1999) 5(4) EFA R 461 at 485, who states that ‘[a]s long as the EDF has not been integrated into the Community budget, financial cooperation under the Partnership Agreement will therefore remain

Footnote continued
1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster: the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them; the smooth and gradual integration of the developing countries into the world economy; the campaign against poverty in the developing countries.

2. Community policy in this area shall 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.

3. The Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

Article 181 gives these objectives an external dimension by providing that:

Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.

under the concurrent competence of the Member States and the Community'. While this ambiguity is not entirely satisfactory from a drafting perspective, it is suggested that the exception in Article 179(3) should therefore be confined to financial aspects of the Cotonou Convention.
The question whether these provisions could support measures under a human rights clause was canvassed in Portugal v Council.\textsuperscript{386} As noted in Part 2, the human rights clause at issue in this case was somewhat unusual in that it consisted solely of an essential elements clause, without any applicable non-execution clause.\textsuperscript{387} The Court found that 'the question of respect for human rights and democratic principles is not a specific field of cooperation provided for by the Agreement'\textsuperscript{388} and that it did not 'go beyond the objective' stated in Article 177(2).\textsuperscript{389} Consequently, insofar as the essential elements clause was concerned, the Court held the Council's decision concluding the cooperation agreement to be supported under Article 181.\textsuperscript{390}

Unfortunately, the Court was less than clear in explaining why a clause serving the secondary human rights objectives of Article 177(2) also served the primary development cooperation objectives of Article 177(1). On this, the Court made the cryptic comment that:

\begin{footnotesize}
\textsuperscript{387} Cooperation Agreement between the European Community and the Republic of India on partnership and development [1994] OJ L223/24. The essential elements clause in that agreement provided that '[r]espect for human rights and democratic principles is the basis for the cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement'. The agreement had no non-execution clause and consequently no declaratory provision defining 'cases of special urgency'.
\textsuperscript{389} Ibid, para 24.
\textsuperscript{390} Ibid, para 29.
\end{footnotesize}
... to adapt cooperation policy to respect for human rights necessarily entails establishing a certain connection between those matters whereby one of them is made subordinate to the other.391

This could conceivably mean two things. First, it could mean that development cooperation measures under Article 179 must serve the human rights objectives of Article 177(2). This would have the effect of ruling out any measures that could not be justified as serving human rights objectives. Second, it could mean that development cooperation measures must not violate human rights conditions established in Article 177(2). This would, of course, merely replicate the existing conditions governing the legality of Community legislative action, not only in this sphere, but generally.392 What the Court did not say, however, was whether the objectives in Article 177(2) would justify the enactment of human rights measures under Article 179 independently of any development cooperation aims.393

392 Steven Peers, 'Casenote: Case G268/94, Portugal v Council, (development policy), [1996] ECR 1-6177 (Full Court)' (1998) 35 CMLR 539 at 550, seems to overlook this existing condition when he states that '... the Court's finding that development policy must be subordinate to human rights has no support from the text of the Treaty. The Court could simply have found that an 'essential element' clause was a permissible method of contributing to the objective of protecting human rights, but it went further in finding human rights to be an obligation. ... In four paragraphs of legal alchemy, an objective to which Community policy was contributing has become a rule which that policy must obey'. He makes the same point in Steve Peers, 'Fragmentation or Evasion in the Community's Development Policy?' in Alan Dashwood (ed), EC External Relations Law: New Perspectives, Sweet & Maxwell, London, 2000, at 103.
393 Dominic McGoldrick, 'The European Union after Amsterdam: An Organisation with General Human Rights Competence?' in David O'Keeffe and Patrick Twomey (ed), Legal Issues of the

Footnote continued
This question arose in the context of the drafting of the two ‘human rights’ regulations, providing basically for the financing of non-governmental organisations (NGOs) involved in projects for the promotion of human rights abroad. An Opinion by the Council’s Legal Service decided that the regulations could not be based on Article 179 unless the main object of the regulations was development cooperation. This provoked some responses, the main point of which was that the objectives in Article 177(2) should not be considered subordinate to those in Article 177(1). However, this is an unconvincing

Amsterdam Treaty, Hart, Oxford/Portland Oregon, 1999, at 259, is not correct to say that ‘in Portugal v Council, the Court of Justice held that Article 177(2) could not be a legal basis for measures the main object and purpose of which is democratisation and human rights rather than development co-operation’.

Opinion of the Legal Service on the Commission proposal for a Council Regulation (EC) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms (Doc 10597/97 DEVGEN 60). Consequently, there are now two ‘human rights regulations’, one, for developing countries, based on Article 179 (Council Regulation (EC) No 975/1999 of 29 April 1999 [1999] OJ L120/1) and the other, for other third countries, based on Article 308 (Council Regulation (EC) No 976/1999 of 29 April 1999 [1999] OJ L120/8). For a summary of the projects financed under these regulations (which are intended to provide a legal basis for all human rights and democratisation operations financed by Chapter B7-70 of the Community budget, see Answer given on behalf of the Commission on 3 July 2001 to Written Question No E1004/01 on ‘European Initiative for Democracy and Human Rights’ [2001] OJ C364/32. For an argument that the second regulation is wrongly based on Article 308 see n315.

argument, as it fails to account for the fact, pointed out in the Opinion, that Article 177(2) states that ‘Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law …’. This clearly implies that the human rights objectives of Article 177(2) are subordinate to the development cooperation policies (the ‘area’) identified in the immediately preceding Article 177(1). As the Council’s Legal Service correctly concluded, it is difficult to see how a policy with no connection to development cooperation could possibly be supported by Article 177(2).

On the other hand, it does not follow that the description of the primary objectives of the development cooperation policy in Article 177(1) should be taken as exhaustive instead of indicative, particularly if one reads this paragraph in the context of Article 177(2). Indeed, in Portugal v Council, the Court described Article 177(1) as being so ‘broad’ that:

... to require a development cooperation agreement concluded between the Community and a non-member country to be based on another provision as well as on Article 130y [now Article 181] and, possibly, also to be concluded by the Member States whenever it touches on a specific matter would in practice amount to rendering devoid of substance the competence and procedure prescribed in Article 130y [now Article 181].

On the assumption that the development cooperation objectives in Article 177(1) are not exhaustively listed in that provision, it is relevant that there is also no

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particular difficulty in defining development objectives more broadly to include conventional human rights norms. Indeed, a cursory look at the annual Human Development Reports produced by the United Nations Development Programme (UNDP) indicates such an intertwining of human rights and development objectives that it is virtually impossible to distinguish the two. In most cases, therefore, appropriate measures designed to enforce the human rights and democracy obligations of third countries, and even their obligations regarding market economy, can be seen as pursuing the objectives set out in Article 177(1).

To answer the present question, we might conclude that Article 179 provides a sufficient basis for appropriate measures designed to enforce other countries’ human rights obligations where this serves development objectives, and in practice, a broad definition of these objectives would authorise most, if not all, ‘appropriate measures’. It follows also that Article 181 can provide a legal basis for human rights clauses in development cooperation agreements designed to effect the possibility of such measures in addition to the implied subsidiary power identified above.

In addition, it should be said that Article 179 provides a legal basis for measures designed to ensure that Community acts comply with fundamental rights obligations, insofar as Article 177(2) requires that Community policy in the area


398 See p 160.
of development cooperation 'shall contribute to the general objective of
developing and consolidating democracy and the rule of law'. Article 179
therefore establishes a firm legal basis, if not a duty, for the repeal of any
Community policies that do not serve this general objective. To some extent that
this overlaps with the pre-existing condition that Community acts not violate
fundamental rights, but there is a difference in that under Article 179 it is
probably no longer necessary to demonstrate that the repealing measure is
‘indispensable’ to this aim; more likely, a less stringent causal link between the
measure and the aim of ensuring compliance with human rights norms will be
sufficient.

This is of particular importance in light of the difficulty of demonstrating that
sanctions against third countries serve human rights objectives, as is illustrated
by the stark difference in the means by which the United States and the EU
pursue their human rights policies in relation to Cuba. Both the United States
and the European Union have declared themselves to be in favour of an
improvement of the political and human rights situation in Cuba.399 But whereas
the United States has imposed a comprehensive embargo against Cuba, the EU’s
Common Position on Cuba states that ‘[i]t is not European Union policy to try to
bring about change by coercive measures with the effect of increasing the
economic hardship of the Cuban people’.400 A less stringent causal link between

399 This is apparent from the very title of the United States legislation imposing sanctions on
Cuba (the Cuban Liberty and Democracy Act).

400 Common Position (96/697/CFSP) of 2 December 1996 defined by the Council on the basis of
the measure and its human rights aims, seen in the context of development cooperation, might justify sanctions of the type imposed by the United States where the stricter requirement of indispensability might not.

(c) Other cooperation agreements (proposed Article 181a)

According to a proposal in the Treaty of Nice, all cooperation with third countries concerning economic, financial and technical cooperation, and not just cooperation with developing countries, would be required to satisfy the subsidiary objective of promoting human rights, democracy and the rule of law.

Its proposed Article 181a states, *inter alia*, as follows:

1. Without prejudice to the other provisions of this Treaty, and in particular those of Title XX, the Community shall carry out, within its spheres of competence, economic, financial and technical cooperation measures with third countries. Such measures shall be complementary to those carried out by the Member States and consistent with the development policy of the Community.

Community policy in this area shall 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.

2. The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall adopt the measures necessary for the implementation of paragraph 1. The Council shall act unanimously for the association agreements referred to in Article 310 and for the agreements to be concluded with the States which are candidates for accession to the Union.
3. Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.\textsuperscript{401}

Despite the obvious similarity between this provision and Article 177, the conclusions reached in that context regarding the hierarchy between the primary objectives of development cooperation and those of human rights do not necessarily apply here. While it was concluded in the previous section that the definition of development could be taken to include human rights objectives, this is less evident in relation to the type of cooperation agreements envisaged here. One would therefore have to be much more careful in taking any measures that have no real connection with the objectives of economic, financial and technical cooperation in Article 181(a)(1)(l). Correspondingly, it is not possible to say with the same degree of certainty that this provision would authorise the Community to take ‘appropriate measures’ to enforce the human rights obligations of a third country. Whether it does must depend in each case on whether the measure also satisfies the primary objective of economic, financial and technical cooperation.

Finally, the same two points that were made in relation to Articles 179 and 181 can also be made here. First, the fact that at least a subset of appropriate

\textsuperscript{401} Treaty of Nice, n 216.
measures under the clause can be justified under Article 181 means that Article 181a(3) also constitutes an express power to include a human rights clause, designed to give effect to such measures, in the Community's international agreements. Second, Article 181a(1)(2) provides an independent legal basis for measures designed to ensure that the Community's cooperation measures remain in compliance with the requirement under Community law that they not violate fundamental rights. This has the same consequences, mutatis mutandis, as we saw under Article 179.

(d) Trade (Article 133)

Some authors have also proposed that Article 133 could authorise measures to enforce the human rights obligations of third countries under the human rights clause,402 based on the past practice of the Community, approved by the Court, according to which Article 133 has been used for measures (such as the GSP program403 and politically motivated trade sanctions404) with aims clearly other than that of the common commercial policy.

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Footnote continued
However, both this practice and the Court's decisions need to be placed in their historical context. Not only were sanctions under Article 133 only ever taken following a unanimous decision within the framework of European Political Cooperation and later the Common Foreign and Security Policy (a practice now codified by Article 301), but all of the Court's decisions involved measures adopted prior to the introduction into the EC Treaty of more appropriate legal bases by the Treaty of Maastricht, which is to say Article 177 (development cooperation) and Article 301 (trade sanctions).

It is true that in Centro-Com, which was decided after the introduction of Article 301, the Court did not actually disapprove the choice of Article 133 as a legal basis for the sanctions regulations in that case. However, this case has many

See also p 197 for a discussion of Case C-124/95, The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England [1997] ECR 1-81.


406 This is confirmed by the practice of the Council, which has not resorted to Article 133 for this purpose since the introduction of Article 301.

special features. First, it concerned a regulation enacted prior to the introduction of Article 301, so there may have been an element of retroactivity in the Court’s failing expressly to disapprove the use of this legal basis. Second, the Court indicated clearly that the use of Article 133 for this purpose was because there was no alternative, when it said that:

It was indeed in the exercise of their national competence in matters of foreign and security policy that the Member States expressly decided to have recourse to a Community measure, which became the Sanctions Regulation, based on Article 113 [now Article 133] of the Treaty. 408

Indeed, the Advocate General in that case went further, expressing skepticism that Article 133 was still available for politically motivated trade sanctions, suggesting that:

Those amendments may have removed embargo measures from the scope of Article 113 [now Article 133] of the Treaty ... Article 228a [now Article 301] codified a firmly established practice, clearly designed to be further developed, and now given a more specific Treaty basis. 409

Furthermore, the Court itself indicated a certain scepticism as to the continuing relevance of Article 133 to trade sanctions in Opinion 1/94. 410 Responding to an

argument advanced by the Commission that the Article 133 for trade sanctions indicated its generous scope, the Court said that:

... those decisions were adopted in situations of urgency. They are atypical acts in which the legal basis appears after the recitals referring to concerted political action by the Member States. This is best demonstrated by the fact that the Treaty on European Union makes entirely separate provision for them. 411

This is confirmed by the more recent case of Opinion 2/00, in which the Court rejected the Commission’s argument that the Cartagena Protocol could be concluded on the basis of Article 133. The Commission argued that ‘measures regulating international trade often pursue a wide range of different objectives, but this does not mean that they must be adopted on the basis of the various Treaty provisions relating to those objectives’. 412 But this argument was rejected by the Court, which said that:

... even if, as the Commission maintains, the control procedures set up by the Protocol are applied most frequently, or at least in terms of market value preponderantly, to trade in LMOs, the fact remains that, as is shown by the examination carried out in paragraphs 26 to 33 of this Opinion, the Protocol is, in the light of its context, its aim and its content, an instrument intended essentially to improve biosafety and not to promote, facilitate or govern trade. 413

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411 Ibid.
413 Ibid, at para 37.
Opinion 2/00 signals a welcome shift from the ‘instrumental’ view of Article 133 as a means of justifying any objectives achieved through the use of trade instruments, and further undermines the idea that Article 133 represents an exception to the normal rule that measures must be supported by a legal basis having regard to its aims and effects. It may therefore be concluded that this legal basis is not available for appropriate measures designed to enforce the human rights obligations of third countries.\footnote{Jan Oliver Schroeder, Community Embargoes and Liability for Embargo Damages, LLM Thesis, European University Institute, 1996 at 26 ff (reviewing various arguments pro and contra this conclusion, and stating that ‘Article 228a ECT establishes a distinct procedure for the imposition of embargoes, serving at the same time as a specific legal basis for Community embargo measures. Article 113 ECT, on the other hand, is a general legal basis for all kinds of commercial policy measures. Therefore, in its field of application, Article 228a ECT, as the lex specialis, displaces Article 113 ECT, as the lex generalis, thus hindering any recourse to this provision’); K. Zeleny, ‘Zur Verhängung von Wirtschaftssanktionen durch die EU’ (1997) 52 Austrian Journal of Public International Law 197 at 205; Hans-Joachim Glaesner, et al., Außen- und sicherheitspolitische Aspekte des Vertrages von Maastricht und seine Konsequenzen für neutrale Beitrittswerber, 1993 at 23; Waldemar Hummer, ‘Das griechische Embargo’ in Ole Due, Marcus Lutter and Jürgen Schwarze (ed), Festschrift für Ulrich Everling, Vol 1, 1995 at 523-4; Michael Schweitzer, ‘GASP und dauernde Neutralität Österreichs’ in Ole Due, Marcus Lutter and Jürgen Schwarze (ed), Festschrift für Ulrich Everling, Vol 2, 1995 at 1384-5. Undecided, but leaning towards the inapplicability of Article 133, is Panos Koutrakos, Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-Use Goods and Armaments, Hart, Oxford, Portland, 2001, at 79; similarly, Nicholas Emiliou, ‘Strategic Export Controls, National Security and the Common Commercial Policy’ (1996) 1 EFA R 55, at 60. Contra, Frank Hoffmeister, Menschenrechts- und Demokratieklauenz in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft, Springer, Berlin, 1998, at 406, arguing that it could not have been intended that a power to impose sanctions by qualified majority could have been subjected to the unanimous CFSP mechanism even if one of the stated objectives of the CFSP is the protection of human rights.} It follows also that Article 133
cannot be used as a basis for including the human rights clause in international agreements.\textsuperscript{415}

(e) \hspace{0.1cm} \textbf{Antidiscrimination (Article 13)}

A more limited basis for certain types of appropriate measures may be provided by Article 13. This provision states that:

\begin{quote}
Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
\end{quote}

The evident intention of this provision is to authorise the Community to apply measures to combat discrimination domestically. The present question is whether this provision would also authorise the Community to impose

\textsuperscript{415} This means additionally that Article 133 does not support measures suspending the GSP program for the specific reason of enforcing a third country's human rights obligations, such as Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar (1997) OJ L85/8. This regulation does not specify any legal basis in the EC Treaty, but the Proposal for a Council Regulation (EC) temporarily withdrawing access to generalized tariff preferences for agricultural goods from the Union of Myanmar, COM (97) 58 final, 97/0041(ACC) (1997) states that the legal basis for the regulation was Article 113 (now Article 133). Indeed, it could be argued that the GSP regulation itself should now be based at least additionally, and perhaps exclusively, on Article 179 (development cooperation) and not Article 133, which is its current legal basis. See Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 (2001) OJ L346/1.
countermeasures on a third country for that country’s failure to comply with antidiscrimination norms.

In certain respects, Article 13 is not entirely clear. For instance, its stipulation that the Council may only act ‘within the limits of the powers conferred … upon the Community’ could be interpreted, institutionally, as meaning that the Council is authorised to legislate in areas previously subject to a procedure involving other Community organs (for instance co-decision), or, alternatively, the reference to ‘powers’ could be understood in the broader sense of ‘fields’ of Community law. The result of this interpretation would be that Article 13 represents a new – though subsidiary – power to legislate for antidiscrimination purposes in those fields. In this respect, an analogy might be drawn with the subsidiary human rights objectives established by Article 177(2) in the area of development cooperation policy.

Another question is whether Article 13 extends to the entire ‘scope of application’ of the Treaty, as does the prohibition on discrimination on the grounds of nationality in Article 12,\(^\text{416}\) or whether, alternatively, it is limited to enabling legislation where a ‘secure’ Treaty basis exists (thereby excluding powers under Article 308).\(^\text{417}\) Even on a narrower reading, however, Article 13


would apply to the Community's development cooperation powers under Articles 179 and 181, and its trade powers under Article 133, as well as any other relevant powers, such as Article 310 (association agreements) or 308 (implied power).

On this basis, we might return to the original question whether Article 13 authorises measures enforcing the human rights obligations of other countries. It seems that there is in fact no objection to the conclusion that it does. Not only is Article 13 expressed in clear enforcement terms, but nothing indicates that it is to

be limited to a domestic field of application. Where the Community enjoys external competence, for instance under Article 133, it should therefore be entitled on the basis of Article 13 to force other countries to comply with antidiscrimination norms. It can additionally be said that the doctrine of implied external powers, discussed above,\textsuperscript{418} would justify, at least to this limited extent, a human rights clause in international agreements. Finally, as noted in the context of Articles 179 and 181a, Article 13 operates as an independent legal basis, with more flexibility than the subsidiary implied power, for measures designed to ensure that the Community’s own policies do not violate anti-discrimination norms.

(f) Community objectives (Article 308)

The notion that Article 308 could be used as a legal basis for countermeasures to enforce the human rights obligations of third countries can quickly be dismissed. First, as noted above, the objectives of the Community under Article 2 are domestic in character.\textsuperscript{419} So even though the tasks of the Community include the promotion of ‘equality between men and women’, and in its activities (which are ‘for the purposes set out in Article 2) ‘the Community shall aim to eliminate inequalities, and to promote equality, between men and women’, this cannot apply to the enforcement of the obligations of third countries.\textsuperscript{420} Second, the

\textsuperscript{418} See p 163.

\textsuperscript{419} See p 143.

\textsuperscript{420} Articles 2 and 3(2) respectively. All references are to the EC Treaty except when stated otherwise.
Court has made it quite clear that Article 308 may not be used to expand the scope of the Community’s express and implied competences.\(^{421}\) In the absence of any Community objectives to protect human rights objectives, as noted above, this provision cannot justify any measures of this nature.

(g) **Association agreements (Article 310)**

Article 310 grants the Community the power to conclude association agreements. Like the implied power in Article 308, this provision may not be used to extend Community power in areas over which it has no competence. At most, it may justify the Community in concluding an agreement in an area in which it has competence but has not yet exercised this competence.

It is, however, necessary to clarify the statement in *Demirel*, where the Court implied that the Community may conclude an association agreement covering all fields of Community law, including rules limiting rather than authorising a legislative power.\(^{422}\) Speaking of provisions governing the movement of workers, the Court said that:

> Since the Agreement in question is an association agreement creating special, privileged links with a non-Member country which must at least to a certain extent, take part in the Community system, Article 238 [now

\(^{421}\) See Case C-249/96, *Grant v South-West Trains Ltd* [1998] ECR I-621, at para 45, where the Court said that ‘although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community’.

Article 310] must necessarily empower the Community to guarantee commitments towards non-Member countries in all the fields covered by the Treaty. Since freedom of movement for workers is, by virtue of Article 48 \textit{et seq} [now Article 39 \textit{et seq}] of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238.\textsuperscript{423}

Though perhaps not immediately obvious, this passage hints at a special scope for Article 310: this follows from the fact that, while Article 48 (now Article 39) establishes the freedom of movement of workers as a constitutional guarantee, it is only Articles 49 and 51 (now Articles 40 and 42) that grant the Community any legislative powers in the field. The Court’s reference to ‘Article 48 \textit{et seq}’ is therefore significant, because it indicates that Article 310 grants the Community a legislative power to conclude agreements in the field of Community law, broadly defined to include guarantees limiting Community powers.

Further support for this interpretation of Article 310 may be found in the Opinion of the Advocate General in \textit{Commission v Ireland}, where the question arose whether the Commission had the power to enforce the obligations of Member States under an association agreement with respect to intellectual property.\textsuperscript{424} According to the Advocate General, the relevant obligations were only binding on the Member States. Nevertheless, he decided that Article 310 authorised the Commission to take enforcement action, because intellectual property was one of

\textsuperscript{423} \textit{Ibid}, para 9.

\textsuperscript{424} Case C-13/00, \textit{Commission v Ireland} [2001] ECR I-0000 (Opinion).
the ‘fields covered by the Treaty’, within the meaning of the above passage in
*Demirel*. For this proposition, he referred to the fact that intellectual property
was ‘within the scope of application of the Treaty’ for the purposes of the
guarantee against discrimination on the grounds of nationality in Article 12 (ex
Article 7).425

Advocate General Mischo’s reading of the passage in *Demirel* is plausible, but
whether the reasoning in both cases is correct is another matter again.426 The
problem in both of these cases is that a legislative power cannot be conjured out
of a constitutional guarantee limiting legislative power. In *Demirel*, the Court
did this directly (though perhaps unintentionally) on the basis of Article 39. In
*Commission v Ireland*, the Advocate General did this in a more roundabout but
also more explicit fashion, insofar as he defined the scope of legislative power in
Article 310 in terms of the scope of application of the constitutional guarantee in
Article 12. The result, however, is the same, and in both cases it is

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425 *Ibid.*, at para 35 and n 11 (citing Joined Cases C-92/92 and C-326/92, *Phil Collins and Others*

426 It might also be pointed out that the Advocate General is contradictory in his reasoning. The
Community cannot on the one hand lack legislative power to conclude the relevant provisions and,
at the same time, possess the legislative power (under Article 310) to enforce these
obligations. The case might have been easier had the Advocate General not decided that the
Commission’s power of supervision under the EEA Agreement ‘in conformity with the Treaty
establishing the European Economic Community’ was coextensive with the Community’s *
legislative* power (at para 28). Instead, he could have held that this power of supervision is an
executive power based independently on Article 226, under which the Commission has the power
to enforce the obligations of the Member States under the EC Treaty by commencing proceedings
before the European Court of Justice. See below at p 272 for an argument that this executive
power extends beyond the legislative power of the Community.
impermissible. It is therefore suggested that, contrary to the implication in these cases, Article 310 does not allow the Community to act in areas where it lacks legislative power. Consequently, Article 310 does not provide an independent basis for including human rights guarantees of the kind set out in the essential elements clause.

5. Summary

In summarising the results of the above survey, it should perhaps again be emphasised that the legal basis on which the Community may adopt measures in order to enforce compliance by third countries with human rights norms is independent of the legal basis on which the particular agreement was concluded. This means that regardless of the nature of the agreement, where there is a valid human rights clause, the Community may apply appropriate measures pursuant to its sanctions power under Article 301, to pursue development objectives with a human rights dimension under Article 179, or to combat discrimination under Article 13. On the other hand, the Community may not base any measures for this purpose on Article 133, Article 308 or Article 310 or on any implied power to impose countermeasures on third countries for human rights reasons.

F. The power of the Community to enter into obligations under the human rights clause

It has so far been established that the Community has a subsidiary implied power to include the human rights clause in its international agreements, that it likewise has an implied power to take appropriate measures under the clause when this is indispensable to ensuring that its policies conform to domestic human rights requirements, and that at least some cases the Community has express powers,
though not implied powers, to take measures with the purpose of ensuring that third countries comply with the human rights norms set out in the essential elements clause. This section investigates a separate problem, namely, whether the Community has the power to perform the obligations which are binding on it under the human rights clause. The results of the previous section regarding the Community’s power to include a human rights clause in its international agreements are contingent on the results this analysis.

1. Obligations under the human rights clause

In analysing this problem, it will be recalled from Part 2 of this thesis that in most cases the human rights clause places the Community under an obligation not only to ensure that its existing policies comply with the human rights conditions set out in the essential elements clause, but also that it take positive steps to ensure that all of these norms are given proper effect within the Community. As far as the Community’s existing policies are concerned, it is unlikely that the conditions established under the human rights clause exceed those already binding on the Community under Community law. However, as was demonstrated in Part 2, these obligations may require the Community to take positive measures to ensure that human rights are respected to the extent that the Community is responsible under the agreement. Here there may be a potential
problem insofar as the Community’s responsibility to perform these obligations under the agreement may exceed its powers under Community law.\textsuperscript{427}

Some indication of this problem may be gained by a comparison with the European Convention on Human Rights, Article 1 of which provides that:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

In cases involving territorial questions, the term ‘jurisdiction’ has been understood in terms of whether the contracting party possesses ‘effective control’ over the territory in which the violation occurred.\textsuperscript{428} In many of these cases, there is a high, though not perfect, degree of congruence between the ‘jurisdiction’ of the contracting party and the scope of its legislative power both under its domestic legal system and under customary international law.\textsuperscript{429} However, it

\textsuperscript{427} A. W. Heringa and L. Verhey, ‘The EU Charter: Text and Structure’ (2001) 8(1) Maastricht Journal of European and Comparative Law 11, at 19, point out that the same problem could arise under the EU Charter on Fundamental Rights. By contrast, Armin von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’ (2000) 37(6) CMLR 1307, at 1310 takes the view that ‘[t]he possibility of it [the Charter] pushing the Union to develop a comprehensive human rights policy is not excluded by Article 50(2) Charter, according to which it “does not establish any new power or task”: the actual competences of the Union under the diverse Treaties already provide a basis for action on many human rights issues’.

\textsuperscript{428} Eg Bankovic et al v Belgium et al, European Court of Human Rights, Application No 52207/99 (12 December 2001), at para 71.

\textsuperscript{429} In \textit{Ibid}, which concerned the responsibility of the NATO countries for acts committed extraterritorially, the European Court of Human Rights conflated the scope of the parties’ jurisdiction for the purposes of Article 1 of the Convention with the scope with the parties’ jurisdiction.
became clear in *Matthews* that the term 'jurisdiction' goes beyond the scope of the legislative powers of the contracting party.\textsuperscript{430} This case concerned a violation by the United Kingdom of a Protocol of the Convention by failing to ensure the free expression of the people of Gibraltar in their choice of a legislature (the European Parliament). The violation in this case was constituted by a treaty – incidentally, also constituting primary Community law – over which the United Kingdom had no legislative power of repeal.\textsuperscript{431} As a result, the United Kingdom advanced the more argument that it had no 'effective control' over the measure at issue, not in a territorial sense, but in a legal sense. This argument was rejected by the Court, which said that:

\begin{quote}
'legislative jurisdiction' under international law (see especially at para 59). This is not a good analogy, as it fails to account for cases where a party has 'effective control' that is illegal under the rules of legislative jurisdiction. The concept of legislative jurisdiction is discussed fully below at pp 376 to 393. See also *Ilașcu and Ors v Moldova and the Russian Federation (Admissibility)*, European Court of Human Rights, Application No 48787/99 (4 Jul 2001), which concerned acts committed in a separatist part of Moldova. Both defendants denied that they had jurisdiction over the acts committed. Moldova claimed that 'the organs of the Republic of Moldova did not control the territory on the left bank of the Dniester, where the acts complained of had been committed, and that de facto the applicants accordingly did not come under the jurisdiction of the Moldovan authorities' (p 14) while the Russian Federation claimed that '[t]he Russian Federation had not exercised and did not exercise any jurisdiction over the region of Transdniestria, which was a territory belonging to the Republic of Moldova' (p 15). The Court left the question to be decided at the merits stage of the hearing (at p 21).

\textsuperscript{430} *Matthews v United Kingdom* (1999) 28 EHRR 361.
\textsuperscript{431} The measure was an Annex to the Act on Direct Elections of 1976, which was itself annexed to Council Decision 76/787. The Annex stated that the United Kingdom would apply the Act only to the United Kingdom (thus excluding Gibraltar). The violation concerned Article 3 of Protocol I of the Convention.
... the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom's responsibility derives from its having entered into treaty commitments subsequent to the applicability of [the measure].432

This provides solid grounds for disagreement with those authors who have claimed that in Opinion 2/94 the Court exaggerated the 'institutional aspects' of the Community's accession to the Convention.433 Giorgio Gaja has recently put this argument as follows:

The ECJ also mentioned the 'integration of all the provisions of the Convention into the Community legal order', but this could hardly mean that by acceding to the Convention the Community would exert powers outside its competence. For instance, a human right concerning criminal proceedings would generally have little to do with conduct regulated by Community law; should the Community bind itself to recognise that right [a right concerning criminal proceedings], it would do so only in so far as the same right became relevant with regard to Community acts or to State acts that are governed by Community law.434

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432 Matthews v United Kingdom (1999) 28 EHRR 361, para 34. The term 'responsibility' generally refers to the consequences of wrongful conduct, while the term 'liability' includes the harmful consequences of conduct that is not wrongful. See, for instance, International Law Commission, First Report on State Responsibility by Mr James Crawford, Special Rapporteur, UN Doc A/CN.4/490/, 24 April 1998, at para 110.


The problem with this view is that it conflates the concept of ‘jurisdiction’ under Article 1 of the Convention with the legislative powers of the Community under Community law. In fact, if Matthews is any guide, the term ‘jurisdiction’ must be understood in a far broader sense, covering not only matters over which the Community may exercise executive or judicial powers, but also forms of Community law over which not only the Community, but even the Member States, have no legislative power of repeal. Indeed, it would be hard to find a better contradiction of Gaja’s thesis specifically with respect to a Community act than the very measure at issue in Matthews.\textsuperscript{435}

But there are also other aspects of the Community’s primary law that could present problems. For instance, Article 230 has been criticised for containing overly restrictive rules on standing (the requirement of ‘individual concern’), and could be seen as violating accepted standards of human rights.\textsuperscript{436} The Community has no legislative power to repeal either Article 230 or to overturn a

\textit{European Law and Integration}, Kluwer, Deventer, 1982, at 175, that ‘[t]he Community would undertake that all Community acts would be in conformity with the Convention in the same way as the Member States have undertaken that all their acts are to be in conformity with the Convention’. See. It is clear that Schermers cannot have meant that the Community would not have been bound by \textit{all} of the obligations of the Convention in relation to persons ‘within its jurisdiction’. This would have been a direct contradiction of his view, expressed earlier in the same article (at 173), that ‘[i]f the Community acted beyond its powers [in concluding an agreement] it will nonetheless be bound unless it or its Members can prove its lack of competence and its manifest character’. See also Henry G Schermers, ‘A Typology of Mixed Agreements’ in David O’Keeffe and Henry G Schermers (ed), \textit{Mixed Agreements}, Kluwer, Deventer, 1983, at 24.

\textsuperscript{435} See n 431.

\textsuperscript{436} See n 354.
Court's decision on the scope of this provision. In addition, it is not out of the question that judgments of the European Court of Justice and of the Court of First Instance might breach human rights guarantees. In *Baustahlgewebe*, the European Court of Justice ruled on whether the Court of First Instance had violated the right to a fair trial.\textsuperscript{437} If the Court of Justice itself violated such a right, the Community and the Member States could be held responsible even though they have no power to overturn such a decision.\textsuperscript{438} Finally, human rights violations by the Member States could pose a problem if these violations are determined (perhaps inaccurately) to be attributable to the Community. There is some precedent for this in the *Airbus* case, in which a GATT panel considered the Community to be responsible for a German export finance subsidy under the Subsidies Agreement,\textsuperscript{439} although, perhaps because the point was not disputed by the parties, the panel did not discuss the basis on which the Community was to be held responsible.\textsuperscript{440}

All of these cases would arguably present problems under the European Convention on Human Rights. They may correspondingly also present problems under the human rights clause. Whether or not they do will depend on a variety

\textsuperscript{437} See n 324.

\textsuperscript{438} This possibility was expressly raised by Koen Lenaerts, ‘Respect for Fundamental Rights as a Constitutional Principle of the European Union’ (2000) 6(1) *Colum J Eur L* 1, at 17. He phrases the problem as one of the Community and the Member States being forced to implement the decision of the European Court of Justice.

\textsuperscript{439} The Community was a party to this agreement but Germany was not, although, interestingly, it was Germany that was named as a defendant.

\textsuperscript{440} *German Exchange Rate Scheme for Deutsche Airbus*, SCM/142, unadopted, 4 March 1992.
of factors, including, most importantly, the question whether or not the agreement is mixed, and whether there is a so-called 'competence clause' in the agreement specifying that the Community is only bound to the extent of its powers. In order to ascertain the full scope of the Community's responsibility to perform obligations under the human rights clause, it is therefore necessary first to describe its responsibilities under agreements generally from the perspective of the law of treaties.

2. Responsibility of the Community and its Member States for the performance of treaty obligations

The general rule regarding the responsibility of international organisations and their member states for treaties is that they are bound to perform their obligations in accordance with the principle of *pacta sunt servanda* unless their consent to be bound to the treaty has been vitiated by a manifest failure of ostensible authority. This rule is codified in Article 46 of the 1986 Vienna Convention.

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441 Article 11(1) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) 1155 UNTS 331 ('the 1986 Vienna Convention') provides that '[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments, constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed' and Article 11(2) that '[t]he consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.' Most of these means are further specified in Articles 12 to 15.

442 It was formerly widely held that that treaties concluded *ultra vires* by international organisations are invalid under international law. The literature is documented in Klaus D Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft*, Duncker & Humblot, Berlin, 1986, at 108-122.
on the Law of Treaties between States and International Organizations or between International Organizations, which states as follows:

Article 46. Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the

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443 Article 46 is considered ‘unanimously’ to represent customary international law, according to Christoph U Schmid, ‘From Pont d’Avignon to Ponte Vecchio: The Resolution of Constitutional Conflicts Between the European Union and the Member States Through Principles of Public International Law’ (1998) 18 YEL 415, at 459, with further references.

444 1986 Vienna Convention, n441.

445 The reference in Article 46(1) to the ‘internal law’ of the Member States reflects Community law regarding the division of competences between the Member States and the Community. But the parallel provision in Article 46(2), referring to the ‘rules of the organization,’ extends beyond Community law, insofar as these are defined in Article 2(j) of the 1986 Vienna Convention to include not only ‘the constituent instruments, decisions and resolutions adopted in accordance with them’, but also ‘established practice of the organization’. This contrasts with the ruling of the European Court of Justice in Case 68/86, United Kingdom v Council, [1988] ECR 855, at para 24, and approved in many other cases, that the practice of Community institutions cannot affect Community competences.
matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith. 446

Once it has been established that a party has consented to be bound to the treaty, questions of sovereignty cannot stand in the way of mandatory performance. This follows from the rule of *pacta sunt servanda* expressed in Article 26 of the Vienna Convention, reinforced by the rule in Article 27 that States and international organisations may not invoke internal rules as justification for their failure to perform a treaty. 447

446 Alexandru Bolintineanu, 'Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention' (1974) 68 *AJIL* 672, at 680, claims that '[d]espite its limitation to certain cases, this article [Article 46] can be construed as recognizing the relevance in international law of municipal law rules concerning the conclusion of treaties. Consent to be bound by a treaty is embodied in a succession of interdependent internal and international acts. The absence of the internal act or its performance in violation of municipal law prescriptions therefore invalidates the international declaration of the state's consent'. This reading, apparently counterintuitive, can be justified only where the treaty itself provides for some recognition of internal requirements, such as ratification. A better summary is provided by Pieter Jan Kuijper, 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties' (1998) 25(1) *Legal Issues of European Integration* 1, at 13, who says that '[i]t is clear that Article 46 is a rule of good faith in respect of treaty relations: one cannot adduce one's own faults (under national law) to evade one's obligations (under international law)'. The 'exceptional' nature of Article 46 is clearly apparent from the commentary of the International Law Commission on draft Article 43 (old numbering), reprinted in International Law Commission, 'Draft Articles on the Law of Treaties, Part 5: Invalidity, Termination and the Suspension of the Operation of Treaties' (1967) 61 *AJIL* 387, at 394-399.

447 Article 27 of the 1986 Vienna Convention provides that:

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.
It is very difficult for a party to escape its obligations on the grounds that there has been a 'manifest violation' of its internal law. Already in 1962, the International Court of Justice recognised that a measure enacted beyond the powers of a particular organ of an international organization will not necessarily be void, stating that:

If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.445

The presumption of the validity of an *ultra vires* agreement is stated with some force in Article 46, where the test is posed in terms of the subjective state of knowledge of the affected party. Furthermore, with a possible exception in cases where the injured party is a member state, that party is not required to possess a

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2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to Article 46.

445 *Certain Expenses of the United Nations (Advisory Opinion)*, [1962] ICJ Rep 151 (20 Jul), at p 168. In a Separate Opinion, Judge Morelli distinguished between the invalidity of an act (*ab initio*) and the voidability of an act, and stated that the acts of international organisations can only be invalid, not voidable (at 222). Applying this strict test, he continued, '[i]t is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. Examples might be a resolution which had not obtained the required majority, or a resolution vitiated by a manifest *excès de pouvoir* (such as, in particular, a resolution the subject of which had nothing to do with the purposes of the Organization)' (at 223).
detailed knowledge of the internal rules of the relevant organisation.\footnote{449} This means that this test will not be satisfied in ambiguous cases, which almost by definition applies to any case coming before the European Court of Justice. It is also unlikely to be met where the wrong organ of the organisation has concluded an agreement, or – for that matter – where the wrong legal basis was chosen for an agreement.\footnote{450} The true situation has been well put by Henry Schermers when he said that:

Whenever the Community concludes a treaty, foreign States may presume that it is competent to do so. If the Community acted beyond its powers it will nonetheless be bound unless it or its Members can prove its lack of competence and its manifest character. The latter especially will be difficult because of the complicated nature of Community law.\footnote{451}


\footnote{450} In \textit{Opinion 2/00}, [2001] ECR 10000, at para 5, the Court said that ‘[i]n incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community’s consent to be bound by the agreement it has signed’. At least from the perspective of international law, this proposition must be strongly contested.

It may be concluded that in cases of pure Community agreements, it will be virtually impossible for the Community to argue that it is not obliged fully to perform the obligations set out in the human rights clause.452 Somewhat similar problems arise in the case of mixed agreements453 — of which the WTO acting outside of its sphere of competence, and that third countries are expected to have notice of this. Tomuschat also recognises that this view is to the detriment of the Community in the long term. Pieter Jan Kuijper, 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties' (1998) 25(1) Legal Issues of European Integration 1 at 13, says that 'it is clear that Article 46 is a rule of good faith in respect of treaty relations ... It is not a rule which somehow forces the Court to take a dualistic view of the relationship between international and national law. It matters little whether the Court voids the Community act approving treaty conclusion or the treaty conclusion itself. In neither case is its action opposable to the treaty partner'. For a more sceptical view, see Martin Björklund, 'Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?' (2001) 70 Nordic Journal of International Law 373, discussed and criticised at n 510.

Indeed, even if Article 46 were in principle applicable, the wide-ranging assertions of competence by the Community in the human rights arena would trigger the application of Article 45 of the Vienna Convention, which provides that '... if, after becoming aware of the facts: [a State or international organisation] shall have expressly agreed that the treaty is valid ..., (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty' with the result that the respective State or international organisation may not invoke Article 46.

453 Discussing the definition of 'mixed agreements', Henry G Schermers, 'A Typology of Mixed Agreements' in David O'Keeffe and Henry G Schermers (ed), Mixed Agreements, Kluwer, Deventer, 1983 first offers a procedural definition of mixed agreements as 'all international agreements to which international organizations as well as their Members are parties' (at 23). He considers, however, that it is only in cases in which neither the Member States nor the organization can fully exert the powers of a party to the agreement that the problems of 'mixity' arise (at 25). He therefore concludes by proposing the following substantive definition: '[a] mixed agreement is any treaty to which an international organization, some or all of its Member States and one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence' (at 25-26). This definition of mixed agreements according to the division of competences between the Community and the Member States under Community law has characterised most discussions of mixed agreements to date. For a recent 'typology' along the same lines, see Allan Rosas, 'Mixed Union — Mixed

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agreements are the best known example – to which both the Community and the Member States are full parties without any express declaration of a limitation of competences.\textsuperscript{454}

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provisions of these two agreements with respect to either Member as to its status in a dispute brought under these agreements' (see para 4.13). The Community's response to this was essentially that the United States was estopped from denying that the Community was responsible in this area. It referred to the fact that all the Member States use the Community Schedule of Concessions, and argued that the provision establishing the Community as a WTO Member was negotiated in full knowledge of the transfer of sovereignty. In this regard it referred to Article XI:1 of the WTO Agreement, which provides that '[i]n the contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, ... shall become original Members of the WTO'. In addition, the Community referred to joint letter to the Chairman of the Dispute Settlement Body, relating to the dispute, in which the parties accepted Community responsibility for addressing the relevant issues. The panel in that case managed to avoid the issue, stating that '... what is at issue in this dispute is tariff treatment of LAN equipment and multimedia PCs by customs authorities in the European Communities. Since the European Communities, Ireland and the United Kingdom are all bound by their tariff commitments under Schedule LXXX, our examination will focus, in the first instance, on whether customs authorities in the European Communities, including those located in Ireland and the United Kingdom, have or have not deviated from the obligations assumed under that Schedule' (at para 8.16). The panel also rejected a request for a change in the title of the panel report to *European Communities, Ireland and the United Kingdom — Increases in Tariffs on Certain Computer Equipment* on the grounds of lateness. The request should have been made at the time of agreement on the terms of reference to the panel (para 8.17). Allan Rosas, 'The European Union and Mixed Agreements' in Alan Dashwood (ed), *EC External Relations Law: New Perspectives*, Sweet & Maxwell, London, 2000, at 212 n 75, notes that the Appellate Body made reference to the fact that the export market was the European Communities, not Britain and Ireland *European Communities — Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted on 22 June 1998, para 96). But this comment was made in a different context, and is not relevant to the question of state responsibility. See also Pierre Pescatore, 'Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape From a Programmed Disaster' (1999) 36(2) *CMLR* 387, at 403, who states that '[u]nder international law (Vienna Convention, Article 27), Member States of the EC may not use their position as WTO Members to oppose or alter the WTO negotiation and decision process by attempts at superimposing rules of internal EC law to the rules of the World Organization [sic], substantive or procedural'*. Tom Carney, 'The EU's Locus Standi in GATT Article III Trade Disputes: A Reappraisal' (1998) 3 *EFAR* 95, at 101, somewhat misses the Community perspective when he writes that '[t]he Vienna Convention notwithstanding, it seems hard to believe, from a political point of view that the Community, not being a federal entity, should be bound to comply with, uphold and enforce an international "obligations" when, at

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On the other hand, the situation is somewhat different in the case of mixed agreements where it appears from the agreement that responsibility is to be allocated between the parties on the basis of a declaration of respective competences, and also in cases where it is evident from the definition of the domestic and international levels, it has no competence for the area in which the "obligation" arises ... Practice shows that any such complaint by a third country will always be directed to the Member States where competence in the matter rests. Also relevant in relation to this issue is Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, adopted as modified by the Appellate Body report on 19 November 1999, at para 9.40, where the panel denied that the customs agreement between the Community and Turkey had international legal personality sufficient to enable Turkey to escape its international obligations under GATT.

423 Article 4(2) of Annex IX of UNCLOS provides that: "[a]n international organization shall be a Party to this Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in Article 5 of this Annex". Article 5.1 provides that: "[t]he instrument of formal confirmation or of accession of an international organization shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention" and Article 5.2 contains an equivalent obligation for the Member States. (Article 2 of the Annex IX also provides that: "[a]t the time of signature an international organization shall make a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to that organisation by its member States which are signatories, and the nature and extent of that competence"). Importantly, Article 5.3 stipulates that in the absence of such notifications, the Member States are deemed to be solely responsible. From the Community perspective, an express declaration of competences is not an ideal result, mainly because of the evolving nature of Community competences. This is reflected in the Community's declaration, which, after describing the relevant areas of competence, warns that: "[t]he scope and the exercise of such Community competence are, by their nature, subject to continuous development, and the Community will complete or amend this declaration if necessary, in accordance with Article 5 paragraph 4 of Annex IX to the Convention". See Ehlermann, 'Mixed Agreements,' n 346, at 14. Lena Granvik, 'Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness' in Martti Koskenniemi (ed), International Law Aspects of the European Union, 1998, at 259 says that "[t]he EC does not want to freeze its competence by clearly delimiting which provisions of an agreement come under its exclusive competence. A subject matter which is not covered by Community law today may be

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'parties' to the agreement that the Community and the Member States are joint parties to the agreement, or that they are joint parties responsible according to their respective competences. The following section will discuss the responsibility of the Community to implement its obligations under human rights clauses in pure Community agreements, and the next section will discuss the question in relation to human rights clauses in mixed agreements of the type described here.

covered by Community rules later on'. See also Pieter Jan Kuijper, 'The Conclusion and Implementation of the Uruguay Round Results by the European Community' (1995) 6 EJIL 222, at text to n7, referring to the situation in the FAO and UNCLOS as one 'in which the Community is barely tolerated by third States and its own Member States as a Member of the organization, where constant explanations of, and declarations on Community competence have to be given vis-à-vis third States and where internal quarrels about Community competence in respect of different points on the agenda of the organization are often drawn out so long as to make it impossible to make a meaningful, or even any, statement on the Community position for lack of time'. See also Rachel Frid, ‘The European Community – A Member of a Specialized Agency of the United Nations’ (1993) 4 EJIL 239, at n 44 et seq, with reference to the FAO declaration of competences and See also Martin Björklund, ‘Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?’ (2001) 70 Nordic Journal of International Law 373, at 380. For a proposal that the model of Article IX of UNCLOS could be adopted for the European Convention on Human Rights, see Andreas Zimmermann and Christine Langenfeld, ‘The Protection of Human Rights in the Framework of the European Convention on Human Rights’ (1995) 89 ASIL Proc 533, at 536 and the argument of Belgium in Opinion 2/94, [1996] ECR 1-1759, reported at para 14).

456 It might be argued that the WTO agreements contain a provision with this effect. Article IX:1 of the WTO Agreement states that: ‘[w]here the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their Member States’ and a note specifies that '[t]he number of votes of the European Communities and their Member States shall in no case exceed the number of the Member States of the European Communities'. This argument was not made by the Community in the case discussed at n 454.

457 This distinction is not usually made in the literature on mixed agreements, which tends to define them in terms of the division of competences under Community law. See n 453.
(a) Pure Community agreements

It follows from the above discussion both that the Community lacks the power to implement fully its obligations under the human rights clause, and that, in the case of pure Community agreements, there is no manifest violation of its internal rules sufficient to vitiate its consent to be bound to the agreement and to the clause. In principle, this means that the Community lacks the power to include the human rights clause in pure Community agreements. This preliminary conclusion is supported, though not affected, by the fact that the human rights clause establishes secondary obligations entitling an ‘injured’ party to resort to dispute settlement in the event that the Community fails to perform its obligations, but also to resort to countermeasures in the form of ‘appropriate measures’ under the non-execution clause. Were the human rights clause expressed in different terms, for instance, as a condition on the legality of Community action, this conclusion might have been avoided. However, as it stands, in principle the clause represents an *ultra vires* act of the Community.458

Before reaching a final verdict on the clause, however, one final possibility for saving the clause needs to be investigated, namely, that the clause is a permissible ‘ancillary clause’ to an agreement otherwise within its competence.

458 It follows from this that the Court was incorrect in *Portugal v Council* to find that the Community had the power under Article 181 to include a human rights clause (albeit one without a non-execution clause) in a development cooperation agreement. The Court neglected in that case to consider the implications of the obligations binding on the Community under the clause.
The doctrine of ancillary clauses represents an exception to the usual rules governing implied external powers, permitting the Community to conclude agreements containing clauses which have an 'ancillary' or 'subsidiary' character to the main object of the agreement, even if these clauses concerned a subject matter over which the Community had no other competence. The doctrine dates from Opinion 1/78, when, discussing an agreement concluded on the basis of Article 133, the Court said the following:

The Court takes the view that the fact that the agreement may cover subjects such as technological assistance, research programmes, labour conditions in the industry concerned or consultations relating to national tax policies which may have an effect on the price of rubber cannot modify the description of the agreement which must be assessed having regard to its essential objective rather than in terms of individual clauses of an altogether subsidiary or ancillary nature. This is the more true because the clauses under consideration are in fact closely connected with the objective of the agreement and the duties of the bodies which are to operate in the framework of the international natural rubber organization which it is planned to set up. The negotiation and execution of these clauses must therefore follow the system applicable to the agreement considered as a whole.459

The Court to some extent confirmed this doctrine in Opinion 1/94, although the question was not directly at issue in that case. The question before the Court in this case was whether the Community had an exclusive competence under Article 133 to conclude the TRIPs agreement on intellectual property. Arguing

in favour of a Community competence, the Commission referred to earlier free trade agreements which had also included provisions relating to intellectual property. However, the Court rejected this reasoning, stating:

The fact that the Community and its institutions are entitled to incorporate within external agreements otherwise falling within the ambit of Article 113 [now Article 133] ancillary provisions for the organisation of purely consultative procedures or clauses calling on the other party to raise the level of protection of intellectual property does not mean that the Community has exclusive competence to conclude an international agreement of the type and scope of TRIPs.460

In Portugal v Council, this doctrine of ancillary clauses was for the first time applied to an agreement (a development cooperation agreement between the EC and India) based on both Article 133 and Article 181.461 It thus extended this doctrine to agreements based on provisions other than Article 133 and at the same time to legal bases which are an area of shared competence between the Community and the Member States. Interestingly, in the present context, it applied the doctrine of ancillary clauses not to the human rights clause, which it found to be valid under an express legal basis, but rather to clauses dealing with energy, tourism, culture, drug abuse control and protection of intellectual property. With regard to these provisions, the Court held that:


The fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterization of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses, provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation (see, in particular, to this effect, *Opinion 1/78* [1979] ECR 2871, paragraph 56).462

In these passages the Court refined slightly the doctrine in *Opinion 1/78* by testing the compatibility of the ancillary clauses with the objectives of the agreement in terms of whether the ‘obligations concerning the specific matters referred to … in fact constitute objectives distinct from those of [the agreement]’. The Court continued by saying that:

As regards more particularly the provisions of the Agreement which relate to specific matters, those provisions establish the framework of cooperation between the contracting parties. Taken as a whole, they are limited to determining the areas for cooperation and to specifying certain of its aspects and various actions to which special importance is attached. By contrast, those provisions contain nothing that prescribes in concrete terms the manner in which cooperation in each specific area envisaged is to be implemented.

... The mere inclusion of provisions for cooperation in a specific field does not therefore necessarily imply a general power such as to lay down the basis of a competence to undertake any kind of cooperation action in that field. It does not, therefore, predetermine the allocation of spheres of competence between the Community and the Member States.

or the legal basis of Community acts for implementing cooperation in such a field.\footnote{Ibid, paras 45 and 47.}

As far as the provisions concerning energy, tourism and culture were concerned, the Court held that ‘[t]he obligations laid down in the provisions in question in the spheres of energy, tourism and culture are obligations to take action which do not constitute objectives distinct from those of development’.\footnote{Ibid, para 54.} The Court also referred to its earlier comment that the relevant provisions ‘establish the framework of cooperation in regard to the matters to which those articles refer’.\footnote{Ibid, para 54, referring to comments at para 45.} The same reasoning applied to the actions mentioned in the agreement’s provisions on drug abuse control, which ‘can constitute measures falling within the sphere of the development cooperation objectives’.\footnote{Ibid, para 63.} Here, ‘even the provisions concerning the actions specified in Article 19(2) of the Agreement cannot, having regard to their wording and context, constitute general enabling powers for their implementation’.\footnote{Ibid, para 68.} As to the provisions on intellectual property, these were said by the Court to serve the object of development cooperation.\footnote{Ibid, para 73.}

Even the most detailed of the specified obligations – that the parties ‘also undertake, wherever possible, to facilitate access to the data bases of intellectual
property organizations' — at most represented an 'ancillary obligation'. 469 In any case, the Court noted, Opinion 1/94 had already determined that the Community had competence to include such clauses in agreements that could be considered 'ancillary provisions' in connection with provisions otherwise legitimately based on Article 113. 470

Accepting the Court's formulation relating to objectives, what emerge are the following tests in regard to 'ancillary clauses'. First, it must be determined whether the ancillary clause is consistent with the object of the agreement. This is to be tested by asking whether the clause establishes objectives distinct from those of the agreement. If the objectives are consistent, it must then be asked whether the clause 'constitute[s] general enabling powers for their implementation' 471 or whether it is merely establishes the 'framework' for future measures. If the clause merely establishes such a framework, the clauses will be permitted. But even if they do not (as in the case of the intellectual property provisions requiring the facilitation of access to databases), they may still be permitted if these measures are at most 'ancillary obligations'. 472

469 Ibid, para 75.

470 Ibid, para 77.

471 Ibid, para 68.


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(i) Distinct objectives

In applying this reasoning to the human rights clause, the first question is whether the human rights clause establishes objectives distinct from those of the respective agreements. In *Portugal v Council*, the Court did not expressly consider the objectives of the clause, but it did state that the clause fell within the scope of the objectives of development cooperation agreements under Article 177(2). More concretely, it follows from the above analysis that its objectives may be described as (1) establishing a legal mechanism in order to ensure that Community policies remain consistent with the Community’s obligations under Community law not to infringe the general principles of law regarding respect for human rights and (2) providing a means to enforce the human rights obligations of third countries (which may be achieved indirectly by virtue of the threat of a suspension of the agreement).

It must also be accepted that the objectives of the human rights clause are not distinct from those of many of the agreements in which they are contained.\(^{473}\) Certainly this applies to development cooperation agreements, which, regardless of the fact that they do not mention human rights in their objectives clauses,\(^ {474}\) must have the express subsidiary purpose under Article 177(2) of 'contribut[ing]

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\(^{473}\) This is a lesser standard than that applicable to the question whether these clauses are essential to the accomplishment of the object or purpose of an agreement, within the meaning of Article 60(3)(a) of the Vienna Convention.

\(^{474}\) See above at p 82.
to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms*.475 With respect to association agreements under Article 310, it is similarly likely that the objectives of the human rights clause would be considered not to be distinct from those of the agreement. To the extent that association agreements are designed to prepare third countries for eventual accession to the European Union,476 any measures designed to guarantee their commitment to human rights and democracy, which is an essential condition of accession to the European Union under Article 49 EU, must be consistent with these agreements.

However, these considerations do not necessarily apply to trade agreements concluded under Article 133. Not only do human rights not appear in the express objectives clauses of these agreements,477 but even from a domestic perspective there seems to be little connection between the objectives of the respective trade agreements and the objectives of the human rights clause. It is certainly conceivable that the enforcement of labour standards abroad can be linked to the ‘competitive conditions’ of trade, and indeed this is the origin of the exception in Article XX(e) of GATT regarding the possibility of trade restrictions ‘relating to the products of prison labour’.478 It is also relevant in this respect that one of the ancillary clauses approved by the Court in Opinion 1/78 concerned labour


477 See above at p 82.

478 See below at n 701.
conditions in the rubber industry. But even if labour standards can be considered relevant to the objectives of trade liberalisation under the agreement (especially in light of the Community's express policy of delinking the issues), the same cannot be said of the remainder of the human rights, and certainly not of the principles of democracy, enshrined in the essential elements clause.

Moreover, if the principal objective of the human rights clause is to enable the imposition of trade measures on non-trade related grounds, it is difficult to see how this is related to the main object of the agreement is to promote trade relations between the parties. To this extent it seems that the objectives of trade agreements are distinct from those of the human rights clause. As far as the first of the three tests of Portugal v Council is concerned, then, it seems that neither the external nor the internal objective of the human rights clause are consistent with the objective of trade agreements under Article 133.

In summary, the first test is satisfied by association agreements and development cooperation agreements, but not by trade agreements. Already at this stage, then, it is possible to rule out the incorporation of human rights clauses in pure Community trade agreements concluded on the basis of Article 133.

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479 See p 226.
480 See above at n 98.
481 See also Eibe Riedel and Martin Will, 'Human Rights Clauses in External Agreements of the EC' in Philip Alston (ed), The EU and Human Rights, Oxford University Press, Oxford, 1999 (coming to the same conclusion but suggesting that a human rights competence 'might be deduced from an overall assessment of the acquis communautaire of the Community pervading the whole treaty and thus also Article 113 (Article 133 Amsterdam) TEC'.)
(ii) Specific measures

The second test is whether the clause authorises specific measures, or whether it merely provides a framework for future cooperation. In this respect, it seems clear that human rights clauses with non-execution clauses do purport to authorise specific measures; indeed, this is their entire purpose. This is supported by the fact that the Council itself uses the human rights clause in the Cotonou Agreement as a specific legal basis for the appropriate measures authorised under that clause.\textsuperscript{482}

It is less clear whether the same can be said of human rights clauses containing only an essential elements clause. As mentioned above, in \textit{Portugal v Council} the Court determined in such a case that ‘the question of respect for human rights and democratic principles is not a specific field of cooperation provided for by the Agreement’.\textsuperscript{483} On the other hand, it was argued above that even essential elements clauses are likely to establish positive obligations for the parties to ensure that human rights are respected in areas for which they are responsible. If this is the case, it could be argued that even an essential elements clause purports to authorise future measures in the field of human rights, despite the Court’s ruling in \textit{Portugal v Council}. However, it must be conceded that this is a less certain result than in relation to clauses containing a non-execution clause.

\textsuperscript{482} See p 178.

It must therefore be concluded that all human rights clauses with a non-execution clause and, though with less certainty, probably also all other human rights clauses will fail the second test.

(iii) Ancillary obligations

For these agreements, it is then necessary to move to the next question, namely, whether the clause entails merely ‘ancillary obligations’ or whether the obligations imposed by the clause are so significant that the clause cannot be considered to be a mere ‘ancillary clause’. There is no jurisprudence on the scope of a permissible ancillary obligation, but certainly in the case of some of the human rights clauses there appears little doubt that the effects of the clause by far exceed those permissible as ‘ancillary obligations’. In this regard, it is perhaps especially relevant that in the case of human rights clauses with a non-execution clause, the norms set out in the essential elements clause are enforceable by way of countermeasures. The obligations arising from such action cannot be seen as merely ‘ancillary’, especially when the basis on which such measures may be taken exceed the ordinary rights of States under customary international law. On the other hand, this rationale does not apply to clauses containing merely an essential elements clause, as was the case in Portugal v Council. In that case, the Court did not consider this question in relation to the essential elements clause in that case, but it is implicit in the Court’s reasoning that the essential elements clause did not impose onerous obligations on the Community.

Again, therefore, while the general conclusion is that human rights clauses including non-execution clauses probably exceed the bounds of an ‘ancillary
clause', this verdict cannot be made with certainty in relation to mere essential elements clauses.

(iv) Conclusion

In conclusion, the doctrine of ancillary clauses can at most apply to save human rights clauses in the form of essential elements clauses, with the exception of clauses in trade agreements concluded on the basis of Article 133. For all other types of human rights clauses, the doctrine of ancillary clauses does not apply. Even when the human rights objectives of these clauses are consistent with the objectives of the agreements in which they are contained, the non-execution clause has two impermissible effects: first, it purports to authorise specific measures rather than merely setting out the future framework for cooperation, and second, it establishes more than merely an ‘ancillary obligation’ This means that, in practice, all existing human rights clauses in pure Community agreements have been enacted *ultra vires*. Some of the implications of this conclusion are addressed below in the context of the Community obligations of the Member States.484

(b) Mixed agreements

It was mentioned above that the human rights clause is found in mixed agreements in which the Community and its Member States are jointly a ‘party’ to the agreement. These agreements may be further subdivided into agreements in which their participation is unlimited, except perhaps by implication, and

484 See pp 262 to 277.
those in which it is stipulated that the parties are bound only to the extent of their respective competences. The first, and somewhat rarer, of these examples may be illustrated by the human rights clause in the Cotonou Agreement, Article 96(1) of which states that:

Within the meaning of this Article, the term ‘Party’ refers to the Community and the Member States of the European Union, of the one part, and each ACP State, of the other part.\(^{485}\)

It is more usual, however, for mixed agreements containing the human rights clause to contain a declaration of joint but limited responsibility in the form of a ‘competence clause’. These are usually in the following form:

For the purposes of this Agreement, the term ‘Parties’ shall mean the Community, or its Member States, or the Community and its Member States, in accordance with their respective powers, of the one part, and the [other party], of the other part.\(^{486}\)

\(^{485}\) Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L317/3. The general rule is set out in Article 1, which provides that ‘[t]he Community and its Member States, of the one part, and the ACP States, of the other part, hereinafter referred to as the “Parties” hereby conclude this Agreement in order to promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment’.

\(^{486}\) Article 124 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part [1998] OJ L68/3 (emphasis added). It has been suggested that one of the primary functions of these clauses is to ensure that Member State relations *inter se* are governed by Community law and not by the international agreement (thereby avoiding the so-called ‘Airbus effect’). See Pieter

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In both of these cases, it is self-evident that there is a joint responsibility for the performance of the agreement in the sense that one or other of the parties will have to performed the agreement; this follows from the fact that they are declared to be one ‘party’ to the agreement. This means, at the very least, that both of these parties are liable to appear before a competent third party tribunal in order to determine the issue. What it does not mean, however, is that either

Jan Kuijper, ‘The Conclusion and Implementation of the Uruguay Round Results by the European Community’ (1995) 6 EJIL 222, at text to n 19 to n 23. This refers to an unadopted panel report (German Exchange Rate Scheme for Deutsche Airbus, SCM/142, unadopted, 4 March 1992) in which, as described by Kuijper, ‘the panel argued that obligations on export subsidies existed between Germany and France, from which the United States could derive rights under the Subsidies Agreement’. The panel also made a separate point that, as Kuijper puts it, ‘since the Member States were still contracting parties to GATT, the “relevant border” for determining whether there was an export subsidy on Airbus fuselages was the border between Germany and France and not the one between the Community and its co-contracting parties to the Subsidies Agreement’. It is less clear how this second issue, at least, would be affected by a competence clause. On the issue generally see also Allan Rosas, ‘The European Union and Mixed Agreements’ in Alan Dashwood (ed), EC External Relations Law: New Perspectives, Sweet & Maxwell, London, 2000, at 216.

487 The question which one of these parties is responsible has nothing to do with any ‘manifest violation’ internal rules; indeed, this question will only arise if neither the Community nor the Member States wish to be held responsible for the agreement.

488 In Black’s Law Dictionary, 1999 joint liability is defined as liability shared by two or more parties; several liability as liability that is separate and distinct from another’s liability, so that the plaintiff may bring a separate action against one defendant without joining the other liable parties; and joint and several liability (known as solidary liability in civil law) as liability that may be apportioned either among the parties at the discretion of the claimant, with the result that each liable party is then individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties. In Certain Phosphate Lands in Nauru (Nauru/Australia), [1992] ICJ Rep 240 (26 Jun), the International Court of Justice held that, in international law, joint liability does not require all parties to be joined in an action (ibid). For a discussion of the law prior to this case, see John E Noyes and Brendan D Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 Yale Journal of

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of these parties will necessarily be held responsible in any given case, although the presumption in favour of such a result is far stronger in the case where the Community and the Member States are considered jointly to be a ‘party’ to the agreement without any stipulation that they are bound ‘in accordance with their respective powers’. This issue will depend on a determination, in accordance with the rules governing the interpretation of treaties, of the meaning of the clause itself.

International Law 225. Christian Tomuschat, ‘Liability for Mixed Agreements’ in David O’Keeffe and Henry G Schermers (ed), Mixed Agreements, Kluwer Law and Taxation, Deventer, 1983, at 131, states that the proposition of joint liability ‘only means that third States could eventually address claims to the Community as such, while internally the distribution of powers would in no way be affected’. Potentially, this is true, but it by no means follows necessarily from the concept of joint liability.

489 In Certain Phosphate Lands in Nauru (Nauru/Australia), [1992] ICJ Rep 240 (26 Jun), the International Court of Justice indicated that in a case of joint liability the parties will be responsible for an equal share of the damage, while in a case of joint and several liability any one of the parties is potentially liable for the whole (at para 48). Albert Bleckmann, ‘Der gemischte Vertrag im Europarecht’ (1976) 11 Europarecht 301, at 311, and Hans Krück, Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaft, 1977, at 142 and 172 (both cited for this in Giorgio Gaja, ‘The European Community’s Rights and Obligations Under Mixed Agreements’ in David O’Keeffe and Henry G Schermers (ed), Mixed Agreements, Kluwer Law and Taxation, Deventer, 1983, at 135 n 8) propose that a third country could request the Community to fulfil an obligation under a mixed agreement in matters pertaining to the Member States’ competence only if these failed to do their part. Gaja (ibid) correctly points out that this view is inconsistent with the view that mixed agreements generally impose obligations on both the Community and its Member States under all their provisions. In addition, however, it is not true that the Community and the Member States are necessarily responsible under every type of mixed agreement for the performance of all obligations in that agreement.
The Vienna Convention does not specifically regulate competences clauses, although two provisions of the Convention come close. The first of these is Article 17, the first paragraph of which provides that:

Without prejudice to Articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits, or if the contracting States and contracting organizations or, as the case may be, the contracting organizations so agree.\textsuperscript{490}

This provision allows for a limitation on a party’s consent to be bound by reference to particular treaty provisions, rather than to a party’s powers in terms of its internal law. It does not therefore apply directly to clauses in which the parties agree that they will be bound only to the extent that this is permitted by their internal law.

Another possibility would be to see competence clauses as a type of mutual reservation. Article 2(d) of the 1986 Vienna Convention provides that:

‘reservation’ means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization.\textsuperscript{491}

\footnotetext[490]{Emphasis added.}

\footnotetext[491]{Article 19 provides that ‘[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty;}

\textit{Footnote continued}
Again, this does not, strictly speaking, apply to a mutually agreed treaty provision with the effect of 'modifying the legal effect of certain provisions of the treaty in their application to that ... organization', but otherwise it seems to be the preferable of the two analogies. One minor point should however be noted, which is that, because of their unilateral character, reservations are not necessarily interpreted in precisely the same way as treaty provisions. The International Court of Justice has said in this regard that:

The Court will ... interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.492

It may be significant that the Court refrained from referring specifically to Articles 31 and 32 of the Vienna Convention, which set out rules governing the interpretation of treaties. These provisions set out similar rules to those in this paragraph, but they place more emphasis on the text of the agreement than on other means of divining the intention of the parties. In particular, under Article 32, 'an examination of evidence regarding the circumstances of its preparation

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty'.

and the purposes intended to be served' is reserved only for ambiguous cases or
to confirm an interpretation reached under Article 31. In this respect, the method
used to interpret a competence clause will be more similar to that used to
interpret a provision authorised under Article 17. Such a provision will be
interpreted in accordance with these normal rules of treaty interpretation, both in
determining whether the treaty has permitted the relevant limitation of consent to
be bound, and in deciding the extent to which the parties have agreed to limit
their consent to be bound by particular provisions of the treaty. For present
purposes, however, the important point is that even on the analogy of a
reservation, and certainly on the analogy of a mutually agreement expressing
partial consent to be bound under Article 17, a competence clause will not be
interpreted according to the 'manifest violation' standard applicable to situations
falling under Article 46.493

493 See, contra, Albert Bleckmann, 'The Mixed Agreements of the EEC in Public International
Law' in David O'Keeffe and Henry G Schermers (ed), Mixed Agreements, Kluwer Law and
Taxation, Deventer, 1983, at 161, who states that the manifestly evident test relevant in
determining the nullity of treaties under Article 46 should also be relevant in the interpretation of
treaties. A separate question is the extent to which Community law will be relevant in
determining the parties' competences under the clause. If Community law is treated as
international law, it may be interpreted as law by an international tribunal. On the other hand, if
– as is more likely – it is treated as municipal law, it will be treated as fact. In Case Concerning
Certain German Interests in Polish Upper Silesia, [1926] PCIJ Ser A, No 7 (1926), at p 19, the
Permanent Court of International Justice stated that '[f]rom the standpoint of International Law
and of the Court which is its organ, municipal laws are merely facts which express the will and
constitute the activities of States, in the same manner as do legal decisions and administrative
measures. The Court is certainly not called upon to interpret the Polish law as such; but there is
nothing to prevent the Court's giving judgment on the question whether or not, in applying that
law, Poland is acting in conformity with its obligations towards Germany under the Geneva

Footnote continued
In *Parliament v Council*, an issue arose as to the respective responsibilities of the Community and the Member States in the context of the Lomé IV Convention, which was concluded jointly by the parties but (as with its successor, the Cotonou Agreement)\(^4\) without a clause expressly purporting to limit their responsibilities. Article 1 of this Convention stated that:

> The Community and its Member States, of the one part, and the ACP States, of the other part (hereinafter referred to as the Contracting Parties), hereby conclude this cooperation Convention in order to promote and expedite the economic, cultural and social development of the ACP States and to consolidate and diversify their relations in a spirit of solidarity and mutual interest.\(^5\)

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\(^4\) S \(\)ee\(^\)s\(\) \(\)en\(\)485.\(^\) See \(\)n 485.

\(^5\) Interestingly, this provision was subject to two unilateral declarations in the area of shipping. Annex XVII of the Convention stated, with respect to provisions on shipping, that: ‘[t]he Community and its Member States interpret the expression ‘Contracting Parties’ as meaning on the one hand the Community and the Member States, or the Community, or the Member States, and on the other, the ACP States. The meaning to be attributed to this expression in each case is to be deduced from the relevant provisions of the Convention and from the corresponding provisions of the Treaty establishing the European Economic Community’. The same Annex contained a unilateral declaration by the ACP States providing that: ‘[t]he above declaration by the Community shall not prejudice the provisions of Article 1 of the Convention concerning the definition of Contracting Parties’.
Advocate General Jacobs described the position under the agreement as follows:

The [Lomé IV] Convention was concluded as a mixed agreement (ie by the Community and its Member States jointly) and has essentially a bilateral character. This is made clear in Article 1, which states that the Convention is concluded between the Community and its Member States, of the one part, and the ACP States, of the other part. Under a mixed agreement the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion.496

This opinion was broadly confirmed by the Court, which stated that:

The Convention was concluded, according to its preamble and Article 1, by the Community and its Member States of the one part and the ACP States of the other part. It established an essentially bilateral ACP-EEC cooperation. In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.497


Most commentators similarly take the view that, in the absence of a statement on competences, the Community and the Member States are jointly responsible for the performance of all of the obligations in mixed agreements. In the words of Giorgio Gaja:

When the agreement does not provide, directly or indirectly, for a distinction between the Community’s and the Member States’ rights and obligations, or when the criteria set out for the distinction cannot lead to a solution, the Community’s and the Member States’ obligations and rights must be taken with regard to the non-member State as an undivided whole. This implies that for the other Contracting State it is a matter of indifference whether an obligation is fulfilled, or a right is exerted, by the Community or one of its Member States. Hence, also an increase of Community competence in pursuance of rules pertaining to Community law would not give rise to any problem. On the other hand, if an obligation under the agreement is not fulfilled, the Contracting State which is affected by the breach may invoke reciprocity against both the Community and its Member States. Breach of the agreement on the part of the Community and the Member States causes joint responsibility.498


Footnote continued
By contrast, an entirely different view of the issue was taken by the Advocate General in *Commission v Ireland*, which – unlike the Lomé Convention – involved a competence clause referring expressly to the parties’ consent to be bound by the agreement. This case concerned the Protocol to the EEA Agreement on intellectual property. Relevantly, Article 2(c) of the EEA Agreement provides that:

the term ‘Contracting Parties’ means, concerning the Community and the EC Member States, the Community and the EC Member States, or the Community, or the EC Member States. The meaning to be attributed to this expression in each case is to be deduced from the relevant provisions of this Agreement and from the respective competences of the Community and the EC Member States as they follow from the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community.  

This is confirmed by Article 9 of the protocol, which states that:

The provisions of this Protocol shall be without prejudice to the competence of the Community and of its Member States in matters of intellectual property.  

Principle of Bindingness’ in Martti Koskenniemi (ed), *International Law Aspects of the European Union*, 1998 (speaking of ‘incomplete mixed agreements’ where only some Member States are party to the agreement). See also n 496 and n 510 for a criticism of the more limited view taken by Martin Björklund, ‘Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?’ (2001) 70 *Nordic Journal of International Law* 373.


The question at issue in this case was whether the Commission was entitled to take proceedings against Ireland under Article 226 for its failure to implement its obligations under a Protocol to the EEA Agreement by not adhering to a further agreement (the Berne Convention). This Convention concerns the area of intellectual property, an area in which the Community had only partial legislative competence.

The Commission only has the power to enforce the Community obligations of the Member States, so the preliminary question was posed whether the obligation under the EEA Agreement was a 'Community obligation'. The Court resolved this question not by assessing the Community's obligations under the agreement, but rather in terms of the scope of the Community's powers under Community law. Regardless of the fact that the Community only has limited competences in

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501 Article 226 provides that: '[i]f the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations'. See also Case C-61/94, Commission v Germany (International Dairy Agreement) [1996] ECR I-4006, at para 15, where the Court agreed with the Commission, acting under Article 226, that Germany had failed to comply with the International Dairy Agreement (a plurilateral and now defunct agreement in the framework of GATT). See also Christiaan Timmermans, 'The EU and International Public Law' (1999) 4 EFAR 181, stating at 192-3 that 'the Commission can always sue a Member State, under the infringement procedure of Article 169 EC Treaty [now Article 226], in case of violation by that Member State of an obligation under international law by which the Community is bound. That possibility exists even when the relevant rule of international law lacks direct effect ... [O]therwise the Community, which will be held responsible under international law for such violation by a Member State, would be disarmed, or at least have no legal action available to bring that Member State to Court'; see also I Macleod, I D Hendry and Stephen Hyett, The External Relations of the European Communities, Clarendon, Oxford, 1996 at 128.

502 Case C-13/00, Commission v Ireland [2001] ECR I-0000.

503 The issue of 'Community obligations' is addressed at pp 262 to 277.
the field of intellectual property, the Court determined that the relevant provisions 'cover an area which comes in large measure within the scope of Community competence' and that 'there is a Community interest in ensuring that all Contracting Parties to the EEA Agreement adhere to [the Berne] Convention'. On the first of these points (the Court did not elaborate on the second), the Court referred to its dictum in Demirel that provisions of mixed agreements coming within the scope of Community competence have the same status in the Community legal order as purely Community agreements. Consequently, it held that the Member States were under a Community obligation, enforceable by the Commission, to adhere to the Berne Convention.

The Advocate General took a different approach to the problem. For him, the important issue was twofold: first, whether a failure to adhere to the Berne Convention would affect Community rules — which may be distinguished from

504 Case C-13/00, Commission v Ireland [2001] ECR I-0000, para 16.
505 Ibid, para 19.
506 Ibid, para 14. Though English was the original language of the case, the text of the decision is unclear on this important point. The Court said as follows: '[the Court has ruled that mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements, as these are provisions coming within the scope of Community competence (see, to that effect, Case 12/86 Demirel [1987] ECR 3719, paragraph 9)'. From other language versions of the case, it is clear that the Court intended to mean where these provisions come within the scope of Community competence. The German version, for instance, says: Der Gerichtshof hat entschieden, dass gemischte Abkommen, die von der Gemeinschaft, ihren Mitgliedstaaten und Drittländern abgeschlossen wurden, in der Gemeinschaftsrechtsordnung denselben Status wie rein gemeinschaftsrechtliche Abkommen haben, soweit es um Bestimmungen geht, die in die Zuständigkeit der Gemeinschaft fallen' (emphasis added).
507 Ibid, para 20.
the Court's reference to Community powers – and second, whether Community was itself under an obligation under the agreement to ensure adherence by the Member States to the Berne Convention. The Advocate General held in favour of the Commission on the first issue, but rejected its arguments on the second, which is the issue that is presently of relevance. As far as this was concerned, he said that:

It does not appear certain to me ... that the simple fact that the respective obligations of the Community and the Member States to the other Contracting Parties have not been defined enables the latter to infer that the Community assumes responsibility for fulfilment of the whole of the agreement in question, including those provisions which do not fall within its competence. On the contrary, the very fact that the Community and its Member States had recourse to the formula of a mixed agreement announces to non-member countries that that agreement does not fall wholly within the competence of the Community and that, consequently, the Community is, a priori, only assuming responsibility for those parts falling within its competence.  

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508 The Advocate General in Ibid reasoned as follows: ‘[48] It should be emphasised, as the Commission has done, that the Berne Convention is not divisible. A State cannot therefore adhere to it in part. Its adherence assumes, on the contrary, the acceptance of all of the obligations laid down by that Convention. It follows that if Community law requires that the Member States adhere, that can only be adherence to the Convention as a whole. [49] As has been noted, that Convention includes provisions which affect Community rules. [50] Accordingly, the obligation to adhere to the Paris Act of the Berne Convention laid down by the EEA Agreement should be regarded as an indivisible obligation to adhere to an agreement, various provisions of which affect Community rules. [51] It is necessarily therefore an obligation concerning the Member States' compliance with Community law and, as such, capable of forming the subject of an action for failure to fulfil obligations’.

This represents a problematic approach to the question of the international liabilities of the Community and the Member States under mixed agreements with a competence clause. In the first place, it is doubtful whether the competence clause does, as a matter of fact, 'announce' to the other parties that the Community lacks competence.\(^{510}\) It is well known that the use of the formula of mixed agreements are concluded for a variety of reasons having nothing at all

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\(^{510}\) The Advocate General's opinion is shared by Martin Björklund, 'Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?' (2001) 70 Nordic Journal of International Law 373, at 400, who states that '[t]he very fact of mixity itself should alert a non-member treaty party to the fact that some part of the agreement is *ultra vires* for either member state or Community. Hence the risk for some part of the agreement being manifestly *ultra vires* could even be heightened through mixity'. This reflects the Björklund's general scepticism as to the joint liability thesis, which he considers should 'be applied only when specifically provided for in agreements and thereby agreed to by the member states' (at 401). His concern is that 'joint liability means that the non-member treaty party would always be free to engage the member state directly, ie, the Community could be bypassed as a legal actor on the international scene. In a sense automatic and direct liability of member states could deprive the organisation of any independent international personality' (at 396). It might be commented that throughout his article Björklund confuses joint liability with joint and several liability (see especially his definition of 'joint liability' at 386 n 52). One significant difference is that in the case of joint liability, the 'guilty' parties are responsible only for their share, while in the case of joint and several liability each 'guilty' party is potentially liable for the whole (see also n 489). In itself, therefore, the concept of joint liability has the potential for limiting the responsibility of the Member States. More problematic, however, is Björklund's conclusion that the onus should be on the third party to determine the division of competences, which he does by finding a 'duty', implied in Article 46(2) of the Vienna Convention, on the part of the innocent party to inform itself of the division of competences (at 401). This is a counterintuitive reading of this provision, the entire point of which is to absolve a third party of having to perform such an investigation. In any case, for the reasons explained in the above text, Article 46 is not relevant to cases of mixed agreements with competence clauses.
to do with competence.\textsuperscript{511} It could well be argued, on the contrary, that a competence clause ‘announces’ to the third party precisely the opposite, namely, that the issue of responsibilities will be decided internally.\textsuperscript{512} The real problem with this Opinion, however, is its emphasis on what is ‘announced’ to the other parties. This language seems to be influenced by the rules governing declarations of a manifest lack of competence under Article 46 of the Vienna Convention. As we have seen, however, Article 46 is irrelevant to cases in which the joint liability of the Community and the Member States is expressed by means of a clause under which they both constitute one ‘party’ to the

\textsuperscript{511} Mixed agreements have been concluded where competence issues are unclear and it is undesirable to have the matter resolved by reference to the Court under Article 300(6) (Ehlermann, ‘Mixed Agreements,’ n 346, at 78). In addition, Member States have joined agreements where they have a role in financing the budget (Moshe Kaniel, The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act, Kluwer Law International, The Hague/London/Boston, 1996, at 150), for reasons of visibility and prestige or to preserve a veto power (Ehlermann, ‘Mixed Agreements,’ n 346, at 6; Allan Rosas, ‘The European Union and Mixed Agreements’ in Alan Dashwood (ed), EC External Relations Law: New Perspectives, Sweet & Maxwell, London, 2000, at 201-2) and, in the case of participation in international organisations, to ensure that the Community possesses the full number of votes of its Member States (Ehlermann, ‘Mixed Agreements,’ n 346, at 6-7; Moshe Kaniel, The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act, Kluwer Law International, The Hague/London/Boston, 1996, at 151). Note, however, that despite his references to many other reasons for concluding mixed agreements, Ehlermann, ‘Mixed Agreements,’ n 346, at 11, still states that ‘Community participation through the mixed agreement formula implies that the Community cannot become a contracting party for all matters covered by the agreement’.

\textsuperscript{512} See Klaus D Stein, Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft, Duncker & Humblot, Berlin, 1986, at 127, stating that competence clauses in mixed agreements enhance the trust of the third party that the other contracting parties are competent with respect to the rights and obligations in an agreement.
This is also not changed by the fact that Article 9 states that ‘[t]he provisions of this Protocol shall be without prejudice to the competence of the Community and of its Member States in matters of intellectual property.’ This provision must be understood as meaning ‘without prejudice to the division of competences between the Community and of its Member States in matters of intellectual property’. It is obvious, in other words, that the Protocol was concluded on the basis that one or other of the parties would have to perform the agreement: the only question is which one.

The fact that the question of the respective responsibilities of the Community and its Member States falls to be determined in terms of the treaty itself, with at most only secondary reference to the relevant instruments establishing the powers of the Community and the Member States, has important consequences for the Community legal order, as it entails the possibility that either of these parties can be placed in the position of having to perform obligations for which it has no legislative power under Community law. It is therefore somewhat regrettable that the European Court of Justice has done its best to evade the question of the Community’s responsibility under mixed agreements.

In Commission v Ireland, the Court treated the question of the Community obligations of the Member States under an international agreement in terms of

513 See p 238.
the Community's powers under Community law.\textsuperscript{515} As we will see below, this largely misses the point of these obligations, which is to enable the Community to discharge its international responsibilities, not to assist the Community to exercise its powers internationally.\textsuperscript{516} On the other hand, the Court's reference to the 'Community interest in ensuring that all Contracting Parties to the EEA Agreement adhere to [the Berne] Convention' may represent at least a partial recognition of this rationale of the Community obligations.

The Court also managed to evade the issue in Opinion 1/94, which concerned the WTO agreements.\textsuperscript{517} In this case, the Court recognised the problem of 'shared competences' and noted that 'it is essential to ensure close co-operation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.'\textsuperscript{518} Despite the language of 'fulfilment of commitments,' it is evident from the context of that remark that the duty of cooperation was being applied to the

\textsuperscript{515} Case C-13/00, Commission \textit{v} Ireland [2002] ECR I-0000.

\textsuperscript{516} See p 262 f.


\textsuperscript{518} Ibid, par 108, citing Ruling 1/78, [1978] ECR 2151 and Opinion 2/91, [1993] ECR I-1061. The duty to cooperate 'flows from the requirement of unity in the international representation of the Community' (Opinion 2/00, [2001] ECR I-0000, at para 18), and finds application in cases where the provisions of mixed agreement may only be implemented partly by the Member States and partly by the Community. As far as the source of this duty, it is generally cited in connection with Article 10 EC, though it has been argued by Joni Heliskoski, 'Should There Be a New Article on External Relations? Opinion 1/94 "Duty of Cooperation" in the Light of the Constitutive Treaties' in Martti Koskenniemi (ed), \textit{International Law Aspects of the European Union}, 1998, at 278, that this provision is not an adequate source for the obligation. In Opinion 1/94, [1994] ECR I-5267, the Court referred to the duty without reference to Article 10.
exercise of rights under the agreement rather than to the fulfilment of obligations under the agreement. The Court made this observation in ‘response to [the] concern’ that ‘the Member States will, in the context of the WTO, undoubtedly seek to express their views individually on matters falling within

519 In Ruling 1/78, [1978] ECR 2151, at para 33, the Court considered that unilateral action by the Member States would have violated the duty insofar as it would have ‘call[ed] in question certain of the essential functions of the Community and in addition ... affect[ed] detrimentally its independent action in external relations’. In Case C-25/94, Commission v Council (FAO) [1996] ECR I-1469, the Court considered the Council to have violated the duty of cooperation by granting voting rights to the Member States in an area of exclusive competence. In this respect, one may consider as an example of this ‘duty of cooperation’ the Internal Agreement Between the Representatives of the Governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement [2000] OJ L317/376. For a discussion, see Allan Rosas, ‘Mixed Union – Mixed Agreements’ in Martti Koskenniemi (ed), International Law Aspects of the European Union, 1998 at 136; similarly, Allan Rosas, ‘The European Union and Mixed Agreements’ in Alan Dashwood (ed), EC External Relations Law: New Perspectives, Sweet & Maxwell, London, 2000, at 209.

520 See on this Joni Heliskoski, ‘The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements’ (2000) 69 Nordic Journal of International Law 395, at 411, stating that ‘[i]t is often forgotten that the Treaty’s objectives are pursued not only through the attribution of competence upon the Community but also through the Community obligations of the Member States and that the scope of the Community’s competence may not be the same as the scope of the Member States’ obligations under Community law. Should this be otherwise, that is, should the Member States only have obligations in areas where the Community has competence, the meaning of the basic principle of the duty of cooperation between the Member States and the institutions of the Community, would certainly become difficult to grasp. If, on the other hand, appropriate attention were paid to the Community obligations of the Member States, one would have a mechanism for dealing with any prejudice the Community might suffer as a result of actions by the Member States, under the rules on international responsibility or otherwise, without there being any need to extend the Court’s jurisdiction under Article 234 of the Treaty to areas of Member State competence’ (emphasis added).
their competence whenever no consensus has been found." It further noted that the Member States and the Community may wish to impose countermeasures against another WTO Member in a sector in which they respectively lack competence ("cross-retaliation"). Given this, it is striking that the Court failed to address the corollary possibility that the Community might itself be subject to retaliatory countermeasures for a breach of obligations committed by a Member State, and vice versa. This can only have been out of a desire to avoid the issue of the respective liabilities of the Community and the Member States under the WTO agreements.

There is one situation, however, when the Court has directly addressed the problem that the Community may be held liable under international agreements in areas in which it lacks competence, namely, when this is able to be determined by a judicial tribunal. In Opinion 1/91 the Court said that:

> An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created by such an agreement as regards the interpretation and application of its provisions.

In practice, however, as that same case demonstrated, the matter is not so simple. In this case, the Court denied the Community the power to accede to the

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522 Ibid, para 109.
proposed EEA Agreement on the grounds that the EEA Court that would have been established under that Agreement would have been in a position to determine the proper demarcation of powers between the Community and its Member States under a competence clause that was, interestingly, identical to that at issue in *Commission v Ireland*.\(^{524}\) The Court expressed the problem as follows:

> The expression 'Contracting Parties' is defined in Article 2(c) of the agreement. As far as the Community and its Member States are concerned, it covers the Community and the Member States, or the Community, or the Member States, depending on the case. Which of the three possibilities is to be chosen is to be deduced in each case from the relevant provisions of the agreement and from the respective competences of the Community and the Member States as they follow from the EEC Treaty and the ECSC Treaty.\(^{525}\)

(This expression of the situation, undoubtedly correct, is quite different from the approach of the Advocate General in *Commission v Ireland*.) The Court continued by saying as follows:

> This means that, when a dispute relating to the interpretation or application of one or more provisions of the agreement is brought before it, the EEA Court may be called upon to interpret the expression 'Contracting Party', within the meaning of Article 2(c) of the agreement, in order to determine whether, for the purposes of the provision at issue, the expression 'Contracting Party' means the

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\(^{524}\) See p 246.

Community, the Community and the Member States, or simply the Member States. Consequently, the EEA Court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement.

It follows that the jurisdiction conferred on the EEA Court under article 2(c), Article 96(1)(a) and Article 117(1) of the agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties, and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 [now Article 220] of the EEC Treaty. ...526

Except for the reference to the exclusive jurisdiction of the Court of Justice, this follows perfectly from the above analysis. As the Court recognises, under the EEA Agreement (as under any mixed agreement), the Community and the Member States could be placed in the position of having to implement obligations in areas in which they have no competence. If this affected large areas of Community law, as the Court noted in the context of describing the powers of the EEA Court, it is also understandable that this would adversely affect the autonomy of the Community legal order.527 But this result this springs primarily from the conclusion of the agreement itself, and only secondarily from

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526 Ibid, paras 34-5. Prefiguring this case by many years, this problem was noted by WH Balekjian, 'Mixed Agreements: Complementary and Concurrent Competences?' in David O’Keeffe and Henry G Schermers (ed), Mixed Agreements, Kluwer Law and Taxation, Deventer, 1983, at 146, with reference to the competence clause in Point 5 of Annex II to the association agreement with Greece. Balekjian specifically referred to a potential conflict with the Court’s duty under Article 220 to ensure that in the interpretation and application of the EC Treaty ‘the law is observed’.

the establishment of a body with jurisdiction to interpret the rules in that agreement. To this extent, the Court’s emphasis on its own jurisdiction seems misplaced.\textsuperscript{528} Its exclusive jurisdiction to interpret and apply Community law would remain, although the ‘Community law’ which it would be applying would now be subject to the rules set out in the EEA Agreement (as interpreted by the EEA Court). In itself, this is no different, however, from the effect on Community law of other agreements concluded by the Community. Moreover, the Court’s determination of the division of competences within Community law would remain unaffected.

In summary, there seem to have been two main features of the proposed EEA Agreement that were potentially problematic: first, that the body of primary obligations in this agreement largely overlapped with those of Community law,\textsuperscript{529}

\textsuperscript{528} René Barents, ‘The Court of Justice and the EEA Agreement: Between Constitutional Values and Political Realities’ (1992) \textit{Rivista di Diritto Europeo} 751, at 762, is quite wrong to say that ‘[t]he basic reason that the EEA-Agreement was held to be incompatible with Community law is that, by virtue of Article 228, second paragraph, the Court of Justice itself would have been obliged to interpret the provisions of EC law which correspond to those of the EEA agreement in the light of the objective of legal homogeneity in the EEA… As a result of this conditioning, the provisions of EC law on free movement and competition which, as the Court put it, constitute for the most part fundamental provisions of the Community legal order, would have to be interpreted in the light of the objectives of the EEA-agreement in order to attain homogeneity of law in the EEA’. For the European Court of Justice, the objectives of the EC Treaty will always rank higher in its interpretation of Community law than the objectives of other agreements, such as the EEA Agreement. For the purposes of interpreting Community law, the Court would have been bound to ignore the objectives of homogeneity in the EEA Agreement to the extent that these conflicted with the objectives of the EC Treaty.

and, combined with this, the fact that these obligations could be applied by a
court able to give precise rulings not only of these rules, but more importantly, of
the respective responsibilities of Community and its Member States to implement
these rules.\textsuperscript{530} It was these structural factors, rather than any question of
principle, that rendered the proposed EEA Agreement incompatible with the
autonomy of the Community legal order.\textsuperscript{531} By contrast, a question of principle
would have been one in which the relative hierarchy between an international
agreement and Community law was at stake.

\textsuperscript{530} Barbara Brandtner, 'The Drama of the EEA – Comments on Opinions 1/91 and 1/92' (1992)
3(2) \textit{EJIL} 300, at text to nn 84 and 85. Indeed, Brandtner postulates further that '[a]s all
international agreements would have fallen under the ECJ's exclusive interpretative jurisdiction,
neither the Community, nor its Member States could have submitted to any international Court or
Tribunal other than the ECJ itself, if this tribunal could deliver binding decisions concerning
(international) parts of the Community legal order'. She considers, however, that '[i]t is
improbable that the Court, in \textit{Opinion 1/91}, was aware of this interpretation's political
implications' (\textit{ibid, at n 91}).

\textsuperscript{531} The same combination of a body of law largely overlapping with Community law, together
with a tribunal with jurisdiction to determine the Community's responsibilities under that body of
law, can be seen in \textit{Opinion 2/94}, [1996] \textit{ECR} 1-1759, para 34; indeed, these two aspects are
expressly described as problematic in the Court's reference to 'the entry of the Community into a
distinct international institutional system as well as integration of all the provisions of the
Convention into the Community legal order' (see also p 146). But while the merely disjunctive
expression used by the Court hints that the two factors are independent, it follows from the
reasoning here that in fact they are not: it is the 'integration of all the provisions of the
Convention into the Community legal order' (in other words, the conclusion of an agreement in
an area largely overlapping with Community law) that makes the 'entry into a distinct
international system' (the Court) so problematic. The issue was not, for example, the potential
direct effect of these provisions, but rather the possibility that the Court could have made a
'wrong' determination of the Community's responsibilities under the Convention. This question
would have been determined as an issue of the Community's 'jurisdiction' under Article 1 of the
Convention.
In the absence of the combination of these two factors, the Court has had no difficulty with mixed agreements, despite the fact that, seen in terms of their primary obligations, the situation in relation to 'respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement' is identical to that in Opinion 1/91. This is perfectly demonstrated by the Court's approval, Opinion 1/92, of an agreement that was substantially the same as that in the former case, except that the dispute settlement rights of the other parties to the EEA Agreement had been significantly reduced. This result is not explicable on the basis that the new EEA agreement does not adversely affect the 'autonomy' of the Community legal order. As with other mixed agreements, it clearly does so, insofar as there is the potential for the Community or its Member States to be held responsible for obligations in areas in which they lack legislative competence. Rather, the

532 In Ruling 1/78, [1978] ECR 2151 at para 35, concerning the 1980 Convention on the Physical Protection of Nuclear Material, the Court said that '... it is not necessary to set out and determine, as regards other parties to the convention, the division of powers ... between the Community and the Member States, particularly as it may change in course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene'. It is relevant that while Article 17(2) of this Convention provided for recourse to arbitration or to the International Court of Justice in cases of disputes under the agreement, the Euratom Community issued a declaration stating that 'because under Article 34 of the Statute of the International Court of Justice only States may be parties in cases before the Court, it can only be bound by the arbitration procedure set out in Article 17(2)'. The Convention is available at www.iaea.or.at/worldatom/Documents/Infcircs/Others/inf274r1.shtml and the declaration at www.iaea.or.at/worldatom/Documents/Legal/cppn_reserv.pdf.

result can be explained by the absence of the combination of the factors of a large degree of overlap with Community law and the existence of a court with the power to determine the respective responsibilities of the Community and the Member States under the agreement. This also means, incidentally, that the Community continues to have the power to enter into mixed agreements along with the Member States, and it may subject itself to dispute resolution mechanisms under such agreements as long as these do not involve an area of law that largely overlaps with Community law. It may be on this basis that the Court's apparent tolerance for the WTO panel procedure can be explained, as well as its apparent approval of the arbitration procedures in other mixed agreements.

But regardless of whether or not an agreement establishes a tribunal, the underlying problem remains that in the event of a 'wrong' determination of the respective responsibility of the Community and its Member States by a treaty interpreter, the Community (and the Member States) may be liable to perform obligations in areas in which its has no legislative competence. In this event, the

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534 The Community does not exceed its competence by concluding a mixed agreement even where it becomes bound by provisions which it has no power to implement. See Giorgio Gaja, 'The European Community's Rights and Obligations Under Mixed Agreements' in David O'Keeffe and Henry G Schermers (ed), Mixed Agreements, Kluwer Law and Taxation, Deventer, 1983, at 137. Gaja also states (ibid) that '[a]n overstepping of competence on the part of the Community would on the contrary take place if the Community could stay, and stayed, as a Contracting Party after all its Member States withdrew, or if rights and obligations under the agreement also covered matters that were within the competence of a Member State which was not a Contracting State'. On this last point, see Lena Granvik, 'Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness' in Martti Koskenniemi (ed), International Law Aspects of the European Union, 1998.
situation is identical to that arising under pure Community agreements concluded *ultra vires*. The solution in both cases, it is suggested here, lies in the concept of the ‘Community obligations’ of the Member States under agreements concluded by the Community.

3. The ‘Community obligations’ of the Member States under international agreements

Article 300(7) EC provides that ‘[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States’. This provision was given an expansive reading in *Kupferberg*, where the Court said the following:

... in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-Member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the Agreement. That is why the provisions of such an agreement, as the Court has already stated in its Judgment of 30 April 1974 in Case 181/73 *Haegeman* [1974] ECR 449, form an integral part of the Community legal system.535

Leaving aside the Court’s reference to the obligation of the Member States to the non-Member country,536 what is relevant for present purposes is the reference to

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536 This was probably influenced by contemporary discussions on what became Article 36bis of the 1986 Vienna Convention. This provision stated that:

*Footnote continued*
Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:

(a) the States members of the organisation by virtue of the constituent instrument of that organisation or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and

(b) the consent of the States members of the organisation to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organisations.

Article 36bis was not finally adopted. In order to avoid the opposite result that the member states of an organisation would be considered unaffected third parties to a treaty concluded by the organisation, Article 74(3) provided that ‘[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party’. Whether or not Article 36bis, applied to Article 300 EC, would have meant that the Member States would have been liable directly to third parties is disputed. In favour of such a reading are Christine Chinkin, Third Parties in International Law, Oxford Monographs in International Law, Clarendon, Oxford, 1993, at 92-3 and Lena Granvik, 'Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness' in Martti Koskenniemi (ed), International Law Aspects of the European Union, 1998, at 263. Gravik also considers Article 300 to be an expression of consent ‘by any other means if so agreed’ under Article 11 of the Vienna Convention (ibid). Eric Stein, ‘External Relations of the European Community: Structure and Process’ in Academy of European Law (ed), Collected Courses of the Academy of European Law, Vol 1(1), Martinus Nijhoff, Dordrecht, 1991, at 168, adds that ‘whether or not one concludes that Article 228(2), as an exclusively internal rule, binds the Member States only vis-à-vis the Community, with the Community alone answering the non-Member State, the Member States would still be held subsidiarily liable under general international law for obligations undertaken by the Community’. More sceptical are Martin Björklund, ‘Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?’ (2001) 70 Nordic Journal of International Law 373 at 397 and Giorgio Gaja, ‘A “New” Vienna Convention for Treaties between States and International Organizations or between International Organizations: A Critical Commentary’ (1987) 58 BYIL 253, at 264.
Community'. In its particular context, this should not have been a controversial statement, given that Kupferberg concerned an *intra vires* pure Community agreement concluded on the basis of Article 133 and therefore wholly within the scope of Community law. What this passage does not answer, however, is the extent to which the Member States are under obligations in relation to *ultra vires* pure Community agreements and in relation to provisions of mixed agreements in areas within their own sphere of competence.

In all of the cases that have so far come before the Court on this point, the Member States have only been held bound by obligations in areas in which the Community not only *has* a legislative competence, but in which it has also *exercised* its legislative competence. This was expressed plainly in *Dior*, where the Court gave a relatively narrow interpretation of the effects on the Member States of the provisions of a mixed agreement, namely the TRIPs agreement. Answering the question whether a provision of that agreement had direct effect in the Community legal order, the Court said that:

... in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article
50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion.\textsuperscript{537}

It might appear that those cases concerning the obligations of the Member States under association agreements leads to a different conclusion, but a closer study reveals that this is not, in fact the case. These include the many cases in which the Member States have been held bound by obligations not to discriminate on the basis of nationality, even where the Community has not exercised any relevant powers under Article 12.\textsuperscript{538} They also include the case of Commission \textit{v} Ireland, which was discussed above.\textsuperscript{539} The explanation is each of these cases is that Article 310 incorporates the Community's legislative powers (including under Article 12) even where these powers have not been exercised. This follows from Demirel, in which the Court stated that:

Since freedom of movement for workers is, by virtue of Article 48 \textit{et seq} of the EEC Treaty [now Article 39], one of the fields covered by that Treaty, it follows that commitments regarding freedom of


\textsuperscript{539} Case C-13/00, Commission \textit{v} Ireland [2002] ECR 1-0000. See above at p 246. The EEA Agreement is an association agreement concluded on the basis of Article 310.
movement fall within the powers conferred on the Community by Article 238 [Article 310].

This was despite the fact that:

... in the field of freedom of movement for workers, as Community law now stands, it is for the Member States to lay down the rules which are necessary to give effect in their territory to the provisions of the agreement or the Decisions to be adopted by the Association Council.

Another way of putting this is to say that the Community’s powers under other provisions of the EC Treaty are deemed to have exercised by the exercise of powers under Article 310. Consequently, the provisions of these agreements that are within Community power constitute ‘Community law’, with all that entails, such as the application of the rule of consistent interpretation and the potential for the provisions to be granted direct effect. However, in terms of the original proposition, all that has so far been established is that a concrete exercise of

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541 Ibid, para 10.
542 Decisions under international agreements are considered to have a ‘direct connection’ to the agreements and are therefore an integral part of the Community legal system (Case 30/88, Greece v Commission [1989] ECR 3711) with the potential for direct effect (Case C-192/89, Sevince v Staatssecretaris van Justitie [1990] ECR I-3461, para 10). These decisions (and see also Case C-237/91, Kazim Kus v Landeshauptstadt Wiesbaden [1992] ECR I-6781) concerned mixed agreements concluded under Article 310. In Case C-124/95, Deutsche Shell AG v Hauptzollamt Hamburg-Harburg [1993] ECR I-363, at 17, the Court extended this reasoning to an agreement concluded on the basis of Article 133, and in Case C-1/96, R v Minister of Agriculture Fisheries and Food, ex parte Compassion in World Farming [1998] ECR 1-1251 (Opinion) at para 128, Advocate General Leger applied the doctrine to an agreement concluded on the basis of internal rules in the field of agriculture under Articles 37 and 94.
legislative power is required for a provision of a mixed agreement to constitute ‘Community law’. It remains to be seen whether the Member States are under a Community obligation in areas beyond the legislative power of the Community.

Some indication of a wider scope for Community obligations is found in the jurisprudence on the Court’s jurisdiction to interpret provisions of mixed agreements. It seems from this jurisprudence that the scope of this judicial power exceeds that of the Community’s legislative powers. In Dior, for instance, despite its narrow interpretation of the ‘scope of Community law’, the Court was careful to preserve a wide jurisdiction to interpret the provisions of the TRIPs agreement. It said that:

... where a case is brought before the Court in accordance with the provisions of the Treaty, in particular Article 177 thereof, the Court has jurisdiction to define the obligations which the Community has thereby assumed and, for that purpose, to interpret TRIPs.543

If one recalls that the Community’s international obligations may exceed its legislative powers, it is significant that the Court defines its powers in terms of

543 Joined Cases G300/98 and G392/98, Dior and Others [2000] ECR I-11307, para 33. A fortiori, this should put to rest the question whether in Case C-53/96, Hermès International v FHT Marketing BV [1998] ECR I-3603, the Court asserted jurisdiction over areas in which the Community has not yet exercised its powers. See Joni Heliskoski, ‘The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements’ (2000) 69 Nordic Journal of International Law 395, taking a narrow view on this point. Also relevant in this respect is Case C-13/00, Commission v Ireland [2002] ECR I-0000, discussed at p 246, in which the Court held that the Community obligations of the Member States were to be considered in terms of the scope of Community powers, regardless of whether these had been exercised in the form of Community rules.
these obligations (assuming this is the reference) and not in terms of the Community’s legislative competence.\textsuperscript{544} Furthermore, if the scope of the Court’s judicial powers does exceed the scope of the Community’s legislative powers, at least for the specific purpose of interpreting the Community’s international obligations, then it may be suggested that the same applies the Community obligations of the Member States under Article 300, subject to the same proviso regarding their limited purpose.\textsuperscript{545} In Kupferberg, it will be recalled, the Court

\textsuperscript{544} Ilona Cheyne, ‘Haegeman, Demirel and their Progeny’ in Alan Dashwood (ed), \textit{EC External Relations Law: New Perspectives}, Sweet & Maxwell, London, 2000, at 39, says that ‘the Court has jurisdiction to consider any international agreement binding on the Community’. Ehlermann, ‘Mixed Agreements,’ n 346, at 18-19, states that ‘the mixed agreement falls legally into two parts: the Community section which becomes part of the Community’s legal order and the Member States’ section which remains national law. … It follows that if the Court interprets a provision of a mixed agreement according to Article 177 of the EEC Treaty, it recognizes implicitly that the provision belongs to the Community part’. However, he continues (at 21) by saying that ‘one would have to recognize the right of the Community to take preventive steps against the Member State whose action risks engaging the Community’s responsibility. In other words, it would be unavoidable to allow the Community to use the infringement procedure in spite of the fact that the Member State acts within its sphere of competence’.

emphasised that these obligations exist for the specific purpose of enabling the Community to implement its international obligations:

... in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-Member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the Agreement. That is why the provisions of such an agreement, as the Court has already stated in its Judgment of 30 April 1974 in Case 181/73 Haegeman [1974] ECR 449, form an integral part of the Community legal system.546

In principle, it should not be controversial to draw an analytical distinction between the Community law obligations of the Member States and the scope of the legislative power of the Community. There are many other areas in which the Member States are under Community obligations but the Community has no legislative power. A prime example of such obligations are those of the Member States not to infringe the general principles of Community law regarding respect for fundamental rights. It has been argued earlier in this Part that the Community has no power, express or implied, to legislative with respect to fundamental rights, except for the very limited purpose of ensuring that its existing legislation remain in conformity with these principles. But it is also significant that in the ERT case, for instance, a Member State measure was held subject to fundamental rights obligations not on the grounds that it fell within the scope of Community legislative competence, but on the alternative grounds that it fell within an

express derogation from Community law.\textsuperscript{547} Similarly, the Member States' obligations not to infringe other freedoms and guarantees in the EC Treaty do not depend upon any legislative power of the Community to 'bring about' these freedoms and guarantees, but on the treaty text itself. Indeed, these legislative powers themselves depend upon the definition of the freedoms and guarantees in the treaty text. It is also worth noting Alan Dashwood's observation, from the somewhat larger perspective of the objectives pursued by the EC Treaty, that:

What I mean by "Community powers" are the authorisations the Treaty has given the institutions to do things. Discovering the limits of those authorisations is not the same as discovering the limits of the Treaty's scope of application. That is because the objectives of the Treaty are not exclusively pursued through actions of the Community institutions: the Member States, too, have a part to play through the observance of rules that require them sometimes to take action, but more often to refrain from exercising, or from exercising fully, powers that would normally be available to them as incidents of sovereignty. To put the point in Hohfeldian terms, duties or disabilities for the Member States do not imply correlative powers for the Community.\textsuperscript{548}

But even if it is accepted that the Community obligations of the Member States are independent of the scope of legislative power of the Community, it takes a further step to hold the Member States responsible to the Community in an area which is defined not as being with the scope of Community law, but rather in terms of the international responsibilities of the Community. This may seem a


\textsuperscript{548} Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 \textit{ELR} 113, at 114 (emphasis added).
large step, but it is suggested here that the step is perfectly justifiable if one sees the source of such a Community obligation as deriving directly from Article 300(7), which provides that '[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'.

It should be stressed that the nature of these obligations is relatively limited. They do not constitute ‘Community law’ in the same way as do the obligations derived from provisions in mixed agreements that are within the scope of Community law, defined in terms of an actual (Dior) or deemed (Demirel)

549 Compare Giorgio Gaja, ‘The European Community’s Rights and Obligations Under Mixed Agreements’ in David O’Keeffe and Henry G Schermers (ed), Mixed Agreements, Kluwer Law and Taxation, Deventer, 1983, at 140, who concludes that ‘the Community may be negatively affected by the failure on the part of one of its Member States, to fulfil one of its obligations under a mixed agreement – whenever the obligations pertaining to the Community and its Member States are part of an undivided whole, or there are two separate, but linked, sets of obligations. Under Community law, the Member States appear then to be under an obligation to respect the mixed agreement. This stems from the general obligation not ‘to jeopardise the attainment of the objectives’ of the EEC Treaty (Article 5, para 2) ... Consequently, the breach of an obligation under a mixed agreement committed by a Member State could lead to infringement proceedings initiated by the Commission’. The basis for the Community obligation suggested here is not Article 10 (ex Article 5) but rather Article 300. See, contra, Moshe Kaniel, The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act, Kluwer Law International, The Hague/London/Boston, 1996, at 156, who states that Article 300 cannot extend beyond the Community’s legislative power. Kaniel correctly states that the scope of the Court’s jurisdiction under Article 234 is distinct from the Community’s legislative power, but still conflates the scope of this legislative power with the liabilities incurred by the Member States directly under Article 300.
exercise of legislative power. Those obligations are to be treated as an integral part of ‘Community law’, with all the usual trappings, including the potential for direct effect. By contrast, the Community obligations of the Member States under Article 300 exist only in order to allow the Community to perform its international obligations. For this purpose, but this purpose only, these obligations not only come within the jurisdiction of the Court, but they are also enforceable by the Commission in the event that Member State action is required in order to the ensure that the Community fulfils its international obligations.

It is notable that the ‘scope of Community law’ for these purposes differs from that applicable in the fundamental rights jurisprudence. It does not include areas in which the Community has no legislative power, such as derogations. See p 205.

Note in this respect the observation of Ilona Cheyne, ‘Haegeman, Demiret and their Progeny’ in Alan Dashwood (ed), EC External Relations Law: New Perspectives, Sweet & Maxwell, London, 2000, at 25 n 39, as to the shift from the term ‘Community law’ in Haegeman to the term ‘Community legal system’ in Kupferberg.

See n 501. Allan Rosas, ‘The European Union and International Human Rights Instruments’ in Vincent Kronenberger (ed), The European Union and the International Legal Order: Discord or Harmony?, TMC Asser, The Hague, 2001, at 62 n 38, cites Article 300(7), and states that ‘[t]he Member States have thus an obligation ... also under the human rights clause, to respect democratic principles and fundamental human rights in general (and not only in the domain of Community law).’ According to the reasoning here, this goes too far. On the other hand, this marks a welcome change from the view that is common in discussions on the accession of the Community to the European Convention on Human Rights, which often ignore the question of the Community obligations of the Member States and the enforceability of these obligations by the Commission under Article 226. Even though the point was made in A G Toth, ‘The European Union and Human Rights: The Way Forward’ (1997) 34 CMLR 491; A G Toth, ‘Human Rights as General Principles of Law, in the Past and in the Future’ in Ulf Bemitz and Joakim Nergelius (ed), General Principles of European Community Law, Kluwer Law International, 2000 at 89, it has been almost deliberately ignored. No mention is made of Toth’s observation in Anthony Arnull, ‘Left To Its Own Devices? Opinion 2/94 and the Protection of Fundamental Rights in the European Union’ in Alan Dashwood (ed), EC External Relations Law: New Perspectives, Sweet

Footnote continued
This can explain the situation under mixed agreements, but it is still necessary to consider one particular objection to the application of this reasoning to *ultra vires* pure Community agreements. The objection is that these agreements are not included among the international agreements accorded binding effect under Article 300(7). 553 The argument is based on the fact that this provision (which states that '[a]greements concluded under the conditions set out in this Article') is restricted to agreements complying with the procedural 'conditions' set out in Article 300(1) to (5). Consequently, it is argued, where these procedural conditions are not met, Article 300(7) does not apply and the agreements are not binding on the Community or its Member States.

The counter-argument is that this is too limited a reading of the term 'conditions'. If one sees Article 300(7) in its context, it becomes apparent that these 'conditions' also include the immediately preceding Article 300(6), which provides that:

The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is

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compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.

This provision establishes a mechanism, available to the various institutions that would be bound by an ultra vires agreement under Article 300(7), to ‘forestall’ such agreements being concluded. It follows that, if these institutions fail to exercise their right to resort to the procedure under Article 300(6), they cannot later recover the situation by a declaration that the agreement is invalid. As the Court said in Opinion 2/00,

Invalidation of the measure concluding the agreement because of an error as to its legal basis is liable to create, both at Community level and in the international legal order, complications which the special procedure of a prior reference to the Court, laid down in Article 300(6) EC, is specifically designed to forestall.554

The Court’s reference in this provision to complications ‘at Community level’ is also a specific indication of the fact that ultra vires agreements continue to have some legal effect in the Community legal order. This is also confirmed by Opinion 3/94, in which the Court held that it was unnecessary to comply with a request for an opinion where the international treaty had already been concluded, on the grounds that a negative opinion, if any, would not have the legal consequences provided for in Article 300(6).555

In addition, it is arguable that a declaration of the invalidity of the decision concluding an agreement would not necessarily affect the status of such agreements in the Community legal order even as a matter of Community law. It seems that international agreements become binding on the Community by virtue of their status as international agreements to which the Community is a party, not because of any act of incorporation.\(^5\)\(^6\) Seen in this light, the decisions approving the agreements are only an acknowledgement that the agreements are binding on the Community, and are not an act of incorporation as such.\(^5\)\(^7\) This interpretation is supported by the wording of Article 300(7), which refers specifically to the binding nature of the 'agreements' themselves and also by the fact that, in practice, the Court focuses on the date of entry into force of the agreement under


\(^5\)\(^7\) Hartley, 'International Agreements and the Community Legal System' (1983) 8 ELR 383, at 390-1; T C Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 Law Quarterly Review 95, at 99; cited also by Ilona Cheyne, 'International Instruments as a Source of Community Law' in Alan Dashwood (ed), EC External Relations Law: New Perspectives, Sweet & Maxwell, London, 2000, at 257. According to Anne Peters, 'The Position of International Law Within the European Community Legal Order' (1997) 40 GYIL 10, at 22, until 1969 this Community act took the form of a Council resolution; later it adopted regulations with the text of the agreements as an annex; and more recently the practice returned to a resolution with the agreements as an annex. More recently still, the practice appears to be a decision with the agreements as an annex. In its consideration of international agreements, the Court has placed no importance on the type of act used to adopt the agreement.
international law, not on the date of the Community act concluding the agreement.\textsuperscript{558}

The better view is therefore that, as Pieter Jan Kuijper has said:

it is ... incorrect to take the view that the treaty can no longer have effects under internal Community law (because its conclusion has been declared void), while it continues to have effect under international law. Insofar as acts under national or Community law are necessary in order to carry out the international obligations under the treaty, such acts and the laws or regulations on which they are based remain valid, or at least continue to have legal effect under internal law.\textsuperscript{559}

It is perhaps also somewhat telling that even Macleod, Hendry and Hyett, who deny that the Member States bear any Community obligations under \textit{ultra vires} agreements,\textsuperscript{560} accept on some unspecified basis that '[t]he Community institutions and the Member States would ... have to take steps to align the internal and external effects of the agreement ...'.\textsuperscript{561} The basis for such action, it is here suggested, is the continuing validity of the agreement as a Community

\textsuperscript{558} Anne Peters, 'The Position of International Law Within the European Community Legal Order' (1997) 40 \textit{GYIL} 10, at 28.


\textsuperscript{560} I Macleod, I D Hendry and Stephen Hyett, \textit{The External Relations of the European Communities}, Clarendon, Oxford, 1996, at 131-2 ('... it is difficult to see how the institutions and the Member States could be obliged as a matter of Community law to give effect to an agreement which was outside the Community's powers, or which had been concluded in breach of fundamental principles of Community law').

\textsuperscript{561} \textit{Ibid}, at 132.
obligation designed to ensures that the Community is able to perform its international obligations.

G. Conclusion

This leads to the following general conclusions. First of all, there is no foundation to the view of the Council that the Community necessarily possesses the power to suspend agreements which it has concluded. On the contrary, it can only do so in accordance with the normal rules governing the choice of legal basis for measures, having regard to their aim and content. Nor is this conclusion affected by Article 300(2)(2), which merely establishes a limited procedural derogation, affecting the ordinary rights of the Parliament, in cases where an agreement needs to be suspended in a case of special urgency. This provision does not have the additional effect of allowing the Community to suspend agreements for any reason whatsoever.

It was also established that the Community has no legislative power to enact rules on human rights, either under any express powers in the teaty, or — significantly — under the implied power in Article 308. This was because, despite arguments to the contrary, the protection of human rights is not one of the ‘Community objectives’ required for the application of that provision. On the other hand, the Community does have a subsidiary implied power independent of Article 308, which entitles it to take measures designed to ensure that legislation enacted intra vires complies with general principles of Community law, including especially those regarding respect for human rights. On this basis, the Community has, provisionally, the power to include a human rights clause in its international agreements, as such clauses are, at least in part, designed to give
effect at the international level to this domestic obligation regarding the legality of Community acts.

Another conclusion concerns the question whether the Community has any legislative powers (the subsidiary implied power being of no application in this regard) to enact measures under the human rights clause with the aim of enforcing the human rights obligations of another country. This is different from the Community’s interest (and, domestically, obligation) in ensuring that its own policies, including external policies, do not involve a violation of human rights norms. In this respect, it seems that while the Community lacks any independent power to impose countermeasures to protect rights in areas in which it lacks legislative power (or which do not concern its international legal personality under Article 210), it does indeed have numerous powers on the basis of which such measures might be authorised. These include primarily Article 301, which entitles the Community to impose sanctions on other countries following a prior CFSP decision under the Treaty on European Union, Article 179, which entitles the Community to take measures to protect human rights in the field of development cooperation, and Article 13, which entitles the Community to take measures to combat discrimination. By contrast, a number of other provisions commonly cited for this purpose are unavailable. This applies in particular to Article 133, which no longer authorises measures without a trade purpose, Article 308, which depends upon Community objectives with a domestic character and Article 310, which incorporates all of the other powers of the Community, both exercised and unexercised, but does not extend beyond these powers.
The foregoing conclusion as to the powers of the Community to include a human rights clause in its agreements is, however, subject to the question whether it has any power to bind itself to the obligations established under the human rights clause. In this respect, it must be recalled that the human rights clause does not merely establish conditions on the legality of Community acts otherwise within the scope of its legislative power; rather, they impose positive obligations on the parties to ensure the respect for human rights in those areas in which they are responsible under the agreement. Furthermore, by analogy with the responsibility of a contacting party to the European Convention on Human Rights to ensure the respect for human rights in areas within its 'jurisdiction', it seems that there are many aspects of Community law which could potentially be in violation of human rights obligations but in respect of which the Community possesses no legislative power of repeal. This includes the primary law of the Community, including the decisions of the European Court of Justice, as well as measures taken by the Member States in their exclusive areas of competence. Consequently, even given the Community's subsidiary implied power to ensure that its acts comply with human rights conditions, in principle the Community is unable to perform any comprehensive obligations in the field of human rights. The remaining question was whether the Community is fully responsible to perform the obligations binding on under the human rights clause.

The starting point for this investigation is the rule expressed in Article 46 of the 1986 Vienna Convention on the Law of Treaties that States and international organisations are bound by agreements to which they have given their consent, subject only to cases where this consent has been given in manifest violation of their internal rules. Applying this test to the agreements containing a human
rights clause, it is self-evident that no such manifest violation will be made out. Indeed, even if it could, the Community’s frequent assertions of human rights competences in the external sphere would trigger the operation of Article 45, which represents a rule of estoppel preventing recourse to Article 46 in such cases.

It follows from this that the Community is unable to perform its obligations under the human rights clause in relation to pure Community agreements. With the exception of the possibility that these clauses could be considered as merely ‘ancillary’, the Community would therefore lack the power to include such clauses in its international agreements. However, with the possible exception of clauses comprising merely an essential elements clause but not a non-execution clause, these clauses cannot be considered relevantly ancillary within the meaning of this doctrine. The result is that the Community lacks the power to include the modern form of human rights clause in pure Community agreements.

The situation is different in the case of the mixed agreements containing human rights clauses. Here it is crucial that, in all relevant agreements, the Community and its Member States are expressed to be a ‘party’ to the agreement. This establishes a *prima facie* joint responsibility for these two parties, although the extent of this responsibility differs according to whether or not there is a provision stating that the parties are only bound ‘in accordance with their powers’. In all cases, however, the question of the Community’s responsibility for the obligations in a mixed agreement of this type is determined according to an interpretation of the agreement itself. While its powers under Community law will be relevant particularly in the case of a clause limiting the Community’s
obligations to the extent of its powers, Community law will only be relevant (probably, as municipal law, as a question of fact) in the interpretation of such a clause in accordance with the ordinary rules of treaty interpretation. This leads to the possibility that the Community may be held responsible for obligations under the human rights clause despite the fact that it may lack legislative power to perform these obligations. However, with the exception of agreements cover an area substantially overlapping with Community law and which establish a tribunal with the power to determine the scope of the respective responsibilities of the Community and the Member States under those agreements, the Court has not denied the Community the power to conclude mixed agreements of this type, notwithstanding the likely result that it may be held responsible in areas beyond its competence. The mixed agreements containing the human rights clause are not characterised by both of these vitiating factors, and consequently it may be concluded that the Community has the power to include a human rights clause in these agreements.

An additional conclusion concerns the further implications of an agreement binding on the Community under international law, but ultra vires under Community law, as well as the implications of a 'wrong' determination that the Community is responsible for its obligation under an agreement, which is to say in an area in which it has no legislative power. The solution in both cases is to consider these international obligations to be binding on the Community and the Member States in the form of 'Community obligations', enforceable by the Commission under Article 226, but only to the limited extent that this is necessary in order to enable the Community to fulfil its international obligations. It is not necessary, though it may not be excluded, to consider such obligations as
'Community law' with all that is entailed by this phrase, including, most importantly, the possibility of direct effect. The result is that in the case of an ultra vires agreement, or a mixed agreement in which the Community is bound to perform an obligation in an area of Member State competence, the gaps in Community competence will be filled by the Member States. This is, of course, in addition to any joint liability incurred by the Member States by virtue of their participation in the agreement.

As far as the normal form of the human rights clause is concerned, this means that while all of the human rights clauses (except those relatively rare examples without a non-execution clause) in pure Community agreements are in principle ultra vires for the reason that they impose obligations on the Community which it is unable fully to perform and which are, moreover, enforceable by way of pre-agreed countermeasures. This probably does not deprives the Community of the possibility of taking 'appropriate measures' under existing human rights clauses even when it would be able to do so under Community law. One invalid legal basis (the human rights clause) should not also negate the possibility of another. But it does mean that the Community must cease its practice of including human rights clauses in future pure Community agreements. The situation in relation to mixed agreements is quite different: in this case, the Community can continue with its current practice. On the other hand, it must be careful not to enact any appropriate measures which may appear justifiable under the clause, but for which there is no legal basis under Community law. In both cases, in the event that the Community is held responsible under the agreement for the implementation of a human rights clause in an area in which it lacks power, these obligations must be fulfilled instead by the Member States. Failure to do so will
render them liable to infringement proceedings by the Commission under Article
226. agreement.
Part 4

The WTO Legality of 'Appropriate Measures' in the Form of Trade Measures

A. Introduction

This Part is concerned with the legality under WTO law of any trade measures taken under the human rights clause in the European Community's international agreements. These include cooperation agreements providing for treatment on most favoured nation basis, one agreement (the Cotonou

562 It is the 'European Communities,' referred to in the singular, that is a WTO Member. However, for reasons of consistency with the remainder of the thesis and to conform to popular usage, the term 'European Community' will be adopted here. In addition, the term 'CONTRACTING PARTIES,' which is the term used to describe the parties to the GATT 1947, will be referred to here as 'Contracting Parties'. Paragraph 2(a) of 'the language incorporating the GATT 1994 into Annex 1A of the WTO Agreement' provides that '[t]he references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member".' According to Article II:4 of the WTO Agreement, the GATT 1994 is 'legally distinct' from the GATT 1947, and according to 'the language incorporating the GATT 1994 into the WTO Agreement' it comprises, in addition to that earlier agreement, the provisions of certain legal instruments, such as protocols and certifications, decisions on waivers and other decisions of the Contracting Parties to the GATT 1947, that entered into force under the GATT 1947 before the entry into force of the WTO Agreement; certain Uruguay Round Understandings relating to specific GATT articles; and the Marrakesh Protocol to the GATT 1994 containing Members' Schedules of Concessions. Interestingly, though, the Appellate Body has continued to use the numbering of the GATT 1947 for the GATT 1994, and has adopted for the introductory provisions of that later agreement the term 'the language incorporating the GATT 1994 into the WTO Agreement'. See, eg, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, adopted on 12 January 2000, para 80 n 69.

563 This thesis does not consider the legality of trade measures under human rights clauses in autonomous Community instruments providing for unilateral trade preferences. For a description of these clauses see p 25.
Agreement) that provides for unilateral trade preferences on a non-reciprocal basis, and association agreements and free trade agreements providing for trade preferences on a reciprocal basis. This Part is limited to the question of the legality of trade measures under the General Agreement on Tariffs and Trade 1994 (GATT 1994). It does not consider the legality of any trade measures taken under the human rights clause under other relevant WTO agreements, such as the Agreement on Technical Barriers to Trade (TBT), the General Agreement on Trade in Services (GATS), and the Agreement on Government Procurement (GPA), which is a plurilateral agreement concluded by a subset of WTO Members, including the Community.

This Part is divided as follows: Section B provides an introduction to the application of the dispute settlement system established by the Dispute

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564 For a human rights related complaint under the TBT Agreement, see the discussion on the Belgian ‘Draft Law Aiming to Promote Socially Responsible Production’ discussed at p 302.


Settlement Understanding (DSU) to the GATT. Section C analyses the potential for a violation of the GATT rules by ‘appropriate measures’ in the form of trade measures under the human rights clause in the Community’s international trade and cooperation agreements. On the basis that a trade measure will be almost certain to violate one or other of these obligations, the next sections analyse the possibility that such measures might nevertheless be justified under one of the exceptions to these obligations.

Section D treats the limited exceptions available in Article XXIV of GATT in relation to certain measures taken pursuant to regional trade agreements and the limited exceptions available to trade measures under the Cotonou Agreement under the waiver granted for this agreement from compliance with Article I of the GATT.

Section E turns to Article XX, which authorises measures for a limited set of public policy reasons. Prior to assessing the applicability of these exceptions to trade measures under the human rights clause, this section includes an analysis of the potential for Article XX to apply to ‘extraterritorial’ measures intended to protect an interest located abroad, as well as a discussion of the meaning of the requirement in the Chapeau of Article XX that any measures justified under that provision be applied in a manner that does not constitute unjustified or arbitrary discrimination, or a disguised restriction on trade.

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567 Generally these reasons are non-economic, although some provisions of Article XX(d), eg concerning measures taken, inter alia, for consumer protection, can be seen as economic in purpose. The same is true of Article XX(e) on goods produced by means of prison labour.
Finally, Section F investigates the relevance of the exceptions for national security and for measures taken in pursuance of a WTO Members obligations under the UN Charter for the protection of international peace and security.

B. The WTO dispute settlement system

Before considering the substantive rules under the GATT that are applicable to trade measures under the human rights clause, it is convenient to begin with a brief description of the rights of WTO Members under the WTO dispute settlement system, and in particular the jurisdiction of panels to hear claims brought by WTO Members. This is important in order to assess the claims that certain types of trade measure are immune from dispute settlement proceedings. In the past, this claim has been made with respect to regional trade agreements (and, by implication, measures authorised by such agreements) authorised under Article XXIV of GATT, unilateral preferences granted under the terms of waivers from GATT obligations, and trade measures justified as security exceptions under Article XXI of GATT. In a number of cases, Understandings concluded at the Uruguay Round have clarified the applicability of the relevant dispute settlement provisions to such measures.

1. Basic features of the WTO dispute settlement system

The WTO dispute settlement system is established under the Dispute Settlement Understanding (DSU), and is administered by the Dispute Settlement Body (DSB), an organ constituted by the General Council convened specifically for
this purpose.\textsuperscript{568} The DSB has the authority 'to establish panels, adopt panel and
Appellate Body reports, maintain surveillance of implementation of rulings and
recommendations, and authorize suspension of concessions and other obligations
under the covered agreements.'\textsuperscript{569} A complaining party has an automatic right to
request the establishment of a panel,\textsuperscript{570} and there is no requirement of 'legal
interest' for a WTO Member to have 'standing' to bring a case.\textsuperscript{571} There is also
provision for an appeal from a panel report, on issues of law, to the Appellate
Body, which similarly issues a report, if necessary, modifying the panel report.\textsuperscript{572}

As far as the remedies for a successful claim are concerned, Article 19.1 of the
DSU provides that:

\begin{quote}
Where a panel or the Appellate Body concludes that a measure is
inconsistent with a covered agreement, it shall recommend that the
Member concerned bring the measure into conformity with that
agreement. In addition to its recommendations, the panel or Appellate
\end{quote}

\textsuperscript{568} Article IV:3 of the WTO Agreement. Under Article IV:2 of the WTO Agreement, the General
Council comprises all WTO Members.

\textsuperscript{569} Article 1.1 of the DSU.

\textsuperscript{570} Article 6 of the DSU.

\textsuperscript{571} In European Communities – Regime for the Importation, Sale and Distribution of Bananas,
WT/DS27/AB/R, adopted on 25 September 1997 ("EC – Bananas"), at para 135, the Appellate
Body stated that ‘we believe that a Member has broad discretion in deciding whether to bring a
case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994
and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-
regulating in deciding whether any such action would be “fruitful”.’

\textsuperscript{572} Article 17 of the DSU.
Body may suggest ways in which the Member concerned could implement the recommendations.\(^{573}\)

Both panel and Appellate Body reports only have binding force on their adoption by the Dispute Settlement Body, but even then they have no *de jure* binding force on subsequent panels. Rather, they 'create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.'\(^{574}\)

2. Jurisdiction of panels and the Appellate Body under the GATT 1994

The jurisdiction of panels is governed, in the first instance, by Article 1.1 of the DSU, which states that:

> The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding.

\(^{573}\) Article 26.1(b) of the DSU provides that in non-violation cases, the Member is under no obligation to withdraw a measure, but the panel or Appellate Body shall 'recommend' that the Member imposing the measure make a satisfactory adjustment to compensate affected Members. For situation complaints, the remedy is weaker again. Here, Article 26.2(b) of the DSU provides that the panel 'shall issue a report addressing any such matters and a separate report on matters falling under this paragraph.' For a discussion of these claims, see p291.

It is on the basis of those ‘consultation and dispute settlement provisions’ that a panel’s terms of reference are established.\textsuperscript{575} While the Appellate Body has described the terms of reference of a panel as establishing its ‘jurisdiction,’ this is true only in the negative sense that a panel may not assert a jurisdiction to consider claims not within its terms of reference.\textsuperscript{576} The origins of its jurisdiction, more broadly speaking, lie in the existence of a claim under the dispute settlement provisions of the covered agreement at issue. This is the basis also of the more limited jurisdiction of the Appellate Body, which hears appeals on ‘issues of law covered in the panel report and legal interpretations developed by the panel’.\textsuperscript{577}

The ‘dispute settlement provisions’ of the GATT 1994, which is one of the ‘covered agreements’ listed in Appendix 1 of the DSU, are set out in Article XXIII. An interesting feature of this provision is that a violation of GATT obligations does not \textit{per se} gives WTO Members the right to relief. What is required is rather the ‘nullification or impairment of benefits’ under the agreement, or the impeding of the attainment of any of its objectives. According to Article XXIII, a violation of GATT obligations is only one of the three ways in which this may occur, although when a violation is demonstrated, there is a

\textsuperscript{575} Article 7 of the DSU.

\textsuperscript{576} In \textit{India - Patent Protection for Pharmaceutical and Agricultural Chemical Products}, WT/DS50/AB/R, adopted on 16 January 1998, at para 92, the Appellate Body said that ‘[t]he jurisdiction of a panel is established by that panel’s terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have.’

\textsuperscript{577} Article 17.6 of the DSU.
presumption of nullification or impairment of benefits. According to Article
XXIII:1, read together with Articles 1.1 and 6.1 of the DSU, a WTO Member
may request the establishment of a panel in the event that it:

... should consider that any benefit accruing to it directly or indirectly
under this Agreement is being nullified or impaired or that the
attainment of any objective of the Agreement is being impeded as the
result of

(a) the failure of another contracting party to carry out its obligations
under this Agreement,

(b) the application by another contracting party of any measure,
whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation.

In practice there has never been a panel report on a complaint that the ‘attainment
of any objective’ of the GATT is being impeded, and only a handful of
‘situation’ complaints under paragraph (c). Most complaints claim a violation of
a GATT provision under paragraph (a), although so-called ‘non-violation
nullification or impairment’ complaints under paragraph (b) are also not
uncommon. For reasons of convenience, this Part will focus only on whether

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578 Article 3.8 of the DSU. This codifies a long-standing rule of GATT practice that originated in
The Australian Subsidy on Ammonium Sulphate, adopted on 3 April 1950, GATT/CP.4/39, BISD
II/189, which has been called ‘the Marbury v Madison of GATT’. See John H. Jackson, ‘Dispute
Law 329, at 332 n 7.

579 For a recent discussion of non-violation complaints, see European Communities – Measures
Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted on 5 April
2001 (‘EC – Asbestos’), which found that such complaints can be made in respect of measures
trade measures under the human rights clause could give rise to a claim of violation of GATT obligations under Article XXIII:1(a). It will ignore the possibility of non-violation complaints, situation complaints, or any complaint that the ‘attainment of any objective of the Agreement is being impeded’.

Because of the presumption of nullification or impairment of benefits in the event of a violation, it is also not necessary to quantify the ‘benefits’ that are presumed to have been nullified or impaired under the GATT. The rationale is that it is the ‘expectations on the competitive relationship between imported and domestic products’ that are protected. Relevantly to the present case, however, it can nevertheless be commented that in addition to the obvious impact of any trade measures under the human rights clause on the other party to the agreement, such measures may also nullify or impair benefits accruing to WTO

found not to have violated the GATT because they were permitted under the General Exceptions in Article XX. Earlier GATT 1947 reports established that non-violation complaints may be made in respect of any benefits accruing under GATT: see European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, L/5776, unadopted, 7 February 1985 at para 4.36. However, it is also necessary to show that there was a reasonable expectation that these benefits would not be nullified or impaired: Treatment by Germany of Imports of Sardines, adopted on 31 October 1952, G/26, BISD 1S/53, para 16; European Economic Community – Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, adopted on 25 January 1990, L/6627, BISD 37S/86, paras 128-129. See, generally, Ernst-Ulrich Petersmann, ‘Violation Complaints and Non-Violation Complaints in Public International Trade Law’ (1991) 34 GYIL 175 at 188-9.


Members not party to this agreement. One obvious effect is where the trade of the third party is directly adversely affected by the impoverishment of its trading partner. This applies particularly to neighbours of the sanction target, whose economies might be affected even though they do not participate in the sanctions regimes. In addition, the nationals of the third party may have investments in the territory of the target State or may import from the target State. There is also the possibility that a diversion of goods into a third States market could cause further competition with domestic products. This occurred with respect to the Community when the United States imposed safeguard measures on steel in 2002, and the Community imposed its own safeguard measures in response.

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584 See *Case G-162/96, A Racke GmbH & Co and Hauptzollamt Mainz* [1998] ECR 13655, which was a case brought by a Community importer against Community sanctions imposed against Yugoslavia.


Finally, the main effects of the sanctions on such third parties may be a sector other than trade. In the context of compensation for sanctions authorised by the United Nations,\textsuperscript{587} third countries have drawn attention to the 'indirect' effects of sanctions, such as 'foregone tax and tariff revenues, job losses ... and, as a result, declining living standards among working people and increased social expenditures.'\textsuperscript{588} All of these effects may induce a third country WTO Member to take action against the author of the sanctions against the target State.

\textsuperscript{587} Article 50 of the United Nations Charter provides that '[i]f preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems' (emphasis added). Speaking of the sanctions imposed on Iraq in 2000, Nico Schrijver, 'The Use of Economic Sanctions by the UN Security Council: An International Law Perspective' in Harry Post (ed), \textit{International Economic Law and Armed Conflict}, Martinus Nijhoff, Dordrecht/Boston/London, 1994, at 149, draws a distinction between the costs of carrying out sanctions and those 'indirectly resulting from the international crisis, such as the impact of the sudden rise of oil prices, lost business opportunities, the stopping of aid and of the flow of oil at concessional prices from Iraq or Kuwait.' He considers that these indirect costs are not covered by Article 50. However, Article 50 refers to the economic costs borne by non-Members. As these are not bound to carry out Security Council resolutions, arguably Article 50 could also be interpreted as applying to countries whose economies are adversely affected by sanctions even when they are not carrying out these sanctions themselves.

\textsuperscript{588} Comments of the Russian Federation, in \textit{Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization: Implementation of
C. Obligations under GATT

1. Introduction

Depending on the type of agreement under which they are taken, and depending on their form, trade measures under the human rights clause could potentially be in violation of a variety of GATT obligations. In this context, it should be noted that in examining a violation of GATT obligations, the objective of the measure is irrelevant.589

Any difference in treatment between exporting WTO Members is almost certainly likely to violate the unconditional most-favoured-nation obligation in Article I. In addition, the suspension of any bound concessions could infringe the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions — Report of the Secretary-General, A/54/383, 23 September 1999, at para 15. See also n 582 and n 587.

589 On Articles XI and XIII see Panel on Quantitative Restrictions Against Imports of Certain Products from Hong Kong, adopted on 12 July 1983, L/5511, BISD 30S/129 at para 27, where ‘[t]he Panel considered the arguments put forward by the European Community regarding the social and economic conditions which prevailed in the various product categories under examination. The European Community did not claim any corresponding GATT provision in justification for these arguments. The Panel was of the opinion that such matters did not come within the purview of Articles XI and XIII of the GATT, and in this instance concluded that they lay outside its consideration.’ As to Article III, the earlier jurisprudence United States — Measures affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, DS23/R, BISD 39S/206-303) introducing an ‘aim and effect’ test of legislative intent in relation to whether products were ‘like products’ for the purpose of an analysis of whether national treatment had been afforded was rejected in Japan — Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996. For a discussion of this latter issue, see, eg, Aaditya Mattoo and Arvind Subramanian, ‘Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution’ (1998) 1 Journal of International Economic Law 303.
the Community's obligations to respect its bound Schedule of Concessions under Article II. A difference in treatment between imported and like domestic products could violate the national treatment obligation in Article III. And the imposition of quantitative restrictions – such as an import embargo – could violate Article XI.

The situation is complicated by the fact that at least some of the agreements under which measures are taken are themselves in principle authorised by various exceptions to these obligations. This means that, in analysing these legality of trade measures under human rights clauses in these agreements, the particular objective of the exceptions authorising these agreements becomes relevant.

For present purposes, the most important of these exceptions is Article XXIV, which provides for a conditional exception to the most-favoured-nation obligation in Article I, as well as a limited ‘defence’ to other obligations, for measures taken under a regional trade agreement, as defined in that provision. These include the Community’s association agreements, such as the Europe Agreements, the Euro-Mediterranean Agreements and its agreement with South Africa, as well as other regional trade agreements, such as the agreement with Mexico, and the interim agreements implementing the trade provisions of these general agreements. In addition, an exemption from Article I, but not from other obligations, has been granted to the Cotonou Agreement, which is subject to GATT obligations but does not fall within the scope of Article XXIV because it provides for non-reciprocal trade preferences.
2. Article I of the GATT (unconditional most-favoured-nation obligation)

Trade measures under a human rights clause could violate the unconditional most-favoured-nation obligation in Article I of GATT. This provision states, relevantly, as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

This provision is extremely broad, and applies to any difference in treatment – de jure or de facto – in relation not only to border measures, but also any internal measures, of a product from one WTO Member compared to the treatment granted to a 'like product' from any other country. It is also well established

Footnote continued

590 For a discussion of the concept of ‘like product’ in Article I, see Spain – Tariff Treatment of Unroasted Coffee, adopted on 11 June 1981, L/5135, BISD 28S/102. See also the discussion below on the definition of ‘like product’ for the purposes of the national treatment obligation in Article III, at p. In EC – Asbestos, n 579, para 89, the Appellate Body said that the meaning to be
that the treatment must be granted without any conditions, such as, for instance, that a Member apply labour standards domestically. 591 Consequently, unless the Community applies precisely the same treatment to all ‘like products,’ regardless of their source, trade measures under the human rights clause will be in violation of Article I. 592

The application of Article I is, of course, subject to the exceptions from this provision set out below, including the exception in Article XXIV for regional trade agreements. However, a failure to fulfil the terms of any one of these exceptions will again render Article I relevant. 593

3. Article II of the GATT (Schedules of Concessions)

Under Article II:1, WTO Members are obliged not to increase duties above the level bound in their Schedules of Concessions, 594 subject to any conditions stated given to the term ‘like products’ need not be identical in all provisions of GATT in which it appears.’

591 Belgian Family Allowances, adopted on 7 November 1952, BISD 1S/59.

592 On discrimination in the Community’s current policy under the human rights clause, see n 873.

593 See Slovak Republic – Measure Affecting Import Duty on Wheat from Hungary – Request for Consultations by Hungary, WT/DS143/1, 21 September 1998 and discussion in Dispute Settlement Body, Minutes of Meeting held on 21 October 1998, WT/DSB/M/49, 19 November 1998, for a claim of a violation of Articles I and II of GATT by a party to a regional trade agreement (the Central European Free Trade Agreement (CEFTA)).

594 The concessions granted under a schedule of concessions need not be restricted to tariffs (see examples in WTO, Analytical Index: Guide to GATT Law and Practice, 6th ed, Geneva, 1995, pp 73-5 and 89; and also the concessions at issue in Korea – Restrictions on Imports of Beef – Complaint by the United States, adopted on 7 November 1989, L/6503, BISD 36S/268). In practice, however, schedules relate mainly to tariffs and, in some areas, quotas. These other types

Footnote continued
As far as duties are concerned, the schedule of concessions may therefore be taken as establishing an absolute ceiling for the application of the most-favoured-nation obligation in Article I, although it should also be noted that, in practice, there is a difference between the rates bound under this provision and the rates actually applied. Article II:1 provides as follows:

(a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

Usually the suspension of concessions under agreements providing for trade preferences does not violate the bound rate set out in the schedule, and but there

of concessions are unlikely to be affected by ‘appropriate measures’ under the human rights clause.

These conditions may not violate other GATT obligations. See United States – Restrictions on Imports of Sugar ('Sugar Headnote'), adopted on 22 June 1989, L/6514, BISD 36S/331, at para 5.2, stating that 'Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement'. This passage was approved in European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, adopted on 23 July 1998, para 98, and EC – Bananas, n 571, pp 68-9.
is no reason why this could not also occur.\textsuperscript{596} The assumption by some commentators on the human rights clause that any suspension of preferences under the clause will not ‘go beyond’ ordinary GATT rights is presumably a reference to Article II.\textsuperscript{597} In conclusion, it is possible, though probably unlikely, that appropriate measures under the human rights clause will violate Article II:1.

\textsuperscript{596} See n 593.

\textsuperscript{597} Barbara Brandtner and Allan Rosas, ‘Trade Preferences and Human Rights’ in Philip Alston (ed), \textit{The EU and Human Rights}, Oxford University Press, Oxford, 1999, at 706, state that ‘[s]ubject to these exceptions [ie. Articles XX and XXI of GATT], suspension or other non-applicability of treaty-based trade preferences should normally take place only with respect to agreements concluded with states, which are not members of the WTO, or preferences that go beyond the WTO obligations’ (emphasis added'). They continue by saying that ‘[i]n the latter case, the WTO rules may still limit the right to suspend preferences’ and state in a footnote that ‘[f]or instance, it can be asked whether a Member can suspend preferences which, in the context of a free trade area or customs union to which it belongs, are part of the “substantially all trade” requirement of Art. XXIV GATT, and still be recognized as such and thus exempt from the MFN obligation as regards the remaining benefits granted under the free trade area or customs union.’ They further make the point that ‘even when suspension can take place without hindrance of the WTO rules, suspension of mutual preferences would often not be considered feasible, as they would equally affect the Community’s market access to the country concerned’ (ibid).

Presumably this reference to ‘mutual preferences’ is a reference to the \textit{reciprocal} preferences required for a legitimate regional trade agreement. See also Marise Cremona, ‘Human Rights and Human Rights Clauses in the EC’s Trade Agreements’ in Nicholas Emiliou and David O’Keeffe (ed), \textit{The European Union and World Trade Law After the Uruguay Round}, John Wiley and Sons, 1996 at 73, stating that ‘[i]n respect of those trading partners who are party to the GATT, even the strongest form of the human rights and democracy clause will only justify a suspension of preferential trading conditions granted by the specific trade agreement. It would not \textit{per se} justify the suspension of underlying GATT-based free-trade obligations, thus ruling out full economic sanctions.’
4. Article III of the GATT (national treatment)

Article III of GATT prohibits discrimination between domestic and imported ‘like products’ (paragraph 2) and discrimination between domestic and imported ‘like products’ by means of any other internal regulations (paragraph 4).\(^{598}\) These two paragraphs read as follows:

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.\(^{599}\)

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. 

\(^{598}\) This section will not address the prohibition on ‘not similar’ taxation so as to afford protection of ‘directly competitive or substitutable products’ under Article III:2 second sentence.

\(^{599}\) The Note Ad Article III provides that ‘[a]ny internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in [Article III:1] which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in [Article III:1], and is accordingly subject to the provisions of Article III.’
This provision applies to any origin specific trade measures imposed at the point of sale, as well as to measures discriminating *de facto* between 'like' imports and domestic products. It might apply, for instance, to a law providing for voluntary or mandatory 'social labelling' measures, such as the Belgian 'Draft Law Aiming to Promote Socially Responsible Production', which had the aim of 'creating] a label which companies can affix to their products if the latter meet criteria and standards recognized in particular by the International Labour Organization.'

Whether or not it does depends on the resolution of two points on which Article III is not entirely clear. First, it is not certain whether a border measure based on a product's process and production methods (PPMs) are to be analysed in the first instance as an 'internal' measure under Article III, or whether, alternatively, they should be analysed as a quantitative restriction under Article XI. In relation to PPMs, a distinction is generally drawn between non-product related

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601 *Notification – Belgium, G/TBT/N/BEL/2*, 16 January 2001 (Draft Law Aiming to Promote Socially Responsible Production). This issue will also be relevant under the Agreement on Technical Barriers to Trade (the TBT Agreement), which is not discussed here.

PPMs, which are based on criteria that do not leave a physical trade on the product, and product-related PPMs, which do leave such a trace.  

The first Tuna panel, which concerned a ban on the sale of tuna caught using ‘dolphin-unsafe’ methods, as well as a ban on the importation of such tuna, took the view that it was Article XI and not Article III that was applicable to such measures. The panel reasoned that:

Article III:4 refers solely to laws, regulations and requirements affecting the internal sale, etc. of products. This suggests that Article III covers only measures affecting products as such.  

On this basis, the panel further decided that the Note Ad Article III, which provides that measures falling within the scope of Article III may be applied at the border, applies only to ‘measures that are applied to the product as such’ and concluded that the measure at issue was more properly considered as a quantitative restriction under Article XI. The implication is that Articles III and XI are mutually exclusive.

Some authors have challenged the assumption of the panel that Article III applies only to measures targeted at products ‘as such’. Moreover, panels are also

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603 See OECD, Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures, OCDE/GD(97)137.
605 Ibid, para 5.14. For the text of the Note see n 599.
increasingly moving away from the position that Articles III and XI are mutually exclusive.\textsuperscript{607} But as the law stands, it seems that although a border measure based on product-related PPMs may perhaps be reviewable under Article III, a border measure based on non-product related PPMs (such as the measure at issue in the \textit{Tuna} case) will probably continue to be reviewed in the first instance under Article XI.

The second question is whether internal measures based on non-product related PPMs, such as a ‘social labelling’ law will violate Article III. This question involves an analysis of whether the measure discriminates between ‘like products’ from domestic and foreign sources. In the \textit{Asbestos} case, the Appellate Body stated that a panel must apply the four-part test used in the \textit{Border Tax

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\textsuperscript{607} Despite cases such as \textit{Canada-Administration of the Foreign Investment Review Act (FIRA), BISD 30S/140}, which strongly supported mutual exclusivity between Articles III and XI (at para 5.14), recent panels have tended to avoid the issue on the grounds of judicial economy. See, for instance \textit{European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R}, adopted as modified by the Appellate Body report on 5 April 2001 (panel deciding that it was not necessary to rule on the issue, at para 8.100). In \textit{India – Measures Affecting the Automotive Sector, WT/DS146/R, WT/DS175/R}, circulated on 21 December 2001, at para 7.296, the panel observed, in relation to the defendant’s claim that Article III and XI are mutually exclusive, that ‘it sees merit in the proposition that there may be circumstances in which specific measures may have a range of effects. In appropriate circumstances they may have an impact both in relation to the conditions of importation of a product and in respect of the competitive conditions of imported products on the internal market within the meaning of Article III:4. This is also in keeping with the well established notion that different aspects of the same measure may be covered by different provisions of the covered Agreements.’
Adjustments case for determining whether products are ‘like’. What must be compared in each case are the following criteria:

(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits – more comprehensively termed consumers’ perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.608

The Appellate Body stressed that evidence relating to each of these criteria must be examined, and that this evidence must then be weighed, along with any other relevant evidence, in making an overall determination of whether the products at issue could be characterized as ‘like’.609

The question whether products can be considered ‘unlike’ based on non-product related process and production methods is one of the more hotly contested issues in WTO law.610 However, it seems that, on the current state of the law, the answer to this question is still in the negative. In Asbestos, the Appellate Body considered that while the end uses between the relevant products containing asbestos and those not containing asbestos might have been the same (which was all that the panel had compared), the health risks associated with the former rendered them ‘unlike’ the latter. But this was for the crucial reason that these risks made the products both physically different, and because they affected

609 EC – Asbestos, n 579, para 109.
610 For a good summary of the arguments, see references at n 606.
consumers' tastes and habits. In the case of a social labelling law, it would at most be possible to argue for 'unlikeness' between products produced in a certain manner on the grounds of consumer preference. There is no jurisprudence to date on whether a review of this one single category would be sufficient to demonstrate that the products are 'unlike,' but the likelihood is extremely remote. It can therefore be concluded with a reasonable degree of certainty that a social labelling law would be likely to violate Article III of the GATT.

5. Article XI:1 of GATT (quantitative restrictions)

Another provision relevant to trade measures imposed under the human rights clause is Article XI:1 of GATT, which prohibits all quantitative trade restrictions such as quotas and embargoes. This provision states that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or

611 EC – Asbestos, n 579, paras 113-130.

612 In addition to a complaint that the Belgian labelling law would have violated the TBT Agreement (which concerns regulations and standards based on product characteristics), it was criticised by the ASEAN group of countries on the grounds that it applied only to imported products and therefore violated the national treatment principle in Article III. See Committee on Technical Barriers to Trade, ASEAN Concerns Regarding the Proposed Belgian Law for the Promotion of Socially Responsible Production – Submission by the Asean Countries, G/TBT/W/159, 28 May 2001; also Committee on Technical Barriers to Trade, Minutes of Meeting held on 30 March 2001, G/TBT/M/23, 8 May 2001.
other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Article XI: is an absolute prohibition on quantitative restrictions regardless of the motives behind such restrictions. Consequently, in cases involving trade embargoes on non-economic grounds, it has been assumed that Article XI applies and argument as to their policy justifications has been considered in terms of the applicability of any of the general exceptions to GATT obligations set out in Article XX or the security exceptions in Article XXI. The United States' embargo on imports of 'dolphin-unsafe' tuna challenged in the two Tuna cases was held to be in violation of Article XI, as was the United States' embargo on imports of 'turtle-unsafe' shrimp in US–Shrimp. Article XI was also invoked by the Community in its request for a panel, subsequently withdrawn, against the US embargo on Cuba in US–The Cuban Liberty and Democratic Solidarity Act. In conclusion, any appropriate measures under the human rights clause taking the form of quantitative restrictions on imports would without any doubt violate Article XI.

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615 United States – The Cuban Liberty and Democratic Solidarity Act – Request for the Establishment of a Panel by the European Communities, WT/DS38/2, 4 October 1996
6. Conclusion

Trade measures imposed under the human rights clause will most likely be in violation of at least one of these provisions. Measures discriminating by origin may violate the most-favoured-nation obligation in Article I, and possibly also the national treatment obligation in Article III. Any increase in tariffs beyond the rate bound in the relevant party's schedule of concessions will violate Article II, while quantitative restrictions will violate Article XI, and internal regulations based on the manner in which a product is made, such as social labelling laws, will violate Article III. This raises the question whether any of the exceptions to these obligations apply to measures taken under the human rights clause.

D. Limited Exceptions (regional trade agreements and waivers)

The first of the exceptions to be addressed apply to a subset of the agreements concluded by the Community containing a human rights clause, namely, association agreements and other agreements providing for free trade between the parties, as well as to the Cotonou Agreement, which falls under a special waiver to the usual most-favoured-nation obligation in Article I.

1. The regulation of free trade areas and customs unions

(a) Article XXIV as an exception from GATT obligations

The primary purpose of Article XXIV is to establish an exception from the most-favoured-nation obligation in Article I of GATT free trade agreement, a customs union or an agreement leading to either of these agreements (all of which are
called 'regional trade agreements').\(^{616}\) In addition, the more recent jurisprudence on Article XXIV has established that it provides a limited 'defence' to violations of other provisions of the WTO agreements as well.

Before setting out the law on these points, it is perhaps relevant to say, by way of background, that it was formerly commonly held that regional trade agreements could constitute a *lex specialis* rendering all other provisions of GATT inapplicable.\(^{617}\) Indeed, the Community put this argument as recently as 1994 when, not altogether irrelevantly to the present case, it sought to justify a special


safeguards clause contained in its Europe Agreements. The Community claimed that:

In concluding these Agreements the Parties in no way intended to impinge upon their GATT obligations. All the same, as a *lex specialis*, the trade relations between the Parties to the Agreements will primarily be governed by the terms of these Agreements. Insofar as either of the Parties has GATT or GATT Code obligations relating to, for example, notification, these will be complied with. Any timetable linked to the abolition of a safeguard measure taken on the basis of the Agreement only affects the exports of the Party involved. Any safeguard measures taken in the different context of the GATT will of course be subject to the disciplines which are imposed on contracting parties in the GATT context.618

However, following *Turkey – Textiles*, it is no longer seems tenable to say that a regional trade agreement provides an automatic exception from other GATT obligations.619 This case concerned a complaint by India that, in imposing quantitative restrictions on textiles pursuant to a customs union agreement with the Community, Turkey had acted in violation of Articles XI and XIII of GATT. The panel in that case rejected Turkey’s argument, stating that:

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We have considered the proposition that Article XXIV is *lex specialis* and is purported to be a self-contained regime insulated from the other provisions of GATT and the WTO Agreement. We are not convinced by this argument. The relationship between Article XXIV and GATT/WTO seems to us to be self-evident from the wording and context of Article XXIV.  

Significantly, Turkey abandoned the *lex specialis* argument on appeal, but it regained some of the ground that it had lost before the panel. Although the panel had held that all GATT obligations continue to apply to measures taken pursuant to a regional trade agreement, the Appellate Body devised a limited 'Article XXIV defence' from such obligations. It said as follows:

... we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this 'defence' is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is *introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV*. And, second, that party must demonstrate that the *formation of that customs union would be prevented* if it were not allowed to introduce the measure at issue.

\footnote{Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, adopted as modified by the Appellate Body report on 19 November 1999 at para 9.186.}
\footnote{Ibid, at paras 9.189-9.192}
\footnote{Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, adopted on 19 November 1999 at para 58 (emphasis added). The panel in United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Footnote continued}
A qualification to the first limb of the first of these conditions was proposed by the panel in *US – Line Pipes* in the context of a clause in a regional trade agreement providing for safeguard measures (the issue did not need to be

WT/DS166/R, adopted as modified by the Appellate Body report on 21 January 2001, at para 8.180, provided a useful addendum to this defence when it said that

Article XXIV of the GATT 1994 may provide a defence to a claim of violation of a provision of the GATT 1994, and may also provide a defence to a claim of inconsistency with a provision of another covered agreement if it is somehow incorporated into that provision or agreement.

In a footnote (n 176), the panel explained further that

Because the Appellate Body viewed Article 2.4 of the Agreement on Textiles and Clothing as incorporating Article XXIV of the GATT 1994 into that Agreement, it noted that Article XXIV “may be invoked as a defence to a claim of inconsistency with Article 2.4 of the ATC, provided that the conditions set forth in Article XXIV for the availability of this defence are met”.

For an earlier rejection of the ‘defence’, see *EEC – Member States’ Import Regimes for Bananas, DS32/R*, unadopted, 3 June 1993 at para 358. An interesting question is whether the ‘defence’ would extend to jurisdictional conflicts between tribunals established under regional trade agreements and the dispute settlement system established under the DSU. This would apply not only to the European Court of Justice (bearing in mind that the Member States have entered into two potentially conflicting exclusive jurisdiction clauses under Article 23 of the DSU and the Article 292 of the EC Treaty) but also to the NAFTA panels. Frieder Roessler, ‘The Relationship between Regional Trade Agreements and The Multilateral Trade Order: A Reassessment’ in Frieder Roessler (ed), *The Legal Structure, Functions and Limits of the World Trade Order*, 2000, at 186-7, points out that the elimination of GATT rights, including dispute settlement rights, in a regional trade agreement may undermine the aims of the multilateral trading order. On conflicts between GATT and NAFTA, see Gabrielle Marceau, ‘The Dispute Settlement Rules of the North American Free Trade Agreement: A Thematic Comparison with the Dispute Settlement Rules of the World Trade Organization’ in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System*, 1997, at 534, referring to the NAFTA Panel Report *In the Matter of Tariffs Applied by Canada to Certain US Origin Agricultural Products*, Secretariat File No. CDA-95-2008-01, 2 December 1996.
considered on appeal). The panel held that for the Article XXIV defence to apply, it was not necessary for the measure to be introduced on the formation of the agreement, as long as the mechanism providing for the measure is established upon formation of the free-trade area. On the other hand, the European Community (a third party) objected that 'the imposition of a new safeguard measure in the present case amounted precisely to the introduction of a trade restriction having an adverse effect on the trade of other Members.' If the panel was correct in its approval of a safeguards clause necessary to the formation of the regional trade agreement, then this reasoning would remove at least one barrier to the application of the 'Article XXIV defence' to measures under the human rights clause. But if the Community's argument is correct, the application of this defence would be excluded from the very beginning.

But it seems that in any case the defence is not available for measures under the human rights clause. Even if it is established that the regional trade agreement complies with Article XXIV (the second limb of the first condition), which is not entirely certain, it would be difficult to argue that the formation of the agreement would be prevented if the clause were not included in the agreement (the second

625 Ibid, para 66.
condition). It is clear from *Turkey – Textiles* that this second requirement is not to be understood in political terms, but rather in terms of whether the measures were necessary for the formation of a regional trade agreement in compliance with GATT requirements. In that case, it was held that 'there are other alternatives available to Turkey and the European Communities to prevent any possible diversion of trade, while at the same time meeting the requirements of sub-paragraph 8(a)(i).'*626 At most, it could be argued that a human rights clause promotes regional economic integration, in a very wide sense, but such an argument is probably too far removed from the economic underpinnings of the WTO ever to be successful.*627 Consequently, the 'Article XXIV defence' is unlikely to be available in respect of appropriate measures taken under the human rights clause.

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*626 Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, adopted on 19 November 1999, para 62. See also the argument of Canada in United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, 15 February 2002, adopted on 8 March 2002, para 60 that '[t]he NAFTA safeguard exclusion was part of the package of trade liberalizing measures introduced in accordance with Article XXIV:8(b) and, therefore, was necessary for the formation of a free-trade area consistent with Article XXIV.' This followed the panel’s ruling in United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/R, adopted as modified by the Appellate Body report on 8 March 2002, at 7.141 that '[a]s the exclusion of imports from Canada and Mexico therefore forms part of the elimination of "duties and other restrictive regulations of commerce" between NAFTA members, it is in principle authorised by Article XXIV:5, provided the relevant conditions are fulfilled.'

*627 However, see Australia’s observation in Communication from Australia, WT/REG/W/25, 1 April 1998 that the imposition of higher harmonized sanitary and phytosanitary standards leads to 'the paradoxical situation that imposing them [such standards] would promote economic integration.' Other dubious practices between parties to regional trade agreements, such as the introduction of voluntary export restraints, are clearly illegal under Article XXIV.
It may therefore be concluded that, with the exception of the most-favoured-nation obligation, any violations of the provisions mentioned above will not be saved by reliance on the fact that they were taken under a regional trade agreement. The following will analyse whether Article XXIV applies as an exception from Article I. This requires a more detailed discussion of the background and context of Article XXIV.

(b) Background to Article XXIV

There are obvious political reasons for wishing to conclude a regional trade agreement, but GATT focuses on the economic rationales. These are stated in Article XXIV:4 to be as follows:

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

As this paragraph also indicates, although regional trade agreements can have beneficial effects on trade, they are not necessarily compatible with the interests of third countries. Not only may parties to a new trade agreement seek to raise trade barriers to their existing trading partners, but the result of the agreement can also be to divert trade away from these partners because of the more
favourable trading conditions now existing in the free trade area. For this reason, the operative provision granting the exception, in Article XXIV:5, is expressed subject to certain conditions. This provision states that:

Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; Provided that: ...

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be.

This ‘external’ condition on the raising of external trade barriers in the form of ‘duties and other regulations of commerce’ is designed to combat the first of the two difficulties that the formation of a regional trade agreement might cause to

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629 Emphasis added.
third parties. The second of these difficulties met by the definition of a permissible regional trade agreement (for the purposes of the Article XXIV:5 exception) set out in Article XXIV:8. According to Article XXIV:8(b), which relates to free trade areas:

A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

The requirement that all 'duties and other restrictive regulations of commerce' be 'eliminated' between the parties to the agreement is a function of the economic theory, current in 1947, that it is only with respect to customs unions and free trade areas in which all restrictions between the member states have been eliminated that their trade creation effects outweigh their trade diversion effects. Despite some doubts in the literature, the balance between trade

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630 This 'external' condition has been the main focus of the recent debate on the compatibility of regional trade agreements with the multilateral framework established by the WTO. See also Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, adopted on 19 November 1999.

631 The same definition, mutatis mutandis, is applied to customs unions in Article XXIV:8(a). Because the human rights clause appears so far only in free trade agreements, the following will be based on the definition provided in Article XXIV:8(b).


Footnote continued

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creation and trade diversion is still at the heart of debate on the compatibility of regional trade agreements with the terms of Article XXIV, and the condition in at 70-71 (who was the Director of the United States Department of State's Office of International Trade Policy) put this argument as follows: '[a] customs union creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources, and thus operates to increase production and raise planes of living. A preferential system, on the other hand, retains internal barriers, obstructs economy in production, and restrains the growth of income and demand. It is set up for the purpose of conferring a privilege on producers within the system and imposing a handicap on external competitors ... a customs union is conducive to the expansion of trade on a basis of multilateralism and non-discrimination, a preferential system is not'. This passage is quoted in both Youri Devuyst, 'GATT Customs Union Provisions and the Uruguay Round: The European Community Experience' (1992) 26 JWTL 15 at 19 and Paul Carrier, 'An Assessment of Regional Economic Integration Agreements After the Uruguay Round' (1996) 9 New York International Law Review 1, at 8-9. There is also a political element to the elimination requirement, premised on the economic argument. As explained in World Trade Organization, Regionalism and the World Trading System, Geneva, 1995 at 9, the obligation to eliminate all barriers on at least substantially all trade ensures that '... regional agreements are limited to those which have sufficient political support in member countries to overcome protectionist opposition to more or less complete free trade among the participants, and that agreements are not misused as a cover for narrow (sectoral) discriminatory arrangements'. See also Frieder Roessler, 'The Relationship between Regional Integration Agreements and The Multilateral Trade Order' in Kim Anderson and Richard Blackhurst (ed), Regional Integration and the Global Trading System, Harvester Wheatsheaf, Geneva, 1993, at 314 (also quoted in World Trade Organization, Regionalism and the World Trading System, Geneva, 1995 at 9, who states that that 'the rules of Article XXIV attempt to limit discrimination by imposing a high (political) cost on it: strictly interpreted, they would only allow it when the parties are really serious about favouring each other (free trade among the partners for most products) ... [thus] the high political cost of establishing such preferential arrangements acts as a deterrent to their formation').

See n 628.

A good recent explanation of the trade diverting effects of regional trade agreements may be found in Jagdish Bhagwati, 'Fast Track to Nowhere' (1997) 345(8039) The Economist 21, who for this reason rejects the term 'free trade agreement' in favour of 'preferential trade agreement'. More comprehensively, see Jagdish Bhagwati, 'Preferential trade agreements: the wrong road' (1996) 27(4) Law and Policy in International Business 865.
Article XXIV:8 that all internal trade barriers must be abolished has rarely been challenged as a matter of principle.\footnote{Note however the argument put by the European Community that Article XXIV does not prohibit trade diversion: '[t]he raising of barriers was opposite to the concept of the facilitation of trade – in other words, it was the prevention of trade which would otherwise have taken place. The drafters of the Article [XXIV] no doubt had had market economies in mind; the creation or diversion of trade in these circumstances remained a matter for economic forces, beyond the ability of RTA parties to control. Trade creation or trade diversion as a test of the legitimacy of an RTA was not an argument that Article XXIV:4 would support.' See \textit{Note on the Meetings of 27 November and 4-5 December 1997, WT/REG/M/15}, 13 January 1998, at para 12.}

(c) Conditions in Article XXIV:8(b)

Subject to certain exceptions, which will be discussed below, Article XXIV:8(b) establishes an obligation on WTO Members not impose trade measures in violation of their obligation to eliminate restrictive regulations of commerce on 'substantially all the trade' under the regional trade agreement.\footnote{Helmut Steinberger, \textit{GATT und regionale Wirtschaftszusammenschlüsse: Eine Untersuchung der Rechtsgrundsätze des Allgemeinen Zoll- und Handelsabkommens vom 30. Oktober 1947 (GATT) über die Bildung regionaler Wirtschaftszusammenschlüsse}, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Carl Heymanns, Köln, Berlin, 1963 at 108, says that 'the requirement of paragraph 8 of Article XXIV, that the entire mutual trade is to be included in the agreement and to be totally freed from duties and other restrictive regulations of commerce, is the central and strictest requirement of GATT for the forming of regional trade agreements.' (Translation: 'Das Erfordernis der Ziff. 8 des Art XXIV, den gesamten gegenseitigen Handel ... in einen Zusammenschluß einzubeziehen und von Zöllen und sonstigen Handelsbeschränkungen vollständig zu befreien, ist das zentrale und schärfste Erfordernis des GATT für die Bildung von Regionalzusammenschlüssen'). In the \textit{Austro-German Customs Union Case}, PCIJ, Ser A/B, No 41 (1931), at 51, the Permanent Court of International Justice set out the requirements of a customs union as 'uniformity of customs law and customs tariff; unity of the customs frontiers and of the customs territory vis-à-vis third States; freedom from import and

\textit{Footnote continued}
It seems clear, firstly, that the requirement applies to all measures having an impact on trade. In *Turkey – Textiles*, the panel said that:

> While there is no agreed definition between Members as to the scope of this concept of ‘other regulations of commerce’, for our purposes, it is clear that this concept includes quantitative restrictions. More broadly, the ordinary meaning of the terms ‘other regulations of commerce’ could be understood to include any regulation having an impact on trade (such as measures in the fields covered by WTO rules, e.g. sanitary and phytosanitary, customs valuation, anti-dumping, technical barriers to trade; as well as any other trade-related domestic regulation, e.g. environmental standards, export credit schemes). Given the dynamic nature of regional trade agreements, we consider that this is an evolving concept.637

The elimination requirement in Article XXIV:8(b) therefore applies both to quantitative restrictions and also to measures affecting ‘conditions of competition’ that would otherwise be treated in terms of the national treatment export duties in the exchange of goods between the partner States; apportionment of the duties collected according to a fixed quota’. See, however, the comment in Pieter J Kuyper, ‘The Influence of the Elimination of Physical Frontiers in the Community on Trade in Goods with Third States’ in Meinhard Hilf and Christian Tomuschat (ed), *EG und Drittstaatsbeziehungen nach 1992*, Nomos, Baden-Baden, 1990, at 53 n 4 that the Community’s failure to eliminate restrictive regulations on commerce by 1990 ‘may indicate that Art XXIV(8)(a) is unrealistic in its requirements relating to “other restrictive regulations of commerce” operated by customs unions.’

637 *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted as modified by the Appellate Body report on 19 November 1999, para 9.120. See also *Communication from Australia*, WT/REG/W/25, 1 April 1998.
obligation, including measures targeted at process and production methods, such as labelling requirements.\(^{638}\)

In addition, the elimination requirement applies to measures even when they are taken pursuant to a clause in an agreement that has been found to be compatible with Article XXIV by the Committee on Regional Trade Agreements (CRTA). This follows from the ruling, discussed in the previous section, that a ‘political’ review of regional trade agreements by the CRTA does not preclude panel review of a measure falling under a regional trade agreement. On the other hand, this is unlikely to be an issue in the present case, given the absence of any relevant reports finding the Community’s agreements to be consistent with Article XXIV.

It is also worth noting that parties to regional trade agreements have themselves relied on the elimination requirement as a defence to violations of other provisions of the GATT (namely Article XIX on safeguards),\(^{639}\) by claiming that Article XXIV:8 represents an obligation which they must be permitted to discharge by way of an right not to impose intra-regional trade restrictions in

\(^{638}\) See n 677.

\(^{639}\) The question was not resolved at Uruguay, with the new Agreement on Safeguards containing a footnote stating that ‘[n]othing in this Agreement prejudices the interpretation of the relationship between Article XIX and Article XXIV:8 of GATT 1994’. Nor has it been resolved since then. In United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, 15 February 2002, adopted on 8 March 2002, at para 198, the Appellate Body specifically said that ‘[w]e need not, and so do not, rule on the question whether Article XXIV of the GATT 1994 permits exempting imports originating in a partner of a free-trade area from a measure in departure from Article 2.2 of the Agreement on Safeguards.’
certain circumstances. In the review of the 1957 EEC Treaty, the Member States said that:

The Six considered that the opening phrase of paragraph 5 of Article XXIV provided a general exception under which they were entitled to deviate from the other provisions of the General Agreement, including Articles XI to XIV, insofar as the application of these provisions would constitute obstacles to the formation of the customs union and to the achievement of its objectives. In their opinion, Article XXIV imposed an obligation on the member countries of a customs union to eliminate insofar as possible — but only to that extent — quantitative restrictions existing between them, without necessarily extending such elimination to countries which are not members of the union, which, as a corollary, implied that the member States may maintain or impose restrictions applying to non-member countries only.\textsuperscript{640}

WTO Members party to other regional trade agreements have reiterated this argument at various times.\textsuperscript{641}

\textsuperscript{640} The European Economic Community, Reports adopted on 29 November 1957, L/778, BISD 65/70 at 77 (emphasis added).

\textsuperscript{641} In United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/R, adopted as modified by the Appellate Body report on 8 March 2002, para 7.132, the United States made the same argument in relation to NAFTA, stating that 'under the express terms of Article XXIV:5, no other provision of the GATT 1994, including Articles I, XIII or XIX, can be read to prevent participants in a free-trade area from carrying out their mutual commitments to exempt each other's trade from trade restrictive measures, including safeguard measures' (emphasis added). For a defence of the argument that safeguards need not be applied on a non-discriminatory basis, see Marco Bronckers, Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community and United States Law, Kluwer, 1985, 85-88; generally, see Synopsis of “Systemic” Issues Related to Regional Trade Agreements – Note by the Secretariat, WT/REG/W/37, 2 March

Footnote continued

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Assuming that the conditions set out in Article XXIV:8 are, in principle, applicable to trade measures taken under a regional trade agreement, regardless of whether the complainant is also a party to that agreement, a separate question arises as to the meaning of the term ‘substantially all the trade’ on which, according to those conditions, trade barriers must be eliminated. In Turkey – Textiles, the Appellate Body approved a passage in the panel report stating that:

The ordinary meaning of the term ‘substantially’ in the context of subparagraph 8(a) appears to provide for both qualitative and quantitative components. The expression ‘substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union’ would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.  

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642 Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, adopted on 19 November 1999, para 49, approving Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, adopted as modified by the Appellate Body report on 19 November 1999, para 9.148. It also noted that ‘[n]either the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term “substantially” in this provision. It is clear, though, that “substantially all the trade” is not the same as all the trade, and also that “substantially all the trade” is something considerably more than merely some of the trade’ (at para 48). See Synopsis of “Systemic” Issues Related to Regional Trade Agreements – Note by the Secretariat, WT/REG/W/37, 2 March 2000, paras 52-5; Systemic Issues Related to “Substantially all the Trade” – Background Note by the Secretariat, WT/REG/W/21/Add.1, 2 December 1997; Stefan Richter, Die Assozierung osteuropäischer
If one were to define the term ‘substantially all the trade’ quantitatively in terms of a percentage of all trade, Article XXIV:8 would only be violated in cases where the appropriate measures adopted under the human rights clause were such that ‘substantially all the trade’ was no longer ‘free’ between the parties.\textsuperscript{643} This would probably limit the application of this provision to trade measures under the human rights clause to cases involving a relatively substantial trade embargo.\textsuperscript{644} On the other hand, if the term is defined qualitatively, it could be argued that a future trade restriction not authorised by one of the Article XXIV:8 exceptions would by definition violate this provision. Usually, the ‘qualitative’ definition of ‘substantially all the trade’ is understood to mean that trade must be free in all or


\textsuperscript{643} Barbara Brandtner and Allan Rosas, ‘Trade Preferences and Human Rights’ in Philip Alston (ed), \textit{The EU and Human Rights}, Oxford University Press, Oxford, 1999 at 706 n 39 pose the question whether 'a Member can suspend preferences which, in the context of a free trade area or customs union to which it belongs, are part of the ‘substantially all trade’ requirement of Art XXIV GATT, and still be recognized as such and thus exempt from the MFN obligation as regards the remaining benefits granted under the free trade area or customs union.'

\textsuperscript{644} In \textit{Argentina – Safeguard Measures on Imports of Footwear}, WT/DS121/R, adopted as modified by the Appellate Body report on 12 January 2000 (at paras 8.97-8.98) the panel said that even if Article XXIV:8 does not prohibit safeguard measures between regional trade agreement members, this is either because such measures do not infringe the ‘substantially all the trade’ requirement or because the measures are allowed for a transitional period of normally up to ten years. In \textit{Argentina – Safeguard Measures on Imports of Footwear}, WT/DS121/AB/R, adopted on 12 January 2000, para 110, the Appellate Body reversed the panel’s reasoning and conclusions, though on the basis that Article XXIV was not relevant to the issue at hand.
at least the majority of sectors. But this only applies to the removal of existing trade restrictions between the parties. It could also be argued that the requirement to eliminate barriers on substantially all the trade between the parties also rules out all future trade restrictions not permitted by the exceptions in Article XXIV.

In this context, it is opportune to recall the argument made by the European Community in Line Pipes that the Article XXIV defence was not available in that case because "[t]he imposition of a new safeguard measure in the present case amounted precisely to the introduction of a trade restriction having an adverse effect on the trade of other Members." The panel's response to this argument was, essentially, that future trade restrictions should still be permitted where this is necessary to the formation of the agreement (seen in economic terms). That may also be an appropriate test in the present context of defining 'substantially all the trade' it is less applicable. In the absence of a ruling from the Appellate Body on this point, and in the face of two equally convincing arguments, it is difficult to speculate as to the correct determination of this question. However, as in the context of the Article XXIV defence, this is probably unnecessary, as it is unlikely that a qualitative definition of 'substantially all the trade' would permit future trade restrictions that, in fact, are not required for the formation of

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645 Synopsis of "Systemic" Issues Related to Regional Trade Agreements – Note by the Secretariat, WT/REG/W/37, 2 March 2000, para 54.
647 See p 309.
the regional trade agreement, seen in economic terms. For this reason, it seems relatively safe to conclude that any trade restrictions imposed under the human rights clause will violate the condition set out in Article XXIV:8 that trade measures must be eliminated on 'substantially all the trade' under the agreement.

(d) Implied exceptions

A later section will discuss the general exceptions under Article XX of GATT, which are incorporated into Article XXIV:8, and the security exceptions under Article XXI of GATT, which is not incorporated into this provision, but which by its own terms constitutes an express exception to this provision. This section will consider whether there are any implied exceptions to the conditions set out in Article XXIV.

In brief, there are three sets of potential exceptions. The first set of exceptions relates to measures which would ordinarily be allowed under GATT, but which for one reason or another are excluded from the list of express exceptions in Article XXIV:8. The second applies to regional trade agreements with a 'political' status. This clearly has more application to an entity such as the European Community than to the regional trade agreements containing the human rights clause, but it provides some interesting context to the problem and is included for that reason. The third exception applies to trade measures arising

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648 Article XXI states that '[n]othing in this Agreement shall be construed ... to require any contracting party ...'. Japan was not therefore correct to argue in Ibid, at para 72, that '[t]he list of exceptions in Article XXIV:8(b) is not exhaustive, since otherwise even security exceptions pursuant to Article XXI would not be allowed in a free-trade area.'
as a consequence of suspension or termination of a regional trade agreement under international law.

1. Measures permitted elsewhere under GATT

Because the list of exceptions in Article XXIV:8 does not include many provisions of GATT under which trade measures can be taken in exceptional situations,\(^{649}\) it has been argued that the list is not exhaustive, and that there are also implied exceptions to the conditions set out in Article XXIV:8. In particular, this argument has been made in relation to safeguard measures\(^ {650}\) (normally permitted under Article XIX and the Safeguards Agreement), antidumping measures\(^ {651}\) (Article VI and the Antidumping Agreement), and – though

\(^{649}\) See *Systemic Issues Related to "Substantially all the Trade" – Background Note by the Secretariat*, WT/REG/W/21/Add.1, 2 December 1997 at para 6, stating that ‘[t]he drafting history does not indicate why Articles XI-XV and XX were included in the list of exceptions while others, in particular Article XIX, were not included’. In *Systemic Issues Related to "Substantially all the Trade" – Background Note by the Secretariat*, WT/REG/W/21/Add.1, 2 December 1997, at para 12, reference is made to the suggestion by some GATT Contracting Parties ‘that the absence of a reference to Article XIX in Article XXIV:8 could be explained by the temporary nature of an Article XIX action’. See Arvind Panagariya, ‘The Regionalism Debate: An Overview’ (1999) 22 *World Economy* 477, at 500-2, who refers to practices such as the introduction of intra-regional trade balancing requirements (outlawed by the TRIMS agreement) and voluntary export restraints under NAFTA (outlawed under the Safeguards Agreement).


\(^{651}\) The Community position in relation to the inclusion of antidumping clauses in the agreement with Sweden was that ‘only a very intensive degree of economic integration could justify

*Footnote continued*
this is unnecessary — trade restrictions on national security grounds (Article XXI). However, even if these do constitute implied exceptions in Article XXIV:8, which is in any case either doubtful or (in the case of Article XXI) redundant, this does not assist the cause of the human rights clause. This is because, unlike these other measures for which an implied exception has been advocated, there is no equivalent authorisation elsewhere in the GATT for human abandonment or even, it seems significant limitation of the option to use anti-dumping measures.


652 In *The European Economic Community*, Reports adopted on 29 November 1957, L/778, BISD 6S/70, the EEC noted that Article XXI was not mentioned in the exceptions listed in Article XXIV:8, but said that ‘it would be difficult, however, to dispute the right of contracting parties to avail themselves of that provision which related, inter alia, to traffic in arms, fissionable materials, etc.’ (at 97). The point was reiterated in *Communication from Japan – Other Regulations of Commerce*, WT/REG/W/29, 29 July 1998. It has been argued that trade restrictions on national security grounds cannot have been prohibited between WTO Members because they cannot be required to form a political union when they form a regional trade agreement, which would be the inevitable result. Thus, Helmut Steinberger, *GATT und regionale Wirtschaftszusammenschlüsse: Eine Untersuchung der Rechtsgrundsätze des Allgemeinen Zoll- und Handelsabkommens vom 30. Oktober 1947 (GATT) über die Bildung regionaler Wirtschaftszusammenschlüsse*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Carl Heymanns, Köln, Berlin, 1963 says at 157 that ‘Article XXIV obliges the members of a customs union or free trade area to integrate economically but not, in addition to that, politically or militarily. It seems to be ruled out that the GATT contracting parties wished to renounce their rights in favour of national or international security in the event of forming integration arrangements under Article XXIV.’ (Translation: ‘Art XXIV verpflichtet die Mitglieder einer Zollunion oder Freihandelszone zu einer wirtschaftlichen, nicht auch zu einer politischen oder militärischen Integration. Es erscheint ausgeschlossen, daß die Parteien des GATT für den Fall der Bildung von Zusammenschlüssen nach Art XXIV auf Vorbehalte zugunsten ihrer nationalen oder internationalen Sicherheit verzichten wollten.’)
rights measures, except for the exceptions in Articles XX and XXI, which apply in any case.

2. Political units

It has also been proposed that there is an implied exception to Article XXIV:8 for regional trade agreements having a 'political' status of some kind. Arguing in favour of such an exception in 1963, Helmut Steinberger said that:

It seems doubtful whether, on concluding the GATT, the parties intended to subject comprehensive political integrations to the restrictions of Article XXIV ... One can therefore interpret Article XXIV restrictively to the extent that the integration of two customs unions resulting in a comprehensive State or State-like unity, in which the substitution of more than one customs union by one alone results only incidentally, but is not the essence of an essential State-political unity encompassing an area of sovereignty, does not fall within the meaning of the term customs union or free trade area as this is used by GATT, and is therefore also subject to the other criteria of Article XXIV.653

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*Footnote continued*
Franz Jaeger argued similarly, some years later, that:

... the Contracting Parties of the General Agreement were evidently not thinking of unities of the legal and political forms of a State. Such forms of integration can therefore also no longer be considered as the norms addressed by the relevant GATT conditions: for them Article XXIV is not applicable.654

Even if this were a plausible proposition (and it smacks more of political imperative than of law), it would have to be established precisely how to determine when an entity has a sufficient ‘political’ status for it to benefit from such an implied exception. Although these authors do not say as much, it would seem that a basic requirement for this ‘political exception’ would be that the entity have international legal personality. This would rule out all free trade agreements concluded to date, which do not purport to have this status, and most customs unions as well.655 However, even the existence of international legal

Begriff der Zollunion oder Freihandelszone im Sinne des GATT und damit auch nicht unter die sonstigen Kriterien des Art XXIV fällt).


655 See Austro-German Customs Union Case, PCIJ, Ser A/B, No 41 (1931), in which the Permanent Court of International Justice held that the proposed customs union in that case would not necessarily violate Austria’s political independence. This case was cited by the panel in

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personality may not be sufficient for an escape from the requirements of Article XXIV:8;656 indeed, the European Community, which had international legal personality under its original founding statute was examined under Article XXIV.657

Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, adopted as modified by the Appellate Body report on 19 November 1999, at para 9.40 n 272, which held that the customs agreement between the Community and Turkey lacked international legal personality sufficient to enable Turkey to escape its international obligations under GATT (at para 9.40).

656 The fact that an organ has international legal personality also does not necessarily exempt a State from its responsibility under international law. The panel in Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, adopted as modified by the Appellate Body report on 19 November 1999, at para 9.42, cited the Separate Opinion of Judge Shahabuddeen in Certain Phosphate Lands in Nauru (Nauru/Australia), [1992] ICJ Rep 240 (26 Jun), at 234, for the proposition that a State continues to be responsible under international law when it acts with other States through a common organ, even when that organ is a separate State (in that case Australia). In Matthews v United Kingdom (1999) 28 EHRR 361, the European Court of Human Rights considered that the United Kingdom was still responsible for a measure taken in the context of accession to the European Community. In EC-Computers, the panel sidestepped an argument by the United States that the Member States of the Community continued to be responsible for their performance of WTO obligations, despite the evident transfer of sovereignty in the matter at hand under Community law to the Community. See above at n 454.

657 Helmut Steinberger, GATT und regionale Wirtschaftszusammenschlüsse: Eine Untersuchung der Rechtsgrundsätze des Allgemeinen Zoll- und Handelsabkommens vom 30. Oktober 1947 (GATT) über die Bildung regionaler Wirtschaftszusammenschlüsse, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Carl Heymanns, Köln, Berlin, 1963 at 126 maintains that even then the Treaty of Rome was properly subjected to review as a regional trade agreement within the meaning of Article XXIV. For an argument in 1962 that the EEC did not constitute a political union amounting to a rebus sic stantibus voiding existing most-favoured-nation treaty obligations see Peter Hay, ‘The European Common Market and the Most-Favored-Nation Clause’ (1962) 23 University of Pittsburgh Law Review 661 at 680-682. It is true however that the Community received a relatively light-handed treatment, as is evident from the following statement by the Committee assessing the Community’s compliance that ‘... the Committee felt

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One alternative would be to apply the 'political' exception when the political unit has acceded to the WTO agreement. This is obviously a convenient solution for those seeking to exempt the European Community from the strictures of Article XXIV:8, but it is difficult to see why accession to the WTO should matter from a legal point of view. All that is required for accession to the WTO is that the entity be 'a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement'. This is probably a less stringent test than the requirements for international legal personality, which do not themselves exempt a customs territory from compliance with Article XXIV.

But even if there were such a 'political' exception to Article XXIV, and regardless of how the test for a sufficient 'political' status might be defined, it could not in any case apply to the agreements containing a human rights clause. In none of these cases can there be any argument that the agreement has a

that it would be more fruitful if attention could be directed to specific and practical problems, leaving aside for the time being questions of law and debates about the compatibility of the Rome Treaty with Article XXIV of the General Agreement. See The Treaty Establishing the European Economic Community, Report by the Intersessional Committee, BISD 7S/69, para 3. This was a direct result of US pressure, according to Youri Devuyst, 'GATT Customs Union Provisions and the Uruguay Round: The European Community Experience' (1992) 26 JWTL 15 at 32-33.

658 Gabrielle Marceau and Cornelis Reiman, 'When and How Is a Regional Trade Agreement Compatible with the WTO?' (2001) 28(3) LIEI 297, at n 68; Frieder Roessler, 'The Relationship between Regional Trade Agreements and The Multilateral Trade Order: A Reassessment' in Frieder Roessler (ed), The Legal Structure, Functions and Limits of the World Trade Order, 2000, at 181 n 1, states that '[t]he EEC, possessing this autonomy, could theoretically accede to the GATT, in which case its existence would no longer require justification under Article XXIV.'

659 Article XII of the WTO Agreement; Article XXXIII of GATT was in the same terms.
'political' status sufficient for the application of this implied 'political' exception. The implied exception is of more interest to the European Community, perhaps in relation to a claim challenging the suspension of the rights of an EU Member State under the EC Treaty for a violation of human rights norms.660

3. Suspension of the agreement

A third implied exception to Article XXIV may apply to trade barriers imposed as a result of the suspension or termination of a regional trade agreement. This raises the difficult question whether Article XXIV not only limits what can happen under agreements while they continue to 'live,' but the extent to which it regulates their right to 'die'. To some extent, this question is speculative in the present context, given the above conclusion that 'appropriate measures' under the human rights clause will not usually entail the suspension or termination of the agreement under its denunciation clause or under the applicable rules of treaty law.661 However, it is worth addressing, partly because it is an issue on which WTO doctrine is almost entirely silent.

In principle, the WTO agreements are perfectly capable of limiting the types of agreement which may be concluded by its Members. Article 41 of the Vienna Convention sets out the general rule regarding the legitimacy of inter se

660 Here it must be noted that any such challenge would probably not come from the Member State itself, given that this is probably prohibited under Community law on the grounds that the challenge involves an interpretation of Community law, which for Member States is exclusively within the competence of the European Court of Justice under Article 292 EC.

661 See above at p 79.
agreements under multilateral agreements, and, modelled on this provision, Article 58, noted above, provides for a similar rule in the case of *inter se* agreements providing for the suspension of a multilateral agreement.

It may be possible to see the human rights clause as an agreement between a subset of parties to a multilateral treaty (the GATT) to suspend the operation of that treaty *inter se*. This would raise the question whether this possibility of suspension is provided for by the treaty under Article 58(1)(a) or is not prohibited by the treaty and conforms to the other conditions set out in Article 58(1)(b).

As to the first question, it seems clear that the human rights clause is not specifically permitted by the treaty for the purposes of Article 58(1)(a). From

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662 Article 41 of the Vienna Convention provides that:

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

   (a) the possibility of such a modification is provided for by the treaty; or

   (b) the modification in question is not prohibited by the treaty and:

      (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

      (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

663 See above at p 77.

664 It has been pointed out that Article XXIV itself is the type of provision envisaged by Article 41(1)(a), which is the equivalent provision to Article 58(1)(a) for *inter se* modifications.

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the above discussion, it also seems that the suspension may affect the enjoyment of third party WTO Members, and indeed, the human rights reasons for the suspension may well not be compatible with the object and purpose of the GATT.\textsuperscript{665} By contrast, it would probably be going too far to treat a standard form denunciation clause as incompatible with third party rights or with the object and purpose of the GATT.\textsuperscript{666} In \textit{Newsprint}, the panel said that in the event that the free trade agreements between the Community and the EFTA countries were ‘discontinued ... these countries would be entitled to fall back on their GATT


\textsuperscript{665} The objectives of GATT 1947 are expressed in the preamble as follows:

- Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,
- Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce ...’

\textsuperscript{666} Most agreements containing the human rights clause contain a denunciation clause with a notice period for termination of the treaty. For example, Article 99 of the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L317/3 (the ‘Cotonou Agreement’) provides that ‘[t]his Agreement may be denounced by the Community and its member States in respect of each ACP State and by each ACP State in respect of the Community and its Member States, upon six months’ notice’. Article 99 of the Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part [1999] OJ L311/32 provides that ‘[e]ither Party may denounce this Agreement by notifying the other Party in writing. The Agreement shall cease to apply six months after the date of such notification.’
rights vis-à-vis the EC, which rights continue to exist. The assumption, no doubt, was that the envisaged 'discontinuation' would take place in accordance with the terms of the agreement. The same would no doubt apply to a suspension or denunciation of an agreement in accordance with the rules of the Vienna Convention.

However, whether the situation is precisely the same in the event of the suspension or termination of an agreement for other reasons is unclear. In this respect, it is telling that the Community showed little confidence within the GATT in explaining why in 1991 it had to suspend its cooperation agreement with Yugoslavia. Despite the fact that the Community argued elsewhere that it was entitled to suspend the treaty on the grounds of a fundamental change of circumstances (rebus sic stantibus), within the GATT the Community considered to appropriate to justify the suspension as a national security measure under Article XXI. Pieter Jan Kuijper has commented on this by saying that:

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668 The Council's claim of rebus sic stantibus was accepted in Case C-162/96, A Racke GmbH & Co and Hauptzollamt Mainz [1998] ECR 1-3655.
669 See Trade measures taken by the European Community Against the Socialist Federal Republic of Yugoslavia – Communication from the European Communities, L/6948, 2 December 1991, at p 2, where the Community stated that '[t]hese measures are taken by the European Community upon consideration of its essential security interests and based on GATT Article XXI'. Yugoslavia denied that Article XXI applied (EEC – Trade Measures Taken for Non-Economic Reasons: Recourse to Article XXIII:2 by Yugoslavia, DS27/2, 10 February 1992). It might also be noted that the preamble of the actual measure referred to the threat to international security posed by the situation in Yugoslavia (see Council Regulation (EEC) No 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the
... it would be a strange world in which large-scale internal hostilities and disintegration of the treaty partner would not constitute sufficient reason for immediate suspension of the operation of a treaty, and it would be a strange GATT, if such conditions were considered insufficient for a valid appeal to the security clause of Article XXI ... 670

This may be true, but the relevant point, for present purposes, is that the Community considered that it was required to justify the suspension on GATT-legal grounds. Where this is not possible, which may be the case in the event of a suspension on human rights the grounds, the resolution of the problem could be quite difficult.

There is unfortunately no easy solution of the problem from general international law. At the least, one might imagine that a suspension or termination of a treaty that is not permitted under international law is also not permitted under Article XXIV. But is it possible to draw a distinction between the suspension or termination of a treaty by its own terms or by operation of the laws of treaties, on the one hand, and a suspension as a temporary countermeasure under the law of state responsibility, on the other? Or can any sensible distinction be drawn

European Economic Community and the Socialist Federal Republic of Yugoslavia [1991] OJ L315/1). The explanation is most likely because Article XXI(c) only extends to trade measures pursuant to a WTO Member’s obligations under the United Nations Charter, and this was problematic for two reasons: there was no Security Council resolution authorizing sanctions at the relevant time, and it was – and remains – unclear whether the Community can rely on Article XXI(c) in case, seeing as it is not, strictly speaking bound by Security Council resolutions (on which see p 524).

between a whole or a partial suspension or termination, both of which are, in principle, legitimate in appropriate cases under international law? The problem from a WTO perspective is that such deference to the rules of general international law could enable parties to evade the rules on Article XXIV by simply agreeing to a full free trade agreement, and then mutually agreeing to suspend an undesirable part of that agreement later on. This cannot be any more permissible than a partial free trade agreement excluding the relevant sector from the very beginning.

Fortunately, perhaps, it is unnecessary to answer this question here. Not only does the human rights clause probably not meet the requirements of Article 58 of the Vienna Convention, but in any case it was established earlier that, for reasons particular to the wording of the non-execution clause, it is unlikely that the Community would fully suspend or terminate a regional trade agreement notified under Article XXIV.

(ii) Jurisdictional issues

It is necessary also to address some of the jurisdictional issues concerning Article XXIV. In particular, there is a relevant question is whether Article XXIV can subject the human rights clause itself to challenge before a panel, or whether it is limited to measures under regional trade agreements.

Even though Article XXIV:8 is structured in terms of the conditions governing the permissibility of the regional trade agreements themselves, in practice these
conditions have been seen as applying to measures taken pursuant to such agreements.\footnote{See, eg, \textit{EEC – Member States’ Import Regimes for Bananas}, DS32/R, unadopted, 3 June 1993, para 358, where the panel said that ‘Article XXIV:5 to 8 permitted the contracting parties to deviate from their obligations under other provisions of the General Agreement for the purpose of forming a customs union or free-trade area, or adopting an interim agreement leading to the formation of a customs union or free-trade area, but not for any other purpose. Article XXIV:5 to 8 therefore did not provide contracting parties with a justification for restrictive import measures as such; it merely provided them – within the limits set out in this provision – with a justification for not applying to imports originating in such a union or area the restrictive import measures that they were permitted to impose under other provisions of the General Agreement. The Panel therefore considered that the import restrictions on bananas could not be justified by Article XXIV.’} That is to say, the condition that trade agreements will only be permitted to benefit from the Article XXIV:5 exemption ‘provided that the duties and other regulations of commerce imposed at the institution of any such union ... shall not on the whole be higher or more restrictive’ than before, and the condition that the exemption applies in any case only to those agreements ‘in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade between the constituent territories’ have been considered to be obligations applicable to trade measures taken under the agreements. It is also beyond doubt that such measures are reviewable by panels for their consistency with these conditions.\footnote{\textit{Turkey – Restrictions on Imports of Textile and Clothing Products}, WT/DS34/AB/R, adopted on 19 November 1999.}

What is less certain is whether panels have the jurisdiction to assess regional trade agreements themselves for conformity with the conditions in Article...
XXIV:5 and 8. Traditionally, it has been argued that Article XXIV:7 provides for a 'political' body to assess this question, and that requirements of 'institutional balance' remove this question from the ambit of the panel procedure. In this context, it should be noted that this review procedure has been less than a complete success: of the 147 regional trade agreements in force to have been notified to the GATT or the WTO by 31 January 2002, only one has expressly been found to be consistent with the provisions of Articles XXIV. This has been matched by a reluctance of panels and the Appellate Body to examine the trade agreements of its members, as opposed to trade measures taken under these agreements. This reluctance, may be seen, for example, in the almost apologetic choice of words adopted by the Appellate Body in the Bananas

673 Since the early days of GATT, the procedure for administering Article XXIV:7 has been for a Working Group to be established to examine the proposed free trade area and to provide a report on its consistency with the provisions of Article XXIV. Paragraph 7 of the Understanding on Article XXIV now sets out the following procedure for examination: '[a]ll notifications made under Article XXIV:7(a) shall be examined by a working party in the light of the relevant provisions of the GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.' This process is now administered by the Committee on Regional Trade Agreements (CRTA). On proposals to improve and tighten notification procedures see Note on Procedures to Facilitate and Improve the Examination Process – Note by the Secretariat, WT/REG/W/9, 9 October 1996.


675 Customs Union between the Czech Republic and the Slovak Republic, Report of the Working Party, L/7501, 4 October 1994. For a list of agreements notified, see WTO Secretariat, Regional Trade Agreements Notified to the GATT/WTO and in Force as of 31 January 2002, table available at www.wto.org/english/tratop_e/region_e/status_040202_e.xls. Factual examinations have been completed for 60 of the 147 agreements notified. Many other agreements are no longer in force, but none of these were found consistent with Article XXIV.
case, when it said that, in order to interpret the waiver granted to the Lomé Convention it had 'no alternative' but to examine the Lomé Convention.676

However, the Appellate Body has given certain indications that, in principle, regional trade agreements are reviewable by panels for consistency with Article XXIV. Addressing the issue, in Turkey-Textiles, the Appellate Body said that:

We are not called upon in this appeal to address this issue, but we note in this respect our ruling in India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products on the jurisdiction of panels to review the justification of balance-of-payments restrictions under Article XVIII:B of the GATT 1994.677

In India—Quantitative Restrictions, the Appellate Body had rejected an argument that 'institutional balance' in the WTO system meant that panels could not review measures that were within the political competence of the Balance of Payments Committee. In particular, the it rejected India's argument that the phrase 'any matters arising from the application of those provisions' in the dispute settlement provisions of the Understanding on Balance of Payments excluded matters that came within the purview of the BOP Committee. The Appellate Body said there that:

In our opinion, this provision makes it clear that the dispute settlement procedures under Article XXIII, as elaborated and applied by the DSU,

676 EC—Bananas, n 571, para 167.
are available for disputes relating to any matters concerning balance-of-payments restrictions.\(^{678}\)

Precisely the same words appear in paragraph 12 of the Understanding on Article XXIV.\(^{679}\) This gives rise to the clear implication that a panel would have jurisdiction to review the WTO-legality of a regional trade agreement.\(^{680}\) Indeed, in US – Line Pipes, both the complainant and the defendant parties assumed that a provision in a regional trade agreement (NAFTA) requiring the exclusion of imports from NAFTA partners from safeguard measures could be reviewed by a panel for consistency with Article XXIV.\(^{681}\)

Despite this clarification of the scope of a panel’s jurisdiction, it should be emphasised that the human rights clause as such is not likely to be challenged in the WTO. An analogy may useful be drawn in this respect with the review of legislation under the WTO. It is generally accepted while mandatory legislation

\(^{678}\) India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/AB/R, adopted on 22 September 1999, para 88.

\(^{679}\) Article 12 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 provides that ‘[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area’ (emphasis added).

\(^{680}\) For the same conclusion, see Frieder Roessler, ‘The Institutional Balance Between the Judicial and the Political Organs of the WTO,’ 2000, available at www.ksg.harvard.edu/ cbg/trade/roessler.htm and Gabrielle Marceau and Cornelis Reiman, ‘When and How Is a Regional Trade Agreement Compatible with the WTO?’ (2001) 28(3) IIEI 297.

will be reviewable for consistency with the GATT, discretionary legislation will at most be reviewable if it has an impermissible ‘chilling effect’ on private trading parties. This raises a difficult issue in relation to the human rights clause. From the Community’s point of view, while it cannot be said that the human rights clause mandates the taking of appropriate measures against a third party in order to enforce that party’s obligations under the essential elements clause, it could potentially be argued that the internal dimension of the clause as a means of guaranteeing the consistency of the Community’s policies with its own domestic human rights conditions mandates the Community to take ‘appropriate measures’ in the event that, as a factual matter, its relations with the other country involve it in human rights abuses.

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682 In *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted on 26 September 2000, para 93, the Appellate Body noted that it is up to the complainant to make out a *prima facie* case that legislation is mandatory.

683 See on this *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted on 27 January 2000, para 7.81. The panel elaborated on this by saying, in a footnote, that ‘[w]e would like to emphasize again that this finding does not require the wholesale reversing of earlier GATT and WTO jurisprudence on mandatory and discretionary legislation. The classical test under previous jurisprudence was that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions (see paras. 4.173 ff. and 7.51 of this Report). The methodology we adopted was to examine first and with care the WTO provision in question and the obligation it imposed on Members. It could not be presumed, in our view, that the WTO would never prohibit legislation under which a national administration would enjoy certain discretionary powers. If it were found upon such examination that certain discretionary powers were in fact inconsistent with a WTO obligation, then legislation allowing such discretion would, on its face, fail the classical test: it would preclude WTO consistency’ (para 7.97, n 675).

684 On these two views of the clause see p 172 above.
In this respect, it is relevant that the Community might be required to take such action following judicial proceedings brought by a private party. In *US – Antidumping Act*,\(^{685}\) the Appellate Body said that:

> The 1916 Act provides for two types of actions to be brought in a United States federal court: a civil action initiated by private parties, and a criminal action initiated by the United States Department of Justice. Turning first to the civil action, we note that there is no relevant discretion accorded to the executive branch of the United States' government with respect to such action. These civil actions are brought by private parties. A judge faced with such proceedings must simply apply the 1916 Act. In consequence, so far as the civil actions that may be brought under the 1916 Act are concerned, the 1916 Act is clearly mandatory legislation as that term has been understood for purposes of the distinction between mandatory and discretionary legislation.\(^{686}\)

However, there are two problems with making an analogy between the human rights clause and the measure at issue in this case. First, in practice it would be very difficult to bring an action against the Community on the grounds that its development policies are in violation of the obligation to respect human rights. As Steve Peers has pointed out, the Community would retain some discretion as


\(^{686}\) *Ibid*, para 90. The Appellate Body also noted, on the basis of past jurisprudence, that 'the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the executive branch of government' (at para 89), quoting United States – *Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted on 4 October 1994, BISD 41S/131, para 18.
to best way in which to ensure that human rights are respected.\textsuperscript{647} But a more serious problem is that any such case would not be brought on the basis of the human rights clause itself, but rather on the basis of general principles of Community law requiring Community acts to respect human rights. The human rights clause is merely the instrument by which the Community would be entitled, at the international level, to conform with its obligations under Community law. That is to say, the human rights clause is not a ‘measure’ requiring mandatory action.

We may therefore conclude by stating that measures under the human rights clause must comply with the conditions governing permissible regional trade agreements, relevantly, under Article XXIV:8, but that the clause itself is not reviewable on the grounds that it does not mandate the taking of appropriate measures.

(iii) Conclusions

It was concluded first that the ‘Article XXIV defence’ to violations of other WTO obligations will not apply to trade measures under the human rights clause for the reason that these restrictions fail the conditions to that defence. This is primarily because such measures are not necessary to the formation of the agreement in accordance with the objective of trade liberalisation. Moreover, even if a clause providing for future measures meets the condition that the

measures be imposed at the formation of the agreement (which is doubtful), this is similarly subject to the agreement serving the aims of trade liberalisation. Consequently trade measures under a regional trade agreement are potentially in violation of provisions of GATT other than Article I.

As far as the Article XXIV exception to Article I is concerned, it would be necessary for trade measures to comply with the requirement that ‘duties and other restrictive regulations of commerce’ be ‘eliminated on substantially all the trade between the constituent territories in products originating in such territories’. This would apply both to increases in duties, and to the imposition of quantitative restrictions (trade embargoes) on certain or all products. There may be a possible exception in cases where the trade measures are so specifically targeted that they do not touch ‘substantially all the trade’. Even here, however, it must be considered that the ‘qualitative’ definition of this term would probably exclude future trade measures not necessary to the formation of the regional trade agreement, seen in economic terms.

The question then turns to the applicability of any exceptions to this rule. As to this, Article XX clearly applies by the terms of Article XXIV:8 itself. Second, Article XXI will almost certainly continue to apply, because this follows from its own terms. As far as other implied exceptions are concerned, it is arguable that there is an exception to the rule in Article XXIV: 8 where the members of a regional trade agreement have reached a sufficient stage of integration that they can be considered to have constituted a political entity of some kind. However, this standard appears very difficult to meet. As to the effects of a suspension of an agreement under international law, it is likely that the human rights clause...
does not meet the conditions applicable to inter se agreements providing for the suspension of a multilateral agreement. But in any case, it was concluded in Part 2 that appropriate measures are unlikely to take this form, given that the non-execution clause requires appropriate measures to be chosen that 'least disturb the agreement'. In conclusion, it seems unless Article XX or Article XXI apply to trade measures under the human rights clause in regional trade agreements, any such measures will fail to meet the terms of Article XXIV and will consequently be in violation of Article I.

Finally, the question was addressed as to whether the human rights clause itself could be challenged for being in violation of Article XXIV. The conclusion to this was that it could not, though not because regional trade agreements are in principle immune from the panel process, but rather because the clause does not provide for mandatory trade measures, but leaves the respective executives of the contracting parties with a substantial degree of discretion as to whether or not to impose trade measures under the clause.

2. Waivers (the Cotonou Agreement)

Non-reciprocal preferences may be authorised by waivers granted by the WTO Members (acting as the Ministerial Conference or General Council) under the terms of Article IX:3 of the WTO Agreement (which supplants the earlier Article XXV:5 of GATT).\textsuperscript{68} Article IX:3 states that:

\textsuperscript{68} Article XXV:5 provides that '[i]n exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a

Footnote continued
In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements; provided that any such decision shall be approved by three fourths of the Members.

As with measures taken under regional trade agreements, the justiciability of measures taken under waivers was clarified by an Understanding reached at the Uruguay Round. Paragraph 3 of the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 stipulates that:

Any Member considering that a benefit accruing to it under GATT 1994 is being nullified or impaired as a result of: (a) the failure of the Member to whom a waiver was granted to observe the terms or conditions of the waiver, or (b) the application of a measure consistent with the terms and conditions of the waiver may invoke the provisions of Article XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding.

contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and (ii) prescribe such criteria as may be necessary for the application of this paragraph.' The main differences are that now a three quarters majority rather than a two thirds majority is required, and (under Article IX:4 of the WTO Agreement) there is an obligation to state the 'exceptional circumstances' on which the waiver was based and provision for mandatory review of the waiver. While not repealed, Article XXV:5 no longer applies by virtue of Article XVI:3 of the WTO Agreement, which provides that '[i]n the event of a conflict between the provisions of this Agreement and the provisions of any of the Multilateral Trade Agreements, the provisions of this Agreement shall prevail.'
On this basis, we may review the legality of trade measures taken under the human rights clauses in the Cotonou Agreement. The Cotonou Agreement waiver states, relevantly, that:

Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement without being required to extend the same preferential treatment to like products of any other member.689

These terms and conditions have no bearing on the present case.

As far as Article I is concerned, the waiver will not extend to measures that are not ‘necessary’ to permit the European Communities to provide preferential tariff treatment for products originating in ACP States ‘as required’ by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement. The equivalent provisions in the Lomé IV Convention were discussed at length by the Appellate Body in EC – Bananas in the specific context of the provisions in that Convention relating to trade in bananas. It is not necessary to enter into an in-depth discussion of this case, because it is more than clear that trade measures applied for the purpose of protecting human rights are well outside the scope of the relevant provisions of the Cotonou Agreement. Consequently, the Cotonou

waiver will not apply, and any trade measures under the human rights clause will also be subject to Article I of GATT.

Moreover, the waiver only applies to Article I. This means that any measures under the Cotonou Agreement will also not be protected from a potential violation of other GATT provisions. This follows directly from EC – Bananas, which concerned a waiver in relevantly identical terms to the Cotonou waiver, applicable to the predecessor to this agreement, the Lomé IV Agreement. In this case, the Appellate Body held that the waiver did not authorise the Community to violate provisions of the GATT other than Article I. Specifically, it said:

The Lomé Waiver does not refer to, or mention in any way, any other provision of the GATT 1994 or of any other covered agreement. Neither the circumstances surrounding the negotiation of the Lomé Waiver, nor the need to interpret it so as to permit it to achieve its objectives, allow us to disregard the clear and plain wording of the Lomé Waiver by extending its scope to include a waiver from the obligations under Article XIII. Moreover, although Articles I and XIII of the GATT 1994 are both non-discrimination provisions, their relationship is not such that

690 The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994 provided that ‘[s]ubject to the terms and conditions set out hereunder, the provisions of paragraph I of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party.’
a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII.691

It seems clear from this that the Cotonou waiver will also not authorise any violations of provisions other than Article I. Consequently, measures under the Cotonou Agreement will be potential violation not only of Article I but also of other provisions of the GATT.

3. Conclusions

The following conclusions may be drawn from this analysis. Any trade measures under the human rights clause treating imports from one WTO Member less favourably than those from any other State will violate the most-favoured-nation obligation in Article I of GATT. This applies to any type of trade measure. Second, any treatment of imported products that is less favourable than the treatment set out in the applicable schedule of concessions will violate Article II. In principle, these concessions could relate to any type of treatment, but in practice concessions are restricted to tariff duties. This means, then, that any increase in duties under the human rights clause beyond the bound rate will violate this provision. Third, any trade measures treating imported products less favourably than domestic products will violate Article III of GATT. This applies in particular to such non-tariff trade barriers as ‘social labelling’. Fourth, any

quantitative restrictions applied to imports (or exports), such as trade embargoes on any product, will violate Article XI:1.

This is subject to three limited exceptions of potential application to the case of trade measures taken under the human rights clause. The first is that, notwithstanding these potential violations of GATT provisions, trade measures taken under regional trade agreements will be justified where they are necessary for the formation of that agreement in accordance with the provisions of Article XXIV and where they (or a clause providing for future such measures) date from the formation of the agreement. In the present case, however, it seems that trade measures for the purpose of protecting human rights do not meet this description, as it is impossible to argue that trade measures (or a clause providing for future trade measures) for the purpose of protecting human rights is necessary for the formation of a regional trade agreement.

Second, trade measures under a regional trade agreement may be justified notwithstanding Article I where they are consistent with the conditions set out in Article XXIV:8(b). But unless they fall within the terms of the general exceptions in Article XX, it is unlikely that trade measures taken under the human rights clause for the purpose of protecting human rights will meet these conditions. This is because, as measures taken after the trade agreement is formed, they will necessarily violate the requirement that the parties to a free trade agreement under Article XXIV:8(b) eliminate trade barriers on ‘substantially all the trade’ under that agreement, according to a qualitative understanding of that term. They may also violate this requirement on pure
quantitative grounds. Nor do any 'implied exceptions' to those conditions apply in the present case.

The third exception is that trade measures may be justified under the terms of a specific waiver from the provisions of the GATT granted under Article IX:3 of the WTO Agreement. In this respect, the only relevant waiver applies to the Cotonou Agreement, and this waiver does not authorise trade measures under the human rights clause in that agreement.

In summary, none of these limited exceptions apply to trade measures under the human rights clause. This raises the question whether any such measures can be justified as falling within one of the general exceptions in Article XX or the security exceptions in Article XXI of GATT.

E. General Exceptions (Article XX) 692

1. Introduction

Article XX ('General Exceptions') provides, relevantly, as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

692 A version of this section is published as Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: the Case of Trade Measures for the Protection of Human Rights' (2002) 36(2) JWT 353.
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the importations or exportations of gold or silver;
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies ..., the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...

There is a clear relationship between certain of these exceptions and human rights principles. As the Secretary-General of the United Nations put it in his 2000 Report to the General Assembly:

The exceptions referred to [in Article XX] call to mind the protection of the right to life, the right to a clean environment, the right to food and to health, the right to self determination over the use of natural resources, the right to development and freedom from slavery to mention a few.693

693 Globalization and its impact on the full enjoyment of all human rights – Preliminary report of the Secretary-General, UN Doc A/55/342, 31 August 2000, cited also in Hoe Lim, 'Trade and Human Rights: What’s at Issue?' (2001) 35(2) JWT 275, at 284. The Office of the UN High Commissioner for Human Rights subsequently addressed a note verbale to Member States attaching a list of ten questions raised in the preliminary report, including ‘(c) To what extent do
The relationship is also more than coincidental: as a matter of treaty interpretation these provisions can and should be read consistently with applicable international human rights norms, as indeed they must be read consistently with any other applicable norms of international law.694 This is the immediate result of Article 3.2 of the DSU,695 which incorporates the rule in Article 31(3)(c) of the Vienna Convention that, for the purpose of interpreting an agreement, an interpreter must take into account as part of the context 'any relevant rules of international law applicable in the relations between the parties.'696 The rule is also reflected in the Appellate Body’s often-quoted

the exceptions included under article XX of the General Agreement on Tariffs and Trade indicate a point of convergence between trade rules and international human rights law?’. By the time of the follow-up report Globalization and its impact on the full enjoyment of all human rights – Report of the Secretary-General, UN Doc A/56/254, 31 July 2001, only five replies had been received, and the Secretary-General recommended that the questions be resubmitted for a report to be submitted to the 57th session of the General Assembly. Of these respondents only Burkina Faso responded directly to question (c), stating that ‘a State can still adopt appropriate measures for the protection of human rights even if such measures are contrary to the State’s trade commitments, if the opening of its frontiers threatens to cause harm to persons’ (at para 6).

694 It is unlikely that this is affected by the rejection of the United States proposal to include a sentence in the Singapore Declaration stating: ‘We recall that all Members have subscribed to the Universal Declaration on Human Rights,’ noted by Virginia A Leary, ‘The WTO and the Social Clause: Post-Singapore’ (1997) 8(1) EJIL 118.


696 Joost Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 AJIL 535 at 562 n 178. The designation by the Appellate Body in United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted on 6 November 1998 at para 130, of the term ‘natural resources’ in Article XX(g) as ‘evolutionary’ was not a direct application of Article 31(3)(c), as it depended upon the intention of the parties with respect to a particular treaty provision at the time of conclusion of the agreement, in this case

Footnote continued
statement in the *Gasoline* case that ‘the General Agreement is not to be read in clinical isolation from public international law’.\(^{697}\)

2. The question of extraterritoriality

But complications arise when it comes to the concrete application of this interpretive principle to the relevant Article XX exceptions. This is because international human rights law is predicated on ‘extraterritoriality’ in the sense that States are presumed to have an interest in the domestic conduct of other States, while the WTO legal system has long been considered to have an aversion to ‘extraterritorial’ trade measures.

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justified by the preamble of the WTO Agreement (at para 130): cf *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, [1971] ICJ Rep 16 (26 Jan), which is cited by the Appellate Body for this method, and *Aegean Sea Continental Shelf (Greece/Turkey), Jurisdiction, Judgment*, [1978] ICJ Rep 3 (19 Dec) at para 79; and *Gabcikovo Nagymaros Project (Hungary/Slovakia)*, [1997] ICJ Rep 7 (25 Sep) at para 112. To the extent that the ‘evolutionary approach’ itself forms part of customary international law, it falls within the scope of Article 31(3)(c) and consequently it is unnecessary to question whether the Appellate Body was here deviating from its view that Articles 31, 32 and 33 of the Vienna Convention represent the ‘customary rules of interpretation of public international law’ referred to in Article 3.2 of the DSU. It should also be said that there is a view that the evolutionary approach is the *same* as that in Article 31(3)(c): see, eg, the Dissenting Opinion of Judge Ameli in *INA Corporation v Iran* (1985) 8 Iran-US CTR 373 at text to nn 91 to 101. There is, however, a significant difference between the two insofar as the evolutionary approach depends upon a term being considered ‘evolutionary’ at the time of treaty conclusion, whereas Article 31(3)(c) applies even to terms that might have been considered ‘static’ at that time.

Not all ‘human rights’ measures falling under Article XX raise this issue. For instance, it is relatively uncontroversial to say that the exception for measures ‘necessary to protect human ... life or health’ should permit a WTO Member to impose trade restrictions necessary to safeguard the human rights within its territory, or, more specifically, the right to health. Similarly, few would argue with the proposition that the exceptions clause in the TRIPS Agreement granting a WTO Member certain rights to override patents in order to protect domestic public health should be read consistently with international human rights with respect to health. But it is more difficult to apply these exceptions

698 See the comment of Burkina Faso, quoted at n 693 above.
699 Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, DS10/R, BISD 37S/200, which concerned a public health issue, was not framed by either party or the panel in human rights terms.
700 James Thuo Gathii, ‘Construing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable AIDS Drugs to Low-End Consumers’ (2001) 53 Florida Law Review 727. The Draft Ministerial Declaration on the TRIPS Agreement, IP/C/W/312, WT/GC/W/450, 4 October 2001, advanced by the African Group and 19 other developing countries included a reference to ‘discharging the obligation to protect and promote the fundamental human rights to life and the enjoyment of the highest attainable standard of physical and mental health ... as affirmed in the International Covenant on Economic, Social and Cultural Rights’, however the final Ministerial Declaration on the TRIPS Agreement, WT/ MIN(01)/DEC/W/2, 14 November 2001 did not include any references to human rights. See also the Resolution of the Sub-Commission on the Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights, E/CN.4/Sub.2/Res/2000/7, 17 August 2000, declaring that ‘there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other’ (at para 2) and ‘[r]equest[ing] the World Trade Organization, in general, and the Council on TRIPS during its ongoing review of the TRIPS Agreement, in particular, to take fully into account the existing State obligations under international human rights instruments’ (at para 8). Intellectual property rights may also be treated as human rights in a positive sense, eg, as a reflection of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural

Footnote continued
to measures designed to promote respect for human rights within the territories of
other WTO Members.

Least controversially, it has been proposed that the exception for measures
'relating to the products of prison labour' in Article XX(e) should be read as
referring to products produced by means of forced labour\(^ \text{701} \) (regardless of the
fact that this provision seems originally to have been designed with wage
competitiveness in mind)\(^ \text{702} \) and that Article XX(a) should permit a WTO

Rights (ICESCR), opened for signature on 19 December 1966, 993 UNTS 3, which sets out a
person's 'right to the protection of the moral and material interests resulting from any scientific,
literary or artistic production of which he is the author.'

\(^{701}\) Virginia A Leary, 'Workers' Rights and International Trade: The Social Clause (GATT, ILO,
NAFTA, US Laws)' in Jagdish Bhagwati and Robert Hudec (ed), *Fair Trade and
Harmonization: Prerequisites for Free Trade?*, MIT Press, Cambridge, Massachusetts, 1996 at
204 (with further references), Janelle M Diller and David A Levy, 'Child Labor, Trade and
Investment: Toward the Harmonization of International Law' (1997) 91 *AJIL* 663 at 683; Patricia
Stirling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: a
33-9; Michele Vellano, 'Full Employment and Fair Labour Standards in the Framework of the
WTO' in Paolo Mengozzi (ed), *International Trade Law on the 50th Anniversary of the
Multilateral Trade System*, Giuffrè, Milano, 1999 at 395-6 (noting the possibility but remaining
non-committal); *contra*, however, Frank J. Garcia, 'Trading Away the Human Rights Principle'
(1999) 25(1) *Brooklyn Journal of International Law* 51 at 79-80 and Christopher McCrudden,
'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' (1999) 2(1) *Journal of International Economic Law* 3 at 39. Note also the failure of a
United States proposal to include an express limitation on 'involuntary labour' at the 1947-8 ITO
Conference and again (this time forced or compulsory labour) in 1956 referred to in Steve
Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime. A

\(^{702}\) Leary, 'Workers' Rights', n 701 at 227 n 57. In *US–Tuna* (1994), n 713, at para 3.35, the EC
argued that '... the exception in paragraph (e) on the products of prison labour was not intended to

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Member to ban the importation of products produced in a manner violating human rights norms in order to protect the public morals of the importing Member.\textsuperscript{703}

combat prison labour practices in other contracting parties. There was very little that was humanitarian about this type of provision on prison labour ... Many, if not all, contracting parties operated systems of prison labour, not necessarily forced or hard labour. Contracting parties simply wanted to be able, if necessary, to protect themselves against the “unfair competition” resulting from the low-cost labour employed in the production of prison goods.' Frieder Roessler, 'Diverging Domestic Policies and Multilateral Trade Integration' in Jagdish Bhagwati and Robert E Hudec (ed), \textit{Fair Trade and Harmonization: Prerequisites for Free Trade?}, Vol 2, MIT, 1996 at 38-9, states that a WTO Member can justify a ban on foreign goods produced by prison labour under Article XX(e) while at the same time permitting the sale of goods made in domestic prisons, thus underscoring not only the competitive but even the protective origins of the provision. This may be what the Appellate Body was referring to when it said, in \textit{US-Shrimp} at para 120, that ‘[w]hat is appropriately characterizable as “arbitrary discrimination” or “unjustifiable discrimination,” or as a “disguised restriction on international trade” in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of “arbitrary discrimination”, for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.’ On what might be required for the public morals exception, see n 704 below.

Incidentally, there is no necessary reason, as supposed by some authors, that the term 'public morals' should be interpreted in a uniform manner.\textsuperscript{704} Israel can – and does – prohibit the importation of non-kosher meat products on the grounds of 'public morals,'\textsuperscript{705} but it is unlikely that the United States could do the same. Nor is it necessary to treat 'public morals' as necessarily synonymous with the norms of international human rights law.\textsuperscript{706} To the extent that the term is

\textsuperscript{704} Eg Howse, 'Workers' Rights,' n 703 at 169 ('the public morals exception in Article XX(a) risks being almost limitless if the content of public morals does not have a universal element. Fundamental Rights supply this content, so a WTO dispute panel could use as a primary test to determine whether sanctions come within the ambit of Article XX(a), if the sanctions have a basis in the Declaration on Fundamental Labor Rights or other international human rights instruments of a universal character ...') and Christoph T Feddersen, 'Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation' (1998) \textit{7 Minnesota Journal of Global Trade} 75 at 77 ('since standards of "public morals" could differ among participating states, an interpretation of these standards must be found which can be consistently shared among all GATT members'). Feddersen rejects an interpretation of 'public morals' that extends beyond a 'core interpretation' for two reasons: (i) because Article XX does not extend to extraterritorial matters (at 117) and (ii) because the \textit{travaux preparatoires} distinguish between public morals and \textit{ordre public}, and consequently the public morals exception does not cover trade measures conflicting with the domestic legal order (at 118-9). Both of these points are disputed here. That the second is unnecessary may be seen from Case 121/85, \textit{Conegate Limited v HM Customs & Excise} [1986] ECR 1007 where the European Court of Justice stated that 'a Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory' (at para 16). Article 30 EC, which corresponds to Article XX of GATT, includes reference to both public morality and \textit{ordre public}.

\textsuperscript{705} Trade Policy Review – Israel – Minutes of Meeting on 14 and 16 September 1999, WT/TPR/M/58, 19 October 1999 at paras 45 and 55.

\textsuperscript{706} In addition to the references at n 704, see Steve Charnovitz, 'The Moral Exception in Trade Policy' (1998) \textit{38 Virginia Journal of International Law} 689 at 742, who proposes that 'the WTO should use international human rights law to ascribe meaning to the vague terms of Article XX(a)' and Garcia, n 701 at 80 (disagreeing with Charnovitz on the scope of the exception, but Footnote continued
contained in a treaty, there is naturally a public international law dimension to the term ‘public morals,’ but international law no more prescribes the content of this term than it prescribes a State’s rules on nationality.\(^0\)\(^7\) This is not to say that the international obligations of a WTO Member are not relevant in determining its domestic public morals, but they are far less persuasive as evidence than the regulating Member’s \textit{domestic} policies.\(^0\)\(^8\) On the other hand, it is conceivable that the human rights obligations of a complaining Member could operate as an estoppel to preclude it from challenging a public morals defence by another Member.


\(^0\)\(^8\) See \textit{Conegate}, n 704, where the Court said that ‘although Community law leaves the Member States free to make their own assessments of the indecent or obscene character of certain articles, it must be pointed out that the fact that goods cause offence cannot be regarded as sufficiently serious to justify restrictions on the free movement of goods where the Member State concerned does not adopt, with respect to the same goods manufactured or marketed within its territory, penal measures or other serious and effective measures intended to prevent the distribution of such goods in its territory. [16] It follows that a Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory’. 

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More controversial, on the other hand, are proposals related to the protection of interests that are purely ‘extraterritorial’. Most obviously, this includes the argument that Article XX(b) allows a WTO Member to ban the importation of products produced in a manner which violates human rights in order to protect the ‘human ... life or health’ of persons in the territory of another WTO Member. There is also a fourth category of arguments that various Article XX exceptions may apply to allow a WTO Member to prohibit the importation of unrelated products from a WTO Member in which human rights violations occur, regardless of whether these products are themselves produced in a manner which violates human rights. Here it is more appropriate to speak of ‘sanctions’ rather than of ‘trade restrictions’.

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709 Diller and Levy, n 701 at 682-3; Howse, ‘Workers’ Rights,’ n 703 at 144; Bal, n 703 at 79-86.
710 Eg Barry Carter, *International Economic Sanctions: Improving the Haphazard US Legal Regime*, Cambridge University Press, Cambridge, 1988 at 132 n 141, who considers that the GATT exceptions ‘might be stretched to cover human rights violations or racial discrimination’. Also apparently going this far is Charnovitz, *Moral Exception* n 706. Stirling, n 701, cites the prison labour exception and reasons that ‘[a]s the suggestion of a social clause indicates, a formal link between trade and human rights is an acceptable idea among industrialized members of the WTO’ (at 37). Stirling proposes the establishment of a Human Rights Body within the WTO to authorise trade sanctions for human rights violations, although this would seemingly exceed the limited objectives of the WTO.

With the exception of the first category, all of these proposals raise the question whether Article XX can apply to measures with the express objective of regulating a matter located outside of that Member's territory: in other words, extraterritorial trade measures. The following will therefore address first the issue of extraterritoriality, then the argument that trade measures are not properly to be considered extraterritorial measures, and finally some limitations on the use of extraterritorial trade measures resulting from the particular features of the WTO dispute settlement system.

(a) Existing approaches

Most discussion of Article XX in the context of extraterritorial measures has concentrated on whether the 'important state interests' protected by Article XX (eg the protection of 'public morals,' 'human life or health' or 'natural resources') are subject to what the Appellate Body in *Shrimp* called a 'jurisdictional limitation'. This has usually meant asking whether Article XX applies only to measures protecting things located within the territory of the importer, or whether it also extends to measures protecting things located within

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712 *US-Gasoline*, n 697 at p 29 ('Article XX of the General Agreement contains provisions designed to permit important state interests – including the protection of human health, as well as the conservation of exhaustible natural resources – to find expression.') On the other hand, the Appellate Body in *US-Shrimp*, n 696 at para 121, stated in the same context that 'the *domestic policies* embodied in such measures have been recognized as important and legitimate in character' (emphasis added).

713 *US-Shrimp*, n 696, at para 133. The term had been adopted by all parties in *United States – Restrictions on Imports of Tuna*, unadopted, 16 June 1994, DS29/R.
the territory of other Members, or, indeed, outside of the territorial jurisdiction of any Member.

It being generally agreed that the text of Article XX is ambiguous on this point,\textsuperscript{714} a number of different approaches have been adopted in an attempt to clarify the issue. Probably the least satisfying of these has been the attempt to reason by analogy from other provisions in Article XX which more obviously have an extraterritorial scope (most obviously Article XX(e)) to support an argument that other provisions in Article XX similarly extend to extraterritorial measures.\textsuperscript{715} One could just as easily (and just as unconvincingly) conclude the opposite on the basis that \textit{expressio unius est exclusio alterius}.\textsuperscript{716} Nor, for that matter, is it all that compelling to argue, again by analogy, that the existence of other WTO Agreements with express territorial limitations (such as the SPS Agreement)

\textsuperscript{714} This was recognised by the panels in \textit{United States – Restrictions on Imports of Tuna}, unadopted, 3 September 1991, DS21/R, BISD 39S/155 at para 5.25, and \textit{US–Tuna} (1994), n 713 at para 5.16 (on Article XX(g)) and para 5.31 (on Article XX(b)).

\textsuperscript{715} Eg Bal, n 703 at 86; Howse, ‘Workers’ Rights,’ n 703 at 143 (both referring to the prison labour exception in Article XX(e) and Chamovitz, ‘Moral Exception,’ n 706 at 700-701 (referring to both Article XX(e) and the exception for measures for the protection of national treasures in Article XX(f)).

\textsuperscript{716} Feddersen, n 704 at 109-110 (criticised for this in Howse, ‘Workers’ Rights,’ n 703 at 143) and McCrudden, n 701 at 38-41. Cf Edward Gordon, ‘The World Court and the Interpretation of Constitutive Treaties’ (1965) 59 \textit{AJIL} 794 at 806, noting that ‘the [ICJ] has not fully accepted the \textit{expressio unius} maxim and that it has relied on other considerations to reach its decisions’. Note also scepticism as to the maxim \textit{expressio unius est exclusio alterius} in \textit{First Written Submission of the United States (Annex A-2) in United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan} WT/DS184/R, adopted on 23 August 2001 at page A-178, with further references.
should be taken to mean that the relevant provisions in Article XX should not apply to extraterritorial measures. 717

Others (most notably Steve Charnovitz) have looked to the travaux préparatoires of the GATT in an effort to sustain an interpretation of these provisions that allows for extraterritorial measures. 718 However, this approach also suffers from various problems. Not only does the Vienna Convention only permit recourse to the travaux as a supplementary means of interpretation, but, in the case at hand, the travaux to Article XX make it fairly plain that these provisions were concerned originally with competitive effects of lower standards, and not with the maintaining of environmental or human rights values, which somewhat undermines the argument. 719 Even aside from this, this historical approach is of limited utility: to the extent that it merely leads to a conclusion that Article XX is

717 Matthias Reuß, Menschenrechte durch Handels sanktionen, Nomos, Baden-Baden, 1999 at 97.
719 This point has been very well made by Elissa Alben, ‘GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link’ (2001) 101 Colum L Rev 1410, who notes that ‘it is clear that parties in the early period did not see anything intrinsically improper about discussing labor standards in the context of a trade negotiation. This confirms the “conventional wisdom” supporting a labor-trade link. It may not support, however, modern human rights concepts of “fair labor standards.” History equally suggests that, in the labor context, the GATT was largely conceived as a means to ensure proper mechanisms for wage setting’ (at 1440 and passim). For references to additional treaties prior to the GATT that did relate trade to human rights concerns, see Charnovitz, Influence,’ n 701.
not inherently hostile to extraterritorial measures, it says nothing new,\(^\text{720}\) and on the important question when such measures might not be appropriate it gives no answer at all.\(^\text{721}\)

More promising are proposals based on Article 31(3)(c) of the Vienna Convention, which, as noted above, provides for the interpretation of treaties in light of rules of international law applicable between the parties, and this approach is also adopted here. As a preliminary matter, it must be said that there is some dispute as to whether Article 31(3)(c) refers to law applicable between only some of the parties to the agreement (usually the parties to a dispute)\(^\text{722}\) or whether it applies only to law applicable to all of the parties to the agreement (i.e. all WTO Members).\(^\text{723}\) This dispute has no effect on the use of customary

\(^{720}\) US-Tuna (1994), n 713, at para 5.16 ("It could not therefore be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure.")

\(^{721}\) Indeed, Charnovitz more or less admits this in Moral Exception, n 706 at 717, when he says that "[t]he various ways morality-based trade measures had been employed before the GATT was written foreshadow many of the uses to which article XX(a) might be enlisted today. Concerns about narcotics, pornography, alcohol abuse, animal cruelty, bombing of civilians, and abortion-inducing drugs remain strong 50 years after the GATT was written. The one new element in today's debate is the use of trade measures to pressure other countries to democratize."


\(^{723}\) Pauwelyn, 'Public International Law,' n 696 at 575-6. One can agree with Pauwelyn that the same meaning should be given to the term 'the parties' in Article 31(3)(c) and the term as used in Articles 31(3)(a) ('any subsequent agreement between the parties regarding the interpretation of

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the treaty or the application of its provisions") and 31(3)(b) ("any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"). But this does not necessarily mean all of the parties to the agreement, despite the fact that, as Pauwelyn notes, this was the express understanding of the ILC with respect to Article 31(3)(b) (at 575 n 202). Pauwelyn also notes that 'party' is defined in the Vienna Convention as 'a State which has consented to be bound by the treaty and for which the treaty is in force.' But the argument is that the term 'the parties' means 'some of the parties to the treaty' (a subset of the definition of 'party') not 'all of the parties to the dispute' (a difference in its meaning). Which of these 'some' parties are to be taken into account in any given interpretation is determined by the term 'applicable'. This may differ according to whether there is a legal dispute before a tribunal, or whether there is an 'autointerpretation' affecting a certain number of other parties. Pauwelyn also argues that the Appellate Body has supported his interpretation in *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted on 22 June 1998 at para 84, when it said that '[t]he purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of one of the parties to a treaty.' However, this passage could just as easily be interpreted as meaning 'parties to the dispute'. Indeed, the Appellate Body later (at para 93) criticised the panel for taking into account the practice of only one party to the dispute, thus apparently violating Article 31(3)(b), and it also later (at para 85) referred expressly to Article 31(3) before stating (at para 89) that 'a proper interpretation of Schedule LXXX should have included an examination of the Harmonized System and its Explanatory Notes'. This amounts to an acceptance of the submission of the European Communities, which expressly stated (at para 13) that, by virtue of Article 31(3)(c), the treaties constituting the Harmonized System and its Explanatory Notes (which were not concluded by all WTO Members) should 'be relevant in interpreting the obligations of the European Communities under Schedule LXXX vis-à-vis WTO Members which are also Members of the World Customs Organization (the "WCO").' The panel in *European Communities - Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R, adopted as modified by the Appellate Body report on 23 July 1998 also clearly took the view that Article 31(3)(c) applies in cases where the relevant agreement is between only the parties to the dispute (at paras 196-201), although the panel in *US-Tuna* (1994), n 713, speaking of Article 31(3)(b), equally clearly took the opposite view (at para 5.19). Further, the view that Article 31(3)(b), and hence Article 31(3)(c), refers to a subset of the parties is supported by the fact that the International Court of Justice has accepted the practice of international organizations in the interpretation of their constituent instruments in which context 'it has given little weight to the existence of dissenting minorities, abstentions, or qualified

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international law or general principles of law for interpretive purposes, but it does determine whether *inter se* agreements between a subset of WTO Members may be used to interpret a WTO agreement. The authorities are somewhat ambiguous on this point, but it should be pointed out that, under the Vienna Convention, WTO Members are in principle permitted to enter into *inter se* agreements modifying their WTO rights and obligations. It does not seem logical, then, to read Article 31(3)(c) to exclude recourse to such agreements in the interpretation of the agreement thereby modified. It might be objected that this would strike against the uniform interpretation of WTO rules. But unlike the European Community, which constitutes a 'legal order' depending upon the uniform application of Community rules protected by a central court, the WTO is a system founded on regulatory diversity, in which the interests of third parties (which, relevantly, do not include individuals or WTO organs) are protected by the principle of most-favoured-nation treatment. There is therefore no call for assents, as invalidating the interpretive value of the resolution itself (Blaine Sloan, 'The United Nations Charter as a Constitution' (1989) 1 Pace Yearbook of International Law 61 at 110).

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724 See n 723.

725 Cf Vienna Convention, Article 30 (Application of successive treaties relating to the same subject-matter) and Article 41 (Agreements to modify multilateral treaties between certain of the parties only).

726 See, eg, Case 66/80, *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato* [1981] ECR 1191, at para 11 ('the main purpose of the powers accorded to the court by Article 177 is to ensure that Community law is applied uniformly by national courts'). The principle of uniform application is an aspect of the Community law principles of supremacy (Case 6/64, *Costa v Enel* [1964] ECR 585) and direct effect (Case 26/62, *van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1).
any uniform interpretation of WTO obligations outside of the context of the particular obligations of any given WTO Member.

In applying Article 31(3)(c) to Article XX, it must be recalled that one WTO Member's obligation under international law does not necessarily imply another WTO Member's right to enforce that obligation by countermeasures in the form of trade measures. Article 31(3)(c) can therefore only be applied to Article XX in those cases in which a WTO Member has a right under international law to impose trade measures for a particular purpose. One author who expressly recognises this problem is Gabrielle Marceau, who has applied Article 31(3)(c) to the defendant WTO Member's rights, though she limits her analysis to rights

\[727\] See above at p 65. It is therefore too broad to say, as does Richard J McLaughlin, 'Sovereignty, Utility, and Fairness: Using US Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO' (1999) 78 *Oregon Law Review* 855 at 919, that 'if a particular activity is prohibited as wrongful conduct under an existing rule of customary international law, a strong argument can be made that a GATT/WTO dispute settlement tribunal should automatically find a nation that imposes a restrictive trade measure to prevent that wrongful activity justified under the article XX chapeau.'

\[728\] A number of authors refer to the obligations of WTO Members to protect natural resources in arguing that trade measures for these purposes should be permitted under Article XX. These arguments are best understood as an indication that such obligations necessarily entail rights to act for these purposes by way of trade measures, not that such measures are available in the form of countermeasures to enforce the obligations of other WTO Members to protect resources. See, for instance, Thomas J Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' (1997) 91 *AJIL* 268 at 280; similarly, Sands, *Treaty, Custom*, n 722 at 103-4; James Cameron and Karen Campbell, 'Challenging the Boundaries of the DSU through Trade and Environment Disputes' in James Cameron and Karen Campbell (ed), *Dispute Resolution in the World Trade Organization*, Cameron May, London, 1998 at 216. It has also been argued by Diller and Levy, n 701 at 694, that the availability of trade measures to enforce *jus cogens* norms should be taken into account under Article XX. This would be consistent with the principles discussed above.
deriving from multilateral environmental agreements. Her argument is that a WTO Member’s trade measures under such an agreement should be presumed to be consistent with Article XX. However, this still leaves the difficulty that in the absence of an applicable rule of customary international law, a non-party to an international agreement would be immune from such an interpretation of Article XX. This seems self-evident from the terms of Article 31(3)(c), which speaks of ‘law applicable in relations between the parties’. Marceau acknowledges this difficulty, suggesting that the agreement could be relevant ‘on the basis that it affects the parties’ relations, even though only one of them is strictly subject to its provisions’. This, however, is unfounded in the text of Article 31(3)(c) and,

729 Marceau, n 722 at 129. Marceau recognises that these rights may take a number of different forms. Speaking of rights under multilateral environmental agreements (MEAs), she distinguishes between situations '(1) where the disputed measure is required by an MEA; (2) where the disputed measure is not required, but is explicitly permitted; and (3) where the disputed measure is taken in furtherance of the goals of an MEA'. She further divides these situations into cases where both parties are party to the MEA and cases where one is a non-party. A similar 'taxonomy' is found in Charnovitz, Taxonomy, n 711 at 7-8.

730 The non-party problem is more acute in the case of those who consider the principles of treaty conflicts (eg Articles 30 and 41 of the Vienna Convention or the rules of lex specialis) to be applicable in WTO dispute settlement proceedings with respect to MEAs, which only apply when all relevant parties are party to all the applicable agreements. For an argument that these principles are of limited relevance in WTO dispute settlement see Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35(3) JWT 499, though note, contra, Pauwelyn, Public International Law, n 696, especially at 564.

731 Marceau, n 722 at 132-3. Additionally, Marceau argues (with reference to EC–Computer, n 723 at para 93) that 'compliance with the MEA is to be viewed as “practice” of one Member' and, secondly, that 'the GATT/WTO should be interpreted with a view to avoiding such conflicts of obligations' with the result that ‘a Panel should take into account that WTO Member’s MEA obligations when interpreting the applicability of Article XX in that specific case.’ The first of these arguments must be clarified: the practice of one Member was held in that case to be.

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in the opinion of this author, should be rejected, except perhaps insofar as the
defendant's actions constitute an estoppel.

(b) A possible solution: the rules on legislative jurisdiction

It is suggested here that rather than by using Article 31(3)(c) to read Article XX
in light of substantive law (eg environmental or human rights law), this Article
should be applied instead as a tool for reading Article XX in light of the rules of
customary international law governing the exercise of legislative jurisdiction by a WTO Member to regulate 'the activities, relations, or status of persons, or
the interests of persons in things' with an extraterritorial element. The result
relevant in determining the common intention of the parties, presumably in accordance with
Article 31(3)(b), and so it can only be relevant if the practice was accepted by the other parties to
the dispute (cf above at n 723), either expressly or by acquiescence. The second argument has no
basis in the Vienna Convention insofar as a non-party cannot be affected by the obligations of
another State without its consent (see n 735). Marceau also argues that the MEA could be
relevant as a factual matter in the case of measures explicitly permitted and in furtherance of the
goals of an MEA. This is uncontroversial.

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would be that where the regulating WTO Member has jurisdiction to enact the measure according to the rules governing legislative jurisdiction under public international law, the measure should potentially be 'saved' under Article XX, provided, of course, that it also answers to the description of one or more of the legitimate purposes listed in that provision and satisfies the requirements of the Chapeau.74

regulations' (enforcement jurisdiction) (eg Restatement, n 733, § 431(1) and its adjudicatory jurisdiction, which is the power to 'exercise jurisdiction through its courts to adjudicate with respect to a person or thing' (Restatement, n 733, § 421(1)). In a Separate Opinion in Arrest Warrant of 11 April 2000 (Congo/Belgium) [2002] ICJ Rep 000 (14 Feb), available at www.icj-cij.org, at para 5, Judge Koroma, says that '[j]urisdiction relates to the power of a State to affect the rights of a person or persons by legislative, executive or judicial means'.

74 This approach was first proposed by Pietro Manzini, 'Environmental Exceptions of Art XX GATT 1994 Revisited in the Light of the Rules of Interpretation of General International Law' in Paolo Mengozzi (ed), International Trade Law on the 50th Anniversary of the Multilateral Trade System, Giuffré, Milano, 1999 n 701, especially at 839-40, but has apparently not been taken up by others. Among those who have recognised the application of the rules governing legislative jurisdiction to Article XX are Bernard Jansen and Maurits Lugard, 'Some Considerations on Trade Barriers Erected for Non-Economic Reasons and WTO Obligations' (1999) 2(3) Journal of International Economic Law 530 at 533, n 6, who stating that '[a] likely reason why the text of Article XX does not contain an express reference to jurisdictional limitations is because it assumes respect for and builds upon general principles of international law, including those on prescriptive jurisdiction', Petros C Mavroidis and Damien Neven, 'Some Reflections on Extraterritoriality in International Economic Law: A Law and Economics Analysis' in Marianne Dony (ed), Mélanges en Hommage à Michel Waelbroeck, Vol II, Bruylant, Brussels, 1999 and Kyle Bagwell, Petros C Mavroidis and Robert W Staiger, 'It's a Question of Market Access' (2002) 96 AJIL 56, at 76, stating that '[o]ur approach is probably consonant with the public international law concept of extraterritoriality. Amazingly, so far there has never been a discussion of this issue in WTO law, although the issue arose on a number of occasions'. See also Schoenbaum, Reconciliation, n 728 at 279 (citing Ilona Cheyne, 'Environmental Unilateralism and the WTO/GATT System' (1995) 24 Georgia Journal of International and Comparative Law 433, who is in fact more cautious) and stating that '[t]hese international law jurisdictional

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As with Marceau’s proposal, this approach would ensure that Article XX is interpreted in a manner which would not unduly restrict – but also not expand – a WTO Member’s existing rights under general international law. But compared to that approach, it has the advantage of allowing for a consideration of a defendant’s obligations and rights under an international agreement, even when the complainant is not a party to that agreement, though naturally be subject to the *pacta tertii* rule. As we will see below, a State is entitled to legislate to affect nationals or the interests of the other party so long as it has a sufficient

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735 The principle of *pacta tertii nec nocent nec prosunt* is reflected in Articles 34 of the Vienna Convention, which provides that ‘[a] treaty does not create either obligations or rights for a third State without its consent.’ This principle was stated by Judge Schücking (dissenting) in *SS Wimbledon (UK, France, Italy and Japan/Germany), Merits*, [1923] PCIJ (Ser A) No 1 (August 17) at 47, when he said that ‘a legally binding contracted obligation cannot be undertaken to perform acts which would violate the rights of third parties’; cited in Christine Chinkin, *Third Parties in International Law*, Oxford Monographs in International Law, Clarendon, Oxford, 1993 at 72. The ‘non-discriminatory’ nature of the rules noted by at 26 (‘the CITES rules normally apply independent of whether the exporting country is a CITES member or not’) and Ann Rutgeerts, ‘Trade and Environment – Reconciling the Montreal Protocol and the GATT’ (1999) 33(4) *JWT* 61 at 69, is not relevant here, though it will be relevant under the Chapeau.
interest in the matter being regulated, and its legislation does not amount to an abuse of rights. Whether this test may be satisfied will depend on a variety of conditions; the mere fact, however, that the affected State is a non-party to an agreement under which the defendant has enacted its measure will not be decisive of the question. As Michael Scharf has pointed out, speaking of a party affected by such a measure, ‘states do not have a right to exercise exclusive jurisdiction over their nationals, even in the case of official acts.’ The affected complainant party must be able to point to a right under international law other than a simple interest in the free conduct of its nationals for it to be able to rely on the *pacta tertiis* rule.

This may be demonstrated by the example of trade restrictions under MEAs which apply to non-parties. Article 4 of the Montreal Protocol on Substances that Deplete the Ozone Layer provides that: ... ‘each Party shall ban the import of controlled substances from any State not Party to this Protocol.’ According to a

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737 It may be that such rights derive from the GATT notwithstanding the right of the regulating party to impose protective measures under Article XX. See below at text to 820 to 822.

traditional application of Article 31(3)(c), this agreement would not be relevant in a dispute between a party and a non-party to that Protocol. On the other hand, the approach suggested here would, on a *prima facie* basis, permit a State to exercise legislative jurisdiction sufficient to enable it to fulfil obligations incurred under this agreement. As mentioned, this will be subject to the requirement that the obligation itself does not improperly affect the rights or obligations of third parties in violation of the *pacta tertius* rule. Whether this is the case under the Montreal Protocol is a matter of some debate in the relevant literature, some authors claiming that it does,739 others that it does not (because the right to release the prohibited substances is outweighed by the other States’ right to a healthy environment),740 and others again arguing that the trade ban has assumed a ‘higher character’ (which presumably means that it constitutes a rule of customary international law).741 It is not necessity for present purposes to attempt an answer to this question, except perhaps to note that the mere fact that


741 Frank Biermann, ‘The Rising Tide of Green Unilateralism in World Trade Law: Options for Reconciling the Emerging North–South Conflict’ (2001) 35(3) *JWT* 421 at 425 claims ‘near-universal status’ for the main MEAs. As a result, he claims that ‘GATT is to be interpreted in such a way that trade restrictions required by quasi-universal multilateral environmental agreements fall under the purview of Article XX(b) and (g) of GATT as well as its chapeau.’ See also Eva M. Kornicker Uhlmann, ‘State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms’ (1998) 11 *Georgetown International Environmental Law Review* 101 at n 142.
a treaty affects the nationals of non-parties does not mean that the treaty violates the *pacta tertiiis* rule.

(c) **Rules on legislative jurisdiction**

It has traditionally been unquestioned that a State may exercise legislative jurisdiction in respect of conduct occurring on its territory (territorial basis) and in respect of its nationals (nationality).

It should perhaps also be said that, since *SS Lotus (France/Turkey)* [1927] PCIJ (Ser A) No 10, there has been a debate about whether States must justify their jurisdiction on a positive rule of international law or whether they may exercise jurisdiction unless prohibited by a positive rule of international law. In favour of the view that a positive law basis is required, see, for example, F A Mann, ‘The Doctrine of Jurisdiction’ (1964) 111 *RdC* 1 at 10-11, who says that ‘[t]he existence of the State's right to exercise jurisdiction is exclusively determined by *public international law*.’ Similarly, Robert Jennings, ‘Extraterritorial Jurisdiction and the United States Anti-trust Laws’ (1957) 33 *BYIL* 146 at 174 states that ‘[a] State has a right to extraterritorial jurisdiction where its legitimate interests are concerned’ and Article 3(1) of the Draft Resolution of the Institute of International Law, ‘The Extraterritorial Jurisdiction of States (Rapporteur: Maarten Bos)’ (1993) 65(1) *Yearbook of the Institute of International Law* 1, provides that ‘[a] State asserting authority to exercise extraterritorial jurisdiction is under an obligation to justify it under international law’. The same opinion is held by Meessen, *Kollisionsrecht*, n 707 at 232 and Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, Springer, Berlin/Heidelberg/New York, 1994 at 547. Cf, however, Derek Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’ (1982) 53 *BYIL* 1 at 3-4, noting some scepticism as to the necessity of a legal basis under public international law for the exercise of legislative jurisdiction (particularly in Michael Akehurst, ‘Jurisdiction in International Law’ (1972-3) 46 BYIL 145 at 170-7), though apparently concluding that an inconsistency of state practice particularly in civil jurisdiction does not remove the need for a rule *(id at 4)*. There is no need to enter into this debate, other than to note that this latter view has been almost entirely abandoned in practice. Thus, even Jean-Gabriel Castel, *Extraterritoriality in International Trade: Canada and United States of America Practices Compared*, Butterworths, Toronto/Vancouver, 1988 at 9, who maintains that ‘it is still correct to say that extraterritorial jurisdiction may be exercised as a matter of principle so long as no limitations are placed it by prohibitive rules of international law’ and that ‘*s*uch jurisdiction is not *conferred* by international law, only *limited*

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State may exercise legislative jurisdiction in respect of activities affecting its national security (protective) and in respect of crimes against humanity (universal). More controversial is the notion that a State may legislate in

by it' promptly goes on to list the 'five principles upon which jurisdiction over a criminal act can be justified'.

743 In *Barcelona Traction, Light and Power Co (Belgium/Spain) (Second Phase)*, [1970] ICJ Rep 3 (5 Feb), at 46 the International Court of Justice denied that this principle could be applied to purely economic harm. See discussion in Stanley J Marcuss and Eric L Richard, 'Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory' (1981) 20 *Colum J Transnat'l L* 439 at 459, noting also the view of Akehurst, n 742 at 237 that this qualification might not apply when the entire economic structure of the State is threatened.

744 The adoption of criminal legislation in absentia on this jurisdictional basis was recently discussed in *Arrest Warrant of 11 April 2000 (Congo/Belgium)* [2002] ICJ Rep 000 (14 Feb), available at www.icj-cij.org, although the case was decided on the grounds that Belgium had 'failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law' (para 78). While the Court expressly refused to rule on the question 'whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts' (at para 43), it did indicate that this was a valid jurisdictional basis when it said, in an obiter dictum, that '[p]rovided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity' (at para 61). Judge Koroma comments in a Separate Opinion (at para 5) that 'the Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide. The Court did not rule on universal jurisdiction, because it was not indispensable to do so to reach its conclusion, nor was such submission before it.' The existence of universal criminal jurisdiction is strongly approved in the Dissenting Opinion of Judge Van Den Wyngaert, and strongly denied in the Separate Opinion of President Guillaume.
respect of acts with substantial effects on its territory (effects principle), and perhaps even more so is the notion that a State may legislate where the victim of an act is a national (passive personality). Probably the best known codification of these principles in the common law world is § 402 of the American Law Institute's Restatement, which sets out all of these bases as sufficient to establish legislative jurisdiction, subject to a 'reasonableness' test set out in § 403. This Restatement, however, neglects to mention another basis of jurisdiction, which is important for the following discussion, namely jurisdiction based on an international agreement. Such jurisdiction may be established both when the agreement provides for express rights and when it imposes obligations on a party.

For a relatively recent rejection of the effects doctrine (and all others apart from territory and nationality), see Submission by New Zealand – Item 1: The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs), WT/CTE/W/20, 15 February 1996 at paras 13-14, where it said that '[13] ... States have sovereign jurisdiction over activities within their territory and in certain circumstances over actions of their nationals outside their territory. Extraterritorial jurisdiction, however, does not extend to the activities of nationals of other States. [14] Absent specific language to the contrary in GATT/WTO or specific agreement otherwise between the parties concerned therefore, measures taken by an individual country to address the effects of other countries' nationals occurring outside its jurisdiction cannot be covered by existing GATT exceptions.'

SS Lotus (France/Turkey) [1927] PCIJ (Ser A) No 10 at 18-19 ('[Jurisdiction] cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention'). This is, of course, referring to enforcement jurisdiction, but as this may not exceed legislative jurisdiction, the statement may be assumed to apply also to legislative jurisdiction.

Brian D Smith, State Responsibility and the Marine Environment: The Rules of Decision, Clarendon, Oxford, 1988 at 154, says that '[i]t was concluded generally that each state has the

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There are also various limitations on the exercise of jurisdiction, which, when breached, will result in that exercise of jurisdiction amounting to an international wrong.\textsuperscript{748} The most obvious of these limitations is when there is concurrent jurisdiction, in which case a balancing of state interests will need to be

obligation to prevent harm to the marine environment of the exclusive zone of any other state and of the high seas beyond any of such zones. Moreover, it was demonstrated that this obligations, following general precepts, translates into a duty to exercise the full measure of the state’s territorial and extraterritorial legal authority to accomplish such prevention.’ He also argues that the standard of responsibility differs according to the degree of control exercised extraterritorially (\textit{id}, at 128, nn 109 to 110). This is confirmed by the European Court of Human Rights, which has imposed liability for acts within the ‘effective control’ of a contracting party. See, recently, \textit{Bankovic et al v Belgium et al}, European Court of Human Rights, Application No 52207/99 (12 December 2001). The trigger for this is the obligation under Article I of the Convention to secure rights to persons within the ‘jurisdiction’ of the contracting party.

undertaken. Independently of this, however, a doctrine of proportionality may also apply, as may a consideration of human rights standards, the principle of non-intervention and the principle of the equality of States. In the case of treaty-based jurisdiction, the *pacta tertiiis* principle constitutes a further limitation on the exercise of jurisdiction.

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749 § 403 of the *Restatement*, n 733, sets out a balancing test to be undertaken by the courts of the regulating State. This test has been criticised by Bowett, n 742 at 21-2, on the grounds that it will inevitably be biased towards an exercise of jurisdiction by the regulating State, may not lead to a uniform approach, entails difficulties in having the views of the affected party being adequately represented, is not accepted in practice, and is not appropriately dealt with by courts. See also the criticisms of this approach in Mann, 'Jurisdiction Revisited,' n 748, at 30-31 and 88-91 and the Observations of Karl Zemanek, in Institute of International Law, n 742, at 160.

750 Brownlie, n 748 at 313; Meessen, *Kollisionsrecht*, n 707 at 232. Meessen also gives an example of proportionality in the context of export controls on strategic goods, where he draws a distinction between 'rules directly addressing (re)exporters in a foreign state (direct extraterritoriality) and rules obliging domestic exporters [to] make their foreign trading partners comply with domestic regulation (indirect extraterritoriality)' and argues that '[d]irect extraterritoriality seems prohibited whenever means of indirect extraterritoriality are sufficiently effective' in Karl M Meessen, 'Extraterritorial Jurisdiction in Export Control Law' in Karl M Meessen (ed), *International Law of Export Control*, Graham & Trotman/Martinus Nijhoff, London/Dordrecht/Boston, 1992) at 13-14. See also the discussion, at text to n 842, of the doctrine of proportionality in *US-Shrimp*, n 696.


753 Bowett, n 742 at 15-16

In 1964, F A Mann subjected the traditional rules on legislative jurisdiction to a powerful critique. He pointed out that a rigid application of the territorial rule can lead to absurd results of concurrent claims of jurisdiction:

It should, indeed, be obvious that the principle of territorial jurisdiction has to be reconsidered for practical rather than doctrinal reasons ... The complications of modern life are responsible for the steadily increasing reluctance to 'localize' facts, events or relationships ... where, for instance, defamatory communications by wireless or television are concerned, where questions of passing-off or unfair competition arise in consequence of the distribution of advertising material in numerous forms and numerous countries, the territorial test is perhaps too readily satisfied and produces results which in a shrinking world may no longer be adequate. In short, a test developed in wholly different economic, social and technical conditions and at a time when corporations did not yet place a predominant role in international life is unlikely to satisfy a generation which is suspicious of rigidity and, indeed, of principles.755

Mann proposed that one abandon the traditional rules, and ask instead whether the regulating State has a 'meaningful connection'756 (or 'genuine link') with the matter being regulated. In a well-known passage he said that:

... a state has (legislative) jurisdiction, if its contact with a given set of facts is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its various aspects (including the practice of states, the principles of non-

755 Mann, 'Jurisdiction,' n 742, at 36-7.
756 This is Mann’s English translation in 'Jurisdiction Revisited', n 748 at 28 of the German term used by Meessen in Kartellrecht, n 748 to summarize the various formulations of the principle in Mann, 'Jurisdiction,' n 742.
interference and reciprocity and the demands of inter-dependence). A merely political, economic, commercial or social interest does not in itself constitute a specific connection.\(^{757}\)

This reference to the interests of states in regulating certain interests was not entirely original. For instance, Jennings preceded Mann in observing that ‘States claim extraterritorial jurisdiction where they believe their legitimate interests to be concerned,’ but did not consider this as a normative principle replacing the traditional bases of jurisdiction.\(^{758}\) Mann was the first to propose that the concept of a ‘meaningful connection’ be adopted on a normative basis. Indeed, the radical nature of this move can be seen in the fact that among those authors who do not mechanically refer to the jurisdictional bases listed in the *Restatement*, there are few common law lawyers are willing to adopt Mann’s position even today.\(^{759}\)

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\(^{757}\) Mann, ‘Jurisdiction,’ n 742 at 49.

\(^{758}\) Jennings, at n 742 at 152.

\(^{759}\) Eg Brownlie, n 748 at 313. (‘The two generally recognized bases for jurisdiction of all types are the territorial and nationality principles, but the application of these principles is subject to the operation of other principles ... Extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed: (i) that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction; (ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed; (iii) that a principle based on elements of accommodation, mutuality, and proportionality should be applied’) The difference in approach is explained in Smith, n 747 at 141. Notable exceptions among common law lawyers include Alan V Lowe, ‘The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution’ (1985) 34 *ICLQ* 730 and Joel Trachtman, ‘Externalities and Extraterritoriality: The Law and Economics of Prescriptive Jurisdiction’ in Jagdeep S. Bhandari and Alan O. Sykes (ed), *Economic Dimensions in International Law*, Cambridge, 1998 (adopting a law and economics approach).
Here it is important to note that, for Mann, it was a legal rather than merely factual connection with the regulating state that was required for it to be 'meaningful'. Mann emphasised in 1984 that 'in each case [ie. area of law] the overriding question is: does there exist a sufficiently close legal connection to justify, or make it reasonable for, a State to exercise legislative jurisdiction'. Mann, 'Jurisdiction Revisited,' n 748 at 29 (emphases added). Mann does not therefore see the 'meaningful connection' purely in terms of 'factual links or similar criteria,' as was alleged by Bianchi, n 748 at 90. Bianchi is, however, correct in his approach of seeking to define the appropriate connection by reference to international law.

This was also apparent from the test formulated in 1964, which excluded 'merely political, economic, commercial or social interest' - concepts that invoke the 'economic spillovers' or 'psychological spillovers' (or 'existence values') which are occasionally promoted today as a justification for trade restrictions.

760 Mann, 'Jurisdiction Revisited,' n 748 at 29 (emphases added). Mann does not therefore see the 'meaningful connection' purely in terms of 'factual links or similar criteria,' as was alleged by Bianchi, n 748 at 90. Bianchi is, however, correct in his approach of seeking to define the appropriate connection by reference to international law.

761 Mann, 'Jurisdiction,' n 742 at 49. See also Brownlie, n 748 at 313. Mann repeated his qualification in 'Jurisdiction Revisited,' n 748 at 28, when he commented that 'the Tentative Draft No 2 of the Revised Foreign Relations Law of the United States adopted the principle of reasonableness - a suggestion which appears unobjectionable, so long as it is understood that mere political, economic, commercial or social interests are to be disregarded when it comes to the weighing which every test of reasonableness implies.'

This emphasis on legal connection was also the main reason why Mann rejected the legitimacy of the effects doctrine. Writing in 1984, Mann posed the example of a British law on minimum prices in Ruritania, and commented that:

The purely commercial effect which makes itself felt in Britain should be insufficient to confer upon Britain any international rights to prescribe conduct abroad. Mere commercial effect, it is submitted, provides an insufficient link with the legislating State.\(^{764}\)

It is not necessary here to enter into a discussion of the merits of the effects doctrine, except to say that there should be nothing wrong, in principle, with attempting to derive legal principles from mere ‘factual’ interests, and to this extent Mann is being somewhat unfair, methodologically speaking. In principle it should be possible to find sufficient state practice and \textit{opinion juris} to establish a rule of customary international law that a state does have an interest in regulating


\[^{764}\] In Mann, ‘Jurisdiction Revisited,’ n 748 at 26.
extraterritorial restrictive trade practices. On the other hand, it does seem to be the case that no attempts to formulate such principles have yet proved successful, either with regard to the effects doctrine or more generally.\textsuperscript{765}

In light of this failure to give more precise legal content to the concept of 'meaningful connection' by inductive means, some authors have preferred to reason deductively from the traditional bases of jurisdiction (territory and nationality), although it has also become more common to adopt such notions as 'sovereignty over the state order' (\textit{Ordnungshoheit}),\textsuperscript{766} 'economic sovereignty,'\textsuperscript{767}

\textsuperscript{765} Meng, \textit{Extraterritoriale Jurisdiktion}, n 742 at 542-4. Meng also notes the failure of two more sophisticated methods: a 'dynamic' approach based on the subjective importance of the interests protected to the regulating state (citing Kaffanke, n 752 and W J Habscheid and W Rudolf, 'Territoriale Grenzen der staatlichen Rechtsetzung' (1973) 11 \textit{Berichte der Deutschen Gesellschaft für Völkerrecht}) and a 'conflicts' based approach taking into account the interests of other states, of which he considers the \textit{Restatement}, n 733 is the prime example.

\textsuperscript{766} Mann, 'Jurisdiction,' n 742 at 98 ('It is a much more difficult and elusive question whether the traditional test of the territoriality of jurisdiction is appropriate and sufficient for purposes of the law of restrictive trade practices. In most cases it may well be adequate'). Mann's reliance on the territorial basis of jurisdiction to reject any extraterritorial antitrust jurisdiction was noted in Meessen, \textit{Kartellrecht}, n 748 at 62; see also Kaffanke, n 752 at 84. One might observe that Mann's conservatism led him consistently to reject the exercise of jurisdiction on unjustified territorial grounds (eg his disapproval of service of process on transit passengers in Mann, 'Jurisdiction Revisited,' n 748 at 24) and national grounds (eg his disapproval of the fiscal jurisdiction claimed by the US over its citizens abroad in Mann, 'Jurisdiction,' n 742 at 101) and his reluctance to accept new legal concepts such as economic sovereignty (see n 767) or functional sovereignty (see n 768) meant that he could never extend the bases of jurisdiction.

\textsuperscript{767} Meng, \textit{Extraterritoriale Jurisdiktion}, n 742 at 547, says that '[d]eshalb werden hier alle dynamischen und kollisionsrechtlichen Erwägungen, welche die allgemeinen Grenzen völkerrechtsgemäßer Anknüpfungen vom Einzelfall abhängig machen würden, aus dem Begriff der hinreichenden Anknüpfung ausgeschieden und erst dann berücksichtigt, wenn eine solche Anknüpfung vorliegt. Die objektiven Kriterien hierzu müssen aus der Grundlage staatlicher Jurisdiktion selbst abgeleitet werden: der Territorial-, Personal- und der Ordnungshoheit.' This

\textit{Footnote continued}
and even ‘functional sovereignty’.\(^7\)\(^6\)\(^8\) This approach makes intuitive sense: for all their faults as justifications for the exercise of legislative jurisdiction, territory and nationality (and sovereignty) are legal concepts. It is therefore suggested here that unless and until customary international law rules are developed by the usual means, one must rely on a deductive approach based on these familiar legal concepts as ‘second-best’ alternative.

One additional observation might also be made, which is that in one important respect Mann’s concept of the ‘meaningful connection’ has apparently not entirely freed the discussion from its rigid adherence to territoriality, as he had evidently hoped. It is important to be clear that the use of this terminology

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last concept includes economic sovereignty (id at 566): ‘Generell muß ein Staat also immer einen hinreichenden Anknüpfungspunkt für die Ausübung von Jurisdiktion haben: Territorialhoheit, Personalhoheit, Schutz des Staates und seiner bestandsnotwendigen Rechtsgüter oder die Teilnahme an seiner Lebensordnung, insbesondere an der Wirtschaftsordnung. Hinreichend ist alles, was zur Gestaltung und Gewährleistung der drei Hoheitsbereiche des Staates dient.’ Another example of reasoning deductively from a concept of ‘economic sovereignty’ is found in Lowe, n 759 at 740-6.

\(^7\)\(^6\)\(^8\) Unlike Meng, Meessen, Kartellrecht, n 748 at 113 advocated the effects principle, not so much on the basis that a State needs to protect its economic sovereignty, but rather on the ‘functional’ grounds that the home State has no interest in regulating its economic actors abroad, and therefore the affected State is justified in filling the vacuum. See also Rutsel Silvestre Martha, The Jurisdiction to Tax in International Law, Kluwer Law and Taxation, Deventer, 1989 at 116-133, who argues in favour of fiscal jurisdiction over the continental shelf and the exclusive economic zone on the basis of a ‘functional sovereignty’ granted by way of treaty. It is interesting to note that the universality basis of jurisdiction has traces of this notion of ‘functional sovereignty’. As noted by Michael P. Scharf, ‘Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States’ (2001) 35 New England Law Review 363, at 370, this basis of jurisdiction was applied not only because the crime of piracy was particularly heinous, but also because it was a crime over which no State had territorial jurisdiction.
(another example is "meaningful domestic connection") does not imply that a State can never have a legal interest sufficient to justify an exercise of legislative jurisdiction in a matter which is purely extraterritorial. The field of human rights is only the most obvious example of a State's legal interests — and, to some extent, legal rights — in what would otherwise be the purely domestic concern of another State. The protection of the global commons, or biodiversity, or space, represents another set of purely extraterritorial concerns which should not automatically be excluded from a State’s field of jurisdiction.

It is therefore proposed that one abandon the term "meaningful connection," with its domestic connotations, in favour of the concept of legitimate state interest as the deciding criterion of the minimum requirement for the exercise of legislative jurisdiction. This has the advantage of refocusing attention on the fact that, at its base, the rules on legislative jurisdiction are a device for balancing the sovereign interests of States in regulating matters of concern to them, regardless of where this concern is located. Moreover, to bring the discussion back to the context of

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69 Meessen, Kollisionsrecht, n 707 ("sinnvolle Inlandsbeziehung"). The same bias is demonstrated in the reference to "linking points" in Lowe, n 759 at 734-6. Meng, Extraterritoriale Jurisdiktion, n 742, at 543 (with references) lists the following additional formulations, many of which suffer from this bias as well: "effet territorial," "Binnenbeziehung," "Beziehung zum Inland," "hinreichend starke Inlandbeziehung," "Minimum von beachtlicher Beziehung," "substantial and bona fide connection," "close, substantial, direct and weighty contact," "hinreichend handgriefflicher Fall," and "un lien".

70 A State may also have an interest in having its judgments enforced in another jurisdiction: Perez, n 734.

71 Martti Koskenniemi, "The Politics of International Law" (1990) 1 EJIL 4 at text to n 54, noting that "cases dealing with the determination of the allowable reach of a state's extraterritorial jurisdiction" are an example of the fact that "legal practice tends to construct the foreign
the WTO, it further conforms to the statement of the Appellate Body in *Gasoline*
that 'Article XX of the General Agreement contains provisions designed to
permit important state interests – including the protection of human health, as
well as the conservation of exhaustible natural resources – to find expression.”

With these considerations in mind, we may propose a reformulation of Mann’s
question as follows: does there exist a *legitimate state interest*, determined in
accordance with the rules of public international law, to justify, or make it
reasonable for, a State to exercise legislative jurisdiction?

If we apply this question to the field of human rights, a good argument can be
made that States do have a legitimate state interest in the promotion and
protection of human rights. It is important to stress, however, that this is quite
different from a State’s rights of enforcement discussed above.773 What we are

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772 *US-Gasoline*, n 697 at p 29.

773 We have seen already that the rights of States to enforce such obligations by way of
countermeasures varies according to the nature of the obligations. We might further observe that
a similar variability exists in the context of whether States have sufficient ‘legal interest’ to apply
to the International Court of Justice for the *judicial* enforcement of human rights obligations (on
which see *Barcelona Traction*, n 143 and *South West Africa (Ethiopia/South Africa; Liberia/South Africa) (Second Phase)*, [1966] ICJ Rep 6 (18 Jul), at paras 44 and 50. However,
we are not here concerned with enforcement either by countermeasures or by judicial measures,
although nothing that is said here is meant to prejudice the existence of such rights of
enforcement. All we are concerned with here is the legal interest of States in the promotion and
protection of human rights in the territory of another State by direct means. The degree of ‘legal
interest’ required in the context of enforcement is quite different from that with which we are
here concerned. Indeed, the interest with which we are concerned is perhaps even less than the
more minimal ‘interest of a legal nature’ required under Article 62 of the ICJ Statute of third

*Footnote continued*
concerned with now is a State’s interest in itself protecting human rights, not its ‘right’ to enforce another State’s obligations itself to respect human rights.

A State’s interest in protecting human rights in another country seems to be made out under both generally, under customary international law, and specifically under the human rights clause. At the general level, Article 56 of the UN Charter provides that

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55

Article 55 sets out as one of these purposes the promotion of:

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

This was interpreted in the Preambles of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as ‘the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms’. Furthermore, the 1993 Vienna Declaration on Human Rights stated that:

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parties seeking to intervene in a case. The ICJ found for the first time that an intervening party (the Philippines) had failed to meet this standard in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) – Application by the Philippines for Permission to Intervene [2001] ICJ Rep 000 (23 Oct), available at www.icj-cij.org, available at www.icj-cij.org.

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... the promotion and protection of all human rights is a legitimate concern of the international community.\textsuperscript{774}

These norms may be considered to represent customary international law. We may therefore conclude that Mann's minimum requirement of 'meaningful connection' is made out in all cases with respect to the protection of human rights.

In this regard, it should be said that regardless of the situation under international law generally, the situation is in any case different under the human rights clause. One of the main effects of this clause is to deem the protection of human rights in the territory of the one contracting party to be a concern of the other contracting party. The same, incidentally, can be said of the 'respect for the principles of market economy' featuring in certain of the essential elements clauses, although one can only speculate on how one party to a human rights clause might legislate to protect its interest in the maintenance of a market economy in the territory of the other contracting party.\textsuperscript{775}

Having made this case in favour of a purely extraterritorial basis for jurisdiction, it is important to recall two qualifying factors. First, as noted above, the existence of a basis for the exercise of legislative jurisdiction does not mean that States have a right to enforce other States' human rights obligations. We have


\textsuperscript{775} It was argued above (at n 136) that respect for the principles of market economy does not reflect customary international law.
seen already that the rights of States to enforce such obligations by way of
countermeasures varies according to the nature of the obligations;\textsuperscript{776} we might
further observe that a similar variability exists in the context of whether States
have sufficient ‘legal interest’ to apply to the International Court of Justice for
the \textit{judicial} enforcement of human rights obligations.\textsuperscript{777} We are not here
concerned with enforcement either by countermeasures or by judicial measures,
but rather with the legal interest of States in the promotion and protection of
human rights in the territory of another State by direct means.\textsuperscript{778} Another way of

\textsuperscript{776} See p 65.

\textsuperscript{777} See \textit{Barcelona Traction, Light and Power Co (Belgium/Spain) (Second Phase)}, \textit{[1970] ICJ Rep} 3 (5 Feb).

\textsuperscript{778} The degree of ‘legal interest’ required in the context of judicial enforcement is quite different
from the ‘legal interest’ necessary to establish a basis for the exercise of legislative jurisdiction.
This point was well expressed by the Court itself in \textit{South West Africa (Ethiopia/South Africa; Liberia/South Africa) (Second Phase)}, \textit{[1966] ICJ Rep} 6 (18 Jul), which is the leading case on the
subject of legal interest. In the course of denying the applicants standing in that case, the Court
said that: ‘[h]umanitarian considerations may constitute the inspirational basis for rules of law,
just as, for instance, the preambular parts of the United Nations Charter constitute the moral and
political basis for the specific legal provisions thereafter set out. Such considerations do not,
however, in themselves amount to rules of law. All States are interested – have an interest – in
such matters. But the existence of an ‘interest’ does not of itself entail that this interest is
specifically juridical in character.’ In this case the ICJ denied the applicants standing on the
grounds that ‘...such rights or interests, in order to exist, must be clearly vested in those who
claim them, by some text or instrument, or rule of law’ (at 28) and ‘... the argument amounts to a
plea that the Court should allow the equivalent of an “actio popularis”, or right resident in any
member of a community to take legal action in vindication of a public interest. But although a
right of this kind may be known to certain municipal systems of law, it is not known to
international law as it stands at present: nor is the Court able to regard it as imported by the
“general principles of law” referred to in Article 38, paragraph 1 (c), of its Statute’ (at 47). See
also the Counter-Memorial of Australia in \textit{East Timor (Portugal/Australia)}, \textit{[1995] ICJ Rep} 90
(30 Jun) at paras 261-2, available at www.icj-cij.org. Indeed, the

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putting this is to say that States have an interest in not participating in human rights violations in other States.

Second, the existence of a legal interest in the promotion and protection of human rights does not mean that a WTO Member will necessarily have jurisdiction to enact extraterritorial measures. This will depend on those qualifying principles mentioned above.\textsuperscript{779} In particular, the manner in which the legislation is enforced may be limited by reason of proportionality.\textsuperscript{780} In some cases, civil or criminal sanctions (especially \textit{in absentia}) may be excessive, where other enforcement measures may not.\textsuperscript{781} Similarly, it may be difficult to support an exercise of extraterritorial jurisdiction on human rights grounds where

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\textsuperscript{779} At p 379 and following.
\textsuperscript{780} See n 750.
\textsuperscript{781} In their Joint Separate Opinion in \textit{Arrest Warrant of 11 April 2000 (Congo/Belgium)} [2002] ICJ Rep 000 (14 Feb), available at www.icj-cij.org, at para 48, Judges Higgins, Kooijmans and Buergenthal distinguish extraterritorial criminal jurisdiction from extraterritorial civil jurisdiction. They refer in this context to the United States Alien Torts Claims Act which, they say, "has not attracted the approbation of States generally."
\end{flushright}
these rights are actually being protected, in some form, by another WTO Member.782 Here, a balancing of State interests will be required.783

However, these considerations should not negate the possibility that there may be a sufficient legal interest to establish the basis for that legislation in the first place. Subject to these qualifications, it can be proposed therefore that a prime candidate for such a definition of an extraterritorial measure would be a trade measure restricting imports of certain products on the grounds that they are produced in violations of core human rights standards, especially where it is clear that there has been an abdication of the responsibility of the WTO Member concerned. Such legislation would not be designed to enforce the human rights obligations of another WTO Member; rather, it would be enacted in pursuance of the interest of the regulating Member in itself promoting respect for human rights in that other Member's territory.

(d) European Community experience

It is useful to test the analysis presented against the jurisprudence under the EC Treaty.784 As far as the academic literature is concerned, it seems that with very few exceptions the dominant opinion is that Article 30 EC (ex Article 36) does

782 See ibid, at para 59, stating that '[a] State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.'

783 See n 768.

784 It should however be noted that these cases are conditioned by factors not directly applicable to the situation in the WTO, in particular the existence of harmonizing directives, which excludes Member State recourse to Article 30 when they provide for full harmonization (see Case 29/87, Dansk Denkavit v Danish Ministry of Agriculture [1988] ECR 2982).
not apply to measures with extraterritorial application, with the possible exception of measures protecting the common heritage of the Member States,\textsuperscript{785} and this is also the view of the Advocates General who have discussed the issue. Nevertheless, a closer review of the cases leads to results consistent with the above analysis: that is to say, even when there are statements to the contrary, the Member States appear to be entitled to regulate extraterritorially when they have a sufficient legal interest in doing so. The argument as to whether or not Article 30 has an extraterritorial application can therefore be resolved as an argument as to whether the Member State’s alleged interest in the matter being regulated is legally sufficient to support an exercise of extraterritorial jurisdiction.

The issue of trade measures for reasons of extraterritorial environmental protection arose in \textit{Gourmetterie Van den Burg}, which concerned the legality of a Netherlands import ban on a species of bird (Scottish red grouse) from the


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United Kingdom, even though the bird was not endangered there.\textsuperscript{7} Because the Court decided that the directive represented a full harmonization, it found it unnecessary to consider the extraterritorial scope of Article 30.\textsuperscript{7} However, Advocate General Van Gerven, who did consider the issue, was generally sceptical of this action. He that:

It is true that Article 36 [now Article 30] does not expressly state that the interests which it protects must be located in the legislating Member State. Nevertheless, it would seem still less appropriate to regard that article as an encouragement to adopt legislation for the protection of interests located in other Member States.\textsuperscript{7}

The question of the jurisdictional scope of Article 30 arose again in 	extit{Hedley Lomas}, which concerned the application of this provision to Member State

\textsuperscript{7} Case C-169/89, Gourmetterie Van den Burg [1990] ECR 2143.

\textsuperscript{7} The directive provided for protective measures for wild birds, and also allowed Member States to take stricter protective measures in two cases (seriously endangered and migratory species) and with respect to species occurring on its own territory. None of these situations being at hand, the Court held against the Dutch measure. It is therefore difficult to understand how this case can be read as favouring, even in theory, an "extrajurisdictional" application of Article 30 in the case of migratory or endangered species, as has been suggested by Steve Charnovitz, "A Taxonomy of Environmental Trade Measures" (1993) 6 Georgetown International Environmental Law Review 1, at 33. According to the Court, neither Article 30 nor any equivalent regulatory provision applied.

legislation restricting exports of sheep based on their method of slaughter abroad.

Advocate General Léger said in this case that:

... a Member State can rely on Article 36 only in order to ensure protection of an interest safeguarded by that article within its own national territory.\(^7\)\(^8\)\(^9\)

What was interesting, however, is that for this proposition he cited Advocate General Trabucchi in *Dassonville*, who said that:

States can derogate in the said manner [under Article 36] only for the purpose of the protection of their own interests and not for the protection of the interests of other States. ... Article 36 allows every State the right to protect exclusively its own national interests. Consequently, for the purpose of protecting industrial and commercial property, each State can restrict the freedom of movement of goods only with reference to the protection of individual rights and economic interests falling under its own sphere of interest.\(^7\)\(^9\)\(^0\)

This better conforms to the theory advanced above: in other words, while an interest located within the territory of the regulating State is much more likely to be considered a legitimate interest of that State, this is not exclusively the case. To this extent, Advocate General Léger draws too narrow a conclusion from the Opinion of Advocate General Trabucchi. Indeed, one commentator questioned


whether the Advocate General Léger was correct in *Hedley Lomas*, given that *Richardt*, to which the Advocate General referred, allowed Luxembourg to restrict the transit of strategic goods from France to the Soviet Union.791 On this point, Advocate General Léger had said that 'all examples [of the 'extraterritoriality' cases cited] concerned regulations of extraterritorial activity for the protection of domestic interests'. In addition, the Advocate General said, specifically with respect to *Richardt*, that:

> When the Grand Duchy of Luxembourg had recourse to Article 36 [now Article 30] to justify a measure restricting transit of goods classified as strategic material (special authorization sanctioned by confiscation of the material), it was seeking to ensure protection of public security within its own territory, even though the goods, which came from France and were destined for the Soviet Union, were merely passing in transit through its territory.792

Again, this makes more sense if one sees the issue not in terms of 'public security within its own territory' and more in terms of the legitimate interest of the regulating Member State. Indeed, this is evident even from the traditional rules of public international law. According to those rules, the interest of the

791 Geert Van Calster, 'Case C-5/94, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd, May 23, 1996 ECR I-2553' (1997) 3 *Colum J Eur L* 132, at 142, referring to Case C-367/89, *Richardt and Les Accessoires Scientifiques* [1991] ECR I-4621. The same commentator continues (at 143) by saying that '[i]t does not seem justified to qualify the UK's export restrictions as being 'extraterritorial', merely because the goods concerned are destined to be moved out of the territory.' This assumes that trade measures are always within the legislative jurisdiction of the regulating state. On this, see p 401 ff below.

regulating State in Richardt would be described as ‘protective,’ a concept that itself is understood in non-territorial sense.

Advocate General Léger expressly reaffirmed his views in Compassion in World Farming, where he noted that:

... as I explained in my Opinion in Hedley Lomas, I consider that a Member State can rely on Article 36 [now Article 30] of the Treaty only in order to ensure protection, within its own national territory, of an interest safeguarded by that article.

The question in this case was whether a Member State might prohibit exports of calves to another Member State on the grounds that their method of rearing in the importing State is considered cruel in the exporting State. The Advocate General emphasised that Article 30 applied to safeguard animal life or health, the public morality, or public policy only in relation to the regulating State. Consequently, he rejected the use of this exception to justify measures directed at the life or health of animals outside of the territory of the Member State. This may be reformulated as a statement that the regulating Member State has no legitimate interest in the life or health of those animals.

Other arguments involved the public morality and public policy exceptions. On these points, the Advocate General noted that the Member States retain a broad

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793 This was also evident from the claim in that case based on Article 297 EC (national security).
794 Case C-1/96, R v Minister of Agriculture Fisheries and Food, ex parte Compassion in World Farming [1998] ECR I-1251 (Opinion) at para 87.
discretion in this regard, and then accepted that the measure could be justified on the grounds of public morality so long as the cruelty could be proved by scientific evidence, although he rejected the public policy argument on the facts.\textsuperscript{796} For various reasons the Court made no findings on the extraterritorial scope of Article 30.\textsuperscript{797}

Interestingly, in commenting on \textit{Hedley Lomas}, Peter Oliver noted that a case decided shortly before by Advocate General Jacobs reached an apparently opposite conclusion regarding the extraterritorial scope of Article 30.\textsuperscript{798} This

\textsuperscript{796} The Advocate General stated that ‘measures restricting exports of animals based on the risk that they may provoke a reaction in national public opinion against the maintenance of a method of rearing animals which is considered to be cruel towards them cannot constitute measures for meeting a public policy objective within the meaning of Article 36 [now Article 30].’ \textit{Ibid}, para 112.

\textsuperscript{797} The Court decided that the harmonization undertaken by the directive excluded a Member State’s right to rely on Article 30 for the purposes of protecting animal life or health, and the relevant provision of the directive contained a specific territorial limitation. (\textit{Ibid}, para 59). Article 30 still applied as far as public morality and public policy were concerned, but the Court reasoned that these provisions did not apply on the basis that ‘in reality, public policy and public morality are not being invoked as a separate justification but are an aspect of the justification relating to the protection of animal health, which is the subject of the harmonising directive’ (para 66). The Court also objected to the Advocate General’s generous interpretation of a Member State’s discretion to determine its public morality. Instead, the Court took the view that ‘[i]n any event, a Member State cannot rely on the views or the behaviour of a section of national public opinion, as CIWF maintains, in order unilaterally to challenge a harmonising measure adopted by the Community institutions’ (para 67).

\textsuperscript{798} Peter Oliver, ‘Casenote: The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd’ (1997) \textit{CMLR} 666, at 671. The case to which Oliver refers is Case C-70/94, \textit{Werner v Germany} [1995] ECR I-13189 (Opinion); in fact, the relevant paragraph 59 related to Case C-83/94, \textit{Leifer} [1995] ECR I-3231 (Opinion), which was the subject of the same Opinion.
case, *Leifer*, concerned restrictions on exports of dual-use goods to third
countries. In interpreting Article 11 of Council Regulation 2603/69 establishing
common rules for imports, which parallels Article 30, the Advocate General
stated that the exception for 'human life and health' can refer to life outside of
the territory of the Member State imposing the export restriction. He said that:

Where ... a war is waged between certain third countries, entailing a
great deal of bloodshed, it would be indefensible to interpret Article 11
of the Export Regulation as not allowing certain export restrictions
aimed at not aggravating the loss of life.799

As Oliver noted, this was particularly important in view of the fact that the
Advocate General stated that this provision was 'to be interpreted in much the
same way as Article 36 of the Treaty'.800 On the other hand, Oliver concluded
that:

Such authority as exists therefore suggests that States may only rely on
Article 36 for the protection of their own interests, save as regards
extremely serious dangers to human life and health; but the Court has
yet to rule on the point.801

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799 Case C-83/94, *Leifer* [1995] ECR I-3231 (Opinion), at para 59. In this case, moreover, the
export restriction was not being imposed by way of countermeasures in retaliation for a violation
of any obligation owed to Germany, but rather by way of 'primary right,' to use the language
proposed above. This would further make it consistent with the principles suggested above in
respect of countermeasures.


801 Peter Oliver, 'Casenote: The Queen v Ministry of Agriculture, Fisheries and Food, ex parte
Hedley Lomas (Ireland) Ltd' (1997) *CMLR* 666, at 671.
In fact, it is not necessary to make an exception for 'extremely serious dangers'. In line with the analysis presented in the context of Article XX of GATT, the case may be reconciled with *Hedley Lomas* by ignoring the location of the resource being protected and focusing instead on whether the Member State has a legitimate interest in the matter being regulated. In the case of the export restrictions on animal welfare grounds, there was no legitimate Member State interest in the life or health of animals in another Member State’s territory. There is, however, an interest in public morality in or, for that matter, in the State’s public policy, which might be affected by actions occurring abroad. This would depend upon the facts of the case. Similarly, a Member State has a legitimate interest in the observance of human rights in another State. Despite various statements to the contrary, then, this brief survey of extraterritoriality under the EC Treaty confirms the conclusions reached above with respect to Article XX of GATT.

(e) Do the rules on legislative jurisdiction apply to trade measures?

Despite the foregoing, there is a fundamental objection that – because they are enforced within the territorial jurisdiction of the party imposing the measures – trade measures have no relevant extraterritorial element raising any questions as to the proper exercise of legislative jurisdiction.\(^{802}\) Usually, the point is assumed,

\(^{802}\) Petersmann, ‘International Trade Law,’ n 703 at 69 n 50, says that ‘the term “extrajurisdictional application” is misleading in so far as the import restrictions were applied within the jurisdiction of the United States to products imported into the United States.’ This statement has been quoted or referred to, *inter alia*, by Cheyne, n 734 at 457 n 11 and Steve Charnovitz, ‘Environmental Trade Sanctions and the GATT: An Analysis of the Pelly

*Footnote continued*
though it has been argued in more detail by Howse and Regan, who have said that:

Process-based restrictions do not directly regulate any behaviour occurring outside the border. To be sure, whether a particular product may be imported depends upon what has previously happened to it outside the border. But nothing that has happened outside the border attracts, by itself, any criminal or civil sanction. Foreign producers may use whatever processes they want, and use them with impunity. The only thing they cannot do is bring products produced with certain processes into the country.803


Footnote continued
However, despite its intuitive appeal, this argument that trade measures cannot be extraterritorial is problematic for a number of reasons. Specifically, it wrongly assumes that an exercise of legislative jurisdiction is only problematic when it is enforced by means of sanctions, it takes an unduly narrow view of legislative jurisdiction, and it ignores the practice of panels and the Appellate Body. These issues will now be addressed in turn.

(i) Enforcement

The first error is to say that trade measures cannot be extraterritorial because ‘nothing that has happened outside the border attracts, by itself, any criminal or civil sanction’. This assumes that legislative jurisdiction (determined by the law principles limiting the ability of States to regulate matters occurring outside their territory. Howse and Regan also distinguish the Belgian Family Allowances case (Belgian Family Allowances, adopted on 7 November 1952, BISD 1S/59), where Belgium wrongly conditioned most favoured nation treatment on the existence of a certain type of domestic social security legislation, by describing this as a ‘country-based’ measure and hence – at least potentially – coercive and impermissible. Responding directly to this point, Bernhard Jansen, ‘The Limits of Unilateralism from a European Perspective’ (2000) 11(2) EJIL 309 at 311-2 and John H. Jackson, ‘Comments on Shrimp/Turtle and the Product/Process Distinction’ (2000) 11(2) EJIL 303 at 303-4 emphasise the similarity between the two situations (Jackson arguing that the use of the term ‘product’ in the GATT text justifies the distinction between product and process). Note in this context the comment by the panel in United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, adopted as modified by the Appellate Body report on 6 November 1998 at p 277 that ‘[w]e agree with the United States that none of the parties cited or discussed the 1952 Belgian Family Allowances case, but in our view a reference to that case is relevant to our findings because, even though it did not relate to Article XX, it addressed a situation similar to this case, where a country had imposed conditions on access to its market based on the existence in the exporting countries of a family allowance system meeting specific requirements.’

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matter regulated by the measure) is only problematic when it is enforced. It is, however, well established that the mere existence of legislation can amount to an international wrong regardless of whether the legislation is enforced. As Mann said,

[T]he mere exercise of prescriptive jurisdiction, without any attempt at enforcement, will not normally have to pass the test of international law, for so long as a State merely introduces a legal rule without taking or threatening steps to enforce it, foreign States and their nationals are not necessarily affected. But this depends on the facts, and it is not difficult to visualize circumstances in which the exercise of legislative jurisdiction so plainly implies the likelihood of enforcement that foreign States are entitled to challenge its presence on the Statute books.

Mann expanded on the rationale for this statement, giving the hypothetical example of British legislation criminalizing marriage with a person under sixteen years of age:

As persons affected by such a statute may at some time set foot on British territory and thus come under the sway of British legislation, they cannot disregard it entirely. This is even clearer in cases where the legislation concerns trading relationships. People all over the world

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804 For definitions see n 733.
805 Mann, 'Jurisdiction,' n 742 at 128, commented on in Meessen, Kartellrecht, n 748 at 103; Nerep, n 748 at 459.
would have to take account of and obey such legislation merely because they or their property may become subject to it.807

In other words, it is the practical effect of extraterritorial legislation on private persons that renders it potentially excessive.808 As in this example, this illegitimate effect usually results from the application, or threat of application, of criminal or civil sanctions in the territory of the regulating State. It may however also result from the application of nonjudicial enforcement measures, such as the 'denial of the right to engage in export or import transactions ... and comparable denial of opportunities normally open to the person against whom enforcement is directed'.809 But, to stress the point, the existence or otherwise of enforcement

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807 Mann, 'Jurisdiction,' n 742 at 15. See also Meessen, Kollisionsrecht, n 707 at 233, noting that the general tolerance of States for conflicting legislation in private international law and international criminal law is not mirrored in international economic law. The situation appears to be different in general international law: cf International Law Commission, Second Report on State Responsibility by Mr James Crawford, Special Rapporteur, A/CN.4/498, 17 March 1999 at para 78, which concludes after reviewing the authorities (in the context of a discussion on obligations of conduct and obligations of result) that 'whether the enactment of inconsistent legislation constitutes of itself a breach of international law depends on the content and importance of the primary rule.'

808 Cf Werner Meng, 'Extraterritorial Effects of Legislative, Judicial and Administrative Acts' in Rudolf Bernhardt (ed), Encyclopedia of Public International Law, Vol 2, Elsevier, Amsterdam/New York/Oxford, 1995 at 156, noting that 'acts of State may have a factual extraterritorial effect if they order the performance of an obligation abroad. Even if this obligation can only be enforced inside the acting State's territory, the consequences of such enforcement, such as the confiscation of assets, may be so weighty that the addressees abroad cannot reasonably afford to disregard the order without suffering considerable hardship.'

809 § 431, comment (c) of the Restatement, n 733. Read in the light of the principle underlying the prohibition on excessive extraterritorial legislation, there seems to be no reason to limit this to the denial of rights to specifically named individuals. The enforcement of legislation by nonjudicial means could just as easily be seen to apply to a class of importers designated by their activities,
measures is not the critical question; what is relevant is whether the legislation has an impermissible practical effect on persons abroad. This is a question properly addressed in terms of whether trade measures constitute an exercise of extraterritorial legislative jurisdiction.

(ii) Legislative jurisdiction

As far as this question is concerned, we need to recall the conventional definition of legislative jurisdiction as a State's power to 'make its law applicable to the activities, relations, or status of persons, or the interests of persons in things'.

In determining when the exercise of jurisdiction is properly to be considered extraterritorial, it is obvious that a line needs to be drawn somewhere. To read the concept of extraterritorial jurisdiction too broadly would deprive it of all meaning in a world in which, practically all domestic legislation – and particularly economic legislation – will have some impact on 'activities, persons or things' located abroad. The question, then, is where to draw the line, and then on which side of this line trade measures are properly to be situated.

One way to draw the line is to adopt what might be termed a 'reverse effects' principle according to which a measure is extraterritorial if its effects are

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as is indicated by the fact that the practice of cargo preferences (imports and/or exports made conditional on transport by national vessels) has been considered to raise questions of excessive extraterritorial jurisdiction. See Institute of International Law, n 733, at 20. A related question is whether visa restrictions under the Helms-Burton Act are extraterritorial: Peter L. Fitzgerald, 'Pierre Goes Online: Blacklisting and Secondary Boycotts in US Trade Policy' (1998) 31 Vanderbilt Journal of Transnational Law 1 at 14 and n 48.

\(^{810}\) Restatement, n 733, § 401(a). See alternative definitions of jurisdiction at n 733.
substantial, foreseeable and not reasonable. This seems to be the essence of Werner Meng’s distinction between legislation with an extraterritorial connection (Anknüpfungspunkt), which he considers subject to the rules on legislative jurisdiction, and legislation with merely factual extraterritorial effect (Auswirkung), which he considers to be immune from these rules. 8 The difference between the two, according to Meng, is that the first category of measures is characterised by its coercive effect (Meng uses the term ‘persuasion’):

The coercive effect (Persuasionswirkung) must be distinguished from other effects. Every extraterritorial regulation intends to have coercive effects abroad (will Persuasionswirkung im Ausland haben). Mere foreign links (Auslandsanknüpfungen) are, on the other hand, not necessarily characterised by such an intention (Willen). Coercion is intentionally directed at influencing the addressee with respect to the desired behaviour or prohibition. The term is broader than that of the prohibition on forcible intervention, and coercion is therefore not automatically a sufficient means of intervention according to this prohibition. Coercion must however be exercised with intention. All

811 Meng, Extraterritoriale Jurisdiktion, n 742 at 76. Meng further distinguishes, id at 74, between ‘extraterritorial regulation’ (Anordnung), being legislation that specifically mandates or forbids certain conduct abroad by creating rights and duties abroad, and ‘extraterritorial connection’ (Anknüpfung). This first type of jurisdiction is reflected in Willis Reese, ‘Legislative Jurisdiction’ (1978) 78 Colum L Rev 1587 at 1587, who begins his article (which is concerned with domestic law) by stating that ‘[Legislative jurisdiction ... is the power of a state to apply its law to affect or create legal interests’. Reese’s understanding of jurisdiction is specifically criticised by Martha, n 768 at 65, who states that ‘this definition begs the question, since to “apply law”, as we have seen, presupposes the existence of law ... Thus, legislative jurisdiction ... should be defined as the State’s right under international law to make (create) legal rules (norms of law)’.

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According to Meng, trade measures are clearly in the category of legislation with merely factual effect and therefore not subject to the rules on legislative jurisdiction. Meng illustrates this point as follows:

Extraterritorial jurisdiction does not however encompass those domestic regulations which only have domestic connections and legal consequences, but factual effects abroad. The prohibition, for instance, of the importation of goods which are produced or obtained by violating ecological standards can substantially influence a foreign exporter's earnings. An export prohibition can clearly have substantial military consequences abroad, insofar as it reduces the military power of other States. An increase in the discount rate by the Deutsche Bundesbank can draw capital abroad because of the anticipated increase in interest rates and thereby divert investments from other States. Every domestic subsidy can improve the competitiveness of the recipient on world markets to the detriment of foreign enterprises ... All of these are extraterritorial effects of territorial jurisdiction. However, they are due to the increasingly cross-border fusing of public orders, in particular the economic order. Aside from contractual obligations, however, they are
not an issue of public international law, but are solely the result of a causal chain, which is founded on the factual merging of areas of life (Lebensbereichen) across boarders. Such effects may well be the regulatory objective of a certain measure, on the other hand, it could also be an unintended and perhaps not even foreseen effect of the regulation.\footnote{id}{76-7 (translation by author): ('Nicht mehr zur extraterritorialen Jurisdiktion gehören alle innerstaatlichen Regelungen, welche lediglich innerstaatliche Anknüpfungspunkte und Rechtsfolgen, aber faktische Auswirkungen auf das Ausland haben. Das Verbot etwa der Einfuhr von Waren, welche unter Verletzung ökologischer Standards produziert oder gewonnen wurden, kann einen ausländischen Exporterlös erheblich beeinflussen. Ein Exportverbot für Kriegswaffen kann durchaus erhebliche militärische Auswirkungen im Ausland haben, indem es die militärische Schlagkraft anderer Staaten reduziert. Eine Diskontsatz erhöhung durch die Deutsche Bundesbank kann Kapital aus dem Ausland wegen der erwarteten Zinserhöhung anziehen und damit Investitionsströme von anderen Staaten ablenken. Jede inländische Subvention kann die Wettbewerbsfähigkeit der Empfänger auf den Weltmärkten zu Lasten ausländischer Unternehmen verbessern ... All dies sind Auslandsauswirkungen territorialer Jurisdiktion. Sie entstehen zwar ebenfalls durch die zunehmenden grenzüberschreitenden Verflechtungen staatlicher Ordnungen, insbesondere der Wirtschaftsordnung. Sie sind aber, abgesehen von vertraglichen Verpflichtungen, keine völkerrechtliches Problem, sondern Ergebnis einer Kausal kette, welche durch die tatsächliche Verflechtung von Lebensbereichen über die Grenze gegründet ist. Solche Auswirkungen mögen geradezu das Regelungsziel einer bestimmten Jurisdiktion - Maßnahme sein, anderseits können sie auch ein nicht beabsichtigter und vielleicht nicht einmal vorhergesehener Effekt der Regelung sein'). Similar points are made by Hans-Jürgen Schlochauer, \textit{Die Extraterritoriale Wirkung von Hoheitsakten nach dem Öffentlichen Recht der Bundesrepublik Deutschland und nach Internationalem Recht}, Vittorio Klostermann, Frankfurt am Main, 1962 at 11-12.}

However, there are certain problems with Meng's approach. One of these is indicated by Meng's textual shift from the coercive effect (Persuasionswirkung) of extraterritorial legislation to its coercive intention (Wollen). The resulting emphasis on intent (notwithstanding the former language of effects) steers dangerously close to the assumption that extraterritorial legislation is only
problematic when it is enforced (or at least enforceable) by civil or criminal sanctions. A second problem with Meng's test is inherent in his use of the concept of coercion \textit{per se}. This problem is that legislation may be abusive not just because it affects the behaviour of private persons, but also because they may later be subject to legislation of which they were entirely unaware. Knowledge of the law may not be presumed by parties abroad. This issue is reflected in the application of human rights principles to extraterritorial legislation.\textsuperscript{814} So it seems that we must abandon both the criteria of intent and of coercion as determinants of relevant and irrelevant extraterritorial effects of legislation.

It is suggested here that there is a better test, which must be applied in two steps. The first step is to define legislation as 'extraterritorial' according to the \textit{legal} connection between the legislation and the extraterritorial subject matter; the second is to ask whether this amounts to a 'denial of opportunities normally open to the person against whom enforcement is directed' (to use the language of the comment of the Restatement).

The first step draws on the definition of jurisdiction as the \textit{application} of legislation to a matter. The assumption here is that legislation applies to a matter not only when it specifically applies to a particular action or thing, but also when that action or thing is an essential element in the \textit{definition} of some other action or thing to which the legislation applies. To put it in the context of extraterritorial

\textsuperscript{814} See references at n 751.
measures, a measure defined by something located or occurring abroad should be considered just as extraterritorial as a measure specifically mandating or forbidding conduct abroad. This may be illustrated by the English decision of *Lepre v Lepre*, in which it was held that a Maltese decree voiding marriages by Roman Catholic Maltese contracted otherwise than by canon law could not apply extraterritorially. Referring to an earlier case by the Court of Appeal, 815 which had held a similar decree of a Maltese court to be void, Sir Jocelyn Simon P commented that:

> the crux of their decision was that it was an intolerable injustice that a system of law should seek to impose extraterritorially, as a condition of the validity of a marriage, that it should take place according to the tenets of a particular faith. 816

To give an example perhaps closer to home, it is submitted here that there is no difference between a law stating that ‘the activity of fishing tuna in a manner that harms dolphins will result in a denial of opportunities normally available’ and a law that stating that ‘tuna fished in a manner that harms dolphins will result in a denial of opportunities normally available’.

To return then to Meng’s examples of measures with (according to him) merely ‘factual’ extraterritorial effect, we can see that there is, in fact, a difference between an ecological trade measure, on the one hand, and his other examples of the raising of the discount rate by the Bundesbank or the granting of domestic

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815 Gray (Otherwise Formosa) v Formosa [1963] P 259.

816 *Lepre v Lepre* [1965] P 52 at 64, referred to in Mann, *Jurisdiction,* n 742 at 12.
subsidiaries, on the other. All of these measures may have certain factual effects abroad, but only the ecological measure is made applicable to conduct occurring abroad in a relevant sense.\footnote{817}

This does not, of course, mean that all trade measures should be defined as extraterritorial in a relevant sense. It is obvious that most subsidies and tariffs, for instance, are not defined in terms of a matter or conduct occurring abroad.

The fact that these measures refer to the act of importation is not material, and to this extent one may agree with the view that, in principle, trade measures are 'territorial'. Likewise, it does not matter that the goods to which trade measures refer originate abroad: 'Goods, once put into circulation, are without nationality. They are subject to the control of the local sovereign, just as traffic or the system of customs duties.'\footnote{818} As opposed to an ecological trade measure, a normal trade

\footnote{817} See also Mann, 'Jurisdiction,' n 742, at 104-5 and 105-6, when he says that '[t]he price at which an exporter sells to the United States may, it is true, be regulated by the latter's import restrictions or tariffs or subsidies, and these may make it even impossible for the exporter to do business with the United States. But it is an entirely different matter if the United States tells the foreign exporter what prices he may or may not charge and how he has to calculate them, and if the United States imposes liabilities upon him in case he disregards its directions ... if State A were entitled to prescribe the terms on which the subjects of State B have to export their goods, State B would be entitled to prescribe the terms on which the subjects of State A have to import the same goods. The resulting confusion would be wholly opposed to the "interacting interests" of the family of nations'. It should not matter that the means chosen for this purpose is a tariff or subsidy. Note that Meng, Zulässigkeit, n 748, at 740 claims that such a measure would be legitimate under the rules on legislative jurisdiction, though wrong as a matter of trade policy.

\footnote{818} Mann, 'Jurisdiction Revisited,' n 748 at 25. By customs duties one must assume, as with the reference to tariffs cited earlier, that Mann meant duties not based on process and production methods. Consequently, Mann argued that a rule mandating minimum prices for the sale of whisky abroad would be unjustified even when applied to the nationals of that state (id, at 25-6). This reasoning found practical application in the Hong Kong case of American President Lines,
measure — and indeed most domestic policy measures with a trade incidence — will only have extraterritorial effects rather than extraterritorial application and will therefore not be relevantly extraterritorial.

This brings us to the second question, which is whether extraterritorial trade measures result in a denial of opportunities normally available. The problem here is that, under customary international law, there is no right to trade. The International Court of Justice made it quite clear in *Nicaragua, Merits*, that ‘[a] State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation’, and this was confirmed by Oda J, who said in his dissenting opinion that ‘[t]rade is not a duty of a State under general international law but may only be a duty imposed by a treaty ...’. On the other hand, under the law of the WTO there is

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a right to trade; indeed, this right is so well protected that a WTO Member is entitled to resort to dispute settlement if it 'should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired' even if this Member is merely a potential trading partner.\footnote{Article XXIII(1) of GATT.}

But can this right to trade be relevant to an assessment of the legality of a trade measure under Article XX? Does this provision not exclude any such consideration of benefits 'normally available' by virtue of the fact that it says that 'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures'? It is suggested here that, despite this language, this right to trade can indeed be relevant under Article XX, although this requires one comment and one justification. The comment is that we are now departing from the previous methodology, which treated the law of legislative jurisdiction 'in clinical isolation' from WTO law. This, of itself, is not problematic, but it deserves to be noted. The justification is that, as the Appellate Body held in \textit{EC–Asbestos}, the 'benefits' to which WTO Members are entitled under GATT may be protected by the non-violation remedy in Article XXIII:1(b) of GATT even where a measure is justified under Article XX.\footnote{EC – Asbestos, n 579, at para 187. Cf also \textit{United States – Trade Measures Affecting Nicaragua}, L/6053, unadopted, 13 October 1986, where the panel did not exclude the possibility that the non-violation remedy could apply to measures justified under the Security Exceptions in Article XXI of GATT.} If a GATT
benefit can survive Article XX for the purposes of a non-violation complaint, it can certainly survive for our purpose of determining whether an exercise of legislative jurisdiction has resulted in 'denial of opportunities normally available' to private persons abroad.

With these considerations in mind, it is perhaps appropriate to attempt a taxonomy of different types of import measures which are extraterritorial in a relevant sense: these could be activities-based measures (eg measures based on process and production methods, such as goods produced in violation of core labour standards), product-based measures (eg ivory), and boycott measures (eg goods from a certain enterprise or State involved in human rights violations).

As to exports, clearly not all export restrictions are extraterritorial in the relevant sense, but it is quite possible for export measures to affect matters abroad in a

823 It must be conceded that the case of product-based measures presents an anomaly insofar as the targeted product may be a non-like product for the purposes of Article III of GATT, and hence a trade restriction on the sale of such products would not violate GATT in the first place: Howse and Regan, n 762 at 279. One way around this would be to extend the logic of US - Tuna (1991), n 714 (at para 5.14), which stated that PPM-based measures must be treated under Article XI, to product-based measures targeted at PPMs. This panel only said that a process-based measure could not be considered under Article III, and therefore had to be treated as a quantitative restriction under Article XI. It did not say that a product-based measure had to be considered under Article III. It should also be noted that, in fact, the logical problem identified by Howse and Regan does not arise to the extent that such measures tend to be phrased as restrictions on imports rather than restrictions on sale and hence in violation of Article XI (cf Charnovitz, Dolphins, n 802 at text to n 78 (referring to relevant United States legislation).

824 Cf Rodolphe Muñoz, 'Case C-1/96, The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Limited, Judgment of 19 March 1998 [1998] ECR 1-1251' (1999) 36 CMLR 831, who considers (at 839) that Article 30 EC must apply to extraterritorial trade measures because it applies to Article 29 EC (export restrictions), which,

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relevant manner (eg export bans on weapons or live animals) and these should also be brought within the purview of the rules governing the exercise of legislative jurisdiction.825

Having said this, some further points need to be made. First, the identification of a trade measure as relevantly extraterritorial does not determine whether a regulating party has jurisdiction; it only means that the question of extraterritoriality arises in the first place. Second, the rules on legislative jurisdiction apply to all legislation with the required extraterritorial element without distinction as to whether that legislation seeks to apply the same or different regulations to matters abroad. To this extent one should be wary of the phrase ‘extraterritorial application of domestic legislation’.826 It would be illogical to treat mere extensions of domestic law as potentially problematic, while allowing without question laws specifically designed to affect behaviour abroad. (The concept does, however, make sense when it comes to trade measures with the object of requiring process and production methods ‘comparable’ to those required of domestic enterprises.)

according to Muñoz, are all extraterritorial. It follows from the proposals here that not all export restrictions are relevantly extraterritorial.

825 In extreme cases such export might amount to ‘indirect aggression’ or a violation of a conventional obligation: Paul Rubenstein, ‘State Responsibility for Failure to Control the Export of Weapons of Mass Destruction’ (1993) 23 California Western International Law Journal 319.

826 For a strong criticism of phrases such as ‘extraterritorial application of domestic law’ and ‘extraterritorial reach’, in favour of the term ‘intraterritorial exercise of jurisdiction with extraterritorial effects’ see Nerep, n 748 at 465 ff.
Third, something must be said of the fact that in the case of expressly coercive trade restrictions, it is only boycotts affecting nationals of third states (secondary boycotts) that are seen to raise extraterritoriality issues, while boycotts directed at the target state (primary boycotts) are usually not considered in this light.\textsuperscript{827} It is sometimes said, and more generally assumed, that this is because primary boycotts are not extraterritorial in the relevant sense.\textsuperscript{828} However, it appears that the true reason for this difference in analytical treatment is quite the opposite: these measures are indeed extraterritorial, but they are legitimately extraterritorial to the extent that they are applied to the nationals of the regulating state.\textsuperscript{829} In other words, it is not because the rules on legislative jurisdiction do


\textsuperscript{829} Andreas Lowenfeld, 'Congress and Cuba: The Helms-Burton Act' (1996) 90 \textit{AJIL} 419 at 429, states that 'a primary boycott does not usually raise issues of international law, because the boycotting state is exercising its jurisdiction in its own territory or over its own nationals'. Lowenfeld's reference here to the territorial principle suffers from the problem that the boycott is presumably directed at activities occurring primarily (though perhaps not exclusively) outside of
not apply to primary trade embargoes that the issue of legislative jurisdiction is not usually raised, but because under these rules there is no question that the measures are permitted.\footnote{30}

(iii) WTO jurisprudence: the Tuna and Shrimp reports

The final problem with the view that trade measures may not be relevantly extraterritorial is one of authority: it entirely fails to account for the assumption of the panels in the two Tuna cases and, more importantly, the Appellate Body's

the territory of the party imposing the boycott, but his interpretation is certainly correct as far as the nationality basis of primary boycotts is concerned.

\footnote{30} It might be added that the rules on legislative jurisdiction, like the rules on countermeasures, provide something of a \textit{lex specialis} to the general rule that economic coercion is generally considered to be lawful: as noted, eg, by Richard D. Porotsky, 'Economic Coercion and the General Assembly: a Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba' (1995) 28 \textit{Vanderbilt Journal of Transnational Law} 901 and Pieter Jan Kuyper, 'Trade Sanctions, cited at n 670, at 149-50 (noting the non-intervention qualification); and cf Nicaragua, Merits, as quoted at n 819. This statement is generally read in the context of the question of the legality of economic coercion. To read it as permitting all trade measures would, however, lead to the result that even secondary boycotts would be permissible, which seems not to be the case according to the rules on legislative jurisdiction (though cf the view of Maier at n 828). Perhaps this statement may be reconciled with the foregoing by reading it as establishing that there is no rule of customary international law prohibiting states from terminating trade relations unless this violates the rules of international law, which includes rules governing the exercise of legislative jurisdiction (an issue that was not before the Court). Omer Yousif Elagab, \textit{The Legality of Non-Forcible Countermeasures in International Law}, Oxford, 1988 at 212-13 notes that 'the issue of the legality will depend on the operation of particular rules of international law in particular contexts. For instance, in their protests against the sanctions imposed by the United States in connection with the Siberian gas pipeline, none of the aggrieved European Governments referred to these sanctions as "economic coercion". Instead, they were challenged for being inconsistent with the principle of jurisdiction.' Elagab concludes that 'the lawfulness of counter-measures on any given occasion may be determined by applying the conditions of the legality of counter-measures to the particular circumstances of that occasion. This may be done without any reference to the category of economic coercion.'
assumption in _Shrimp_, that there is a valid question as to whether a WTO Member has jurisdiction to impose import restrictions with respect to matters outside its territory.831

Both the _Tuna_ and the _Shrimp_ cases were concerned with measures expressly directed at extraterritorial activities: respectively, the killing of dolphins and the killing of turtles. According to the above tests, the measures at issue were therefore clearly extraterritorial. Interestingly, however, from our point of view, the arguments used by the United States in each case differed substantially on the degree of 'connection' that existed between the United States and the animals being protected. In the _Tuna_ cases, it does not appear to have been argued that the dolphins being protected occurred within the territorial waters of the United States. The US submitted rather that 'dolphin roamed the seas and were therefore common resources within the jurisdiction of no one contracting party.'832 This led the panel in the first _Tuna_ case to assume, though without expressly stating as much, that the United States had no jurisdiction to enact the measure, and to conclude that Articles XX(b) and (d) did not authorise measures protecting human, animal or plant life or health located outside of the

831 By contrast, some authors have considered the measures in these cases to be countermeasures: see, for this approach to the _Tuna_ cases, Mary Ellen O'Connell, 'Using Trade to Enforce International Environmental Law: Implications for United States Law' (1994) 1 _Indiana Journal of Global Legal Studies_ 273 at 285, and for an apparently similar view of _Shrimp_, see Thomas J Schoenbaum, 'The Decision in the _Shrimp-Turtle Case_ (1998) 9 _Yearbook of International Environmental Law_ 36 at 39. The distinction between the enactment of measures as a 'primary right' and in the form of countermeasures is drawn below at p 426.

'jurisdiction' of the party imposing the measure833 (by which the panel apparently meant 'territorial jurisdiction').834

The panel in the second Tuna case agreed that jurisdiction was the key issue, but it expanded the first panel's definition of 'jurisdiction' to allow for extraterritorial measures, so long as these did not force other countries to change their policies within their own jurisdictions. Such coercion meant that the measures could neither be 'primarily aimed at' the conservation of an exhaustible natural resource under Article XX(g) nor 'necessary' for the protection of animal life or health under Article XX(b).835 It is worth noting that nowhere did the panel

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833 Id at para 5.27 (Article XX(b)) and para 5.31 (Article XX(g)). The panel further held that the measures were not 'necessary' to the objective of protecting animal health under Article XX(b) because they were unrelated to a negotiated agreement and also because the quota by which the measure was made effective was based on the indeterminate factor (how many dolphins had been caught by US fishermen in a given period) (at para 5.28) and that both the extraterritorial nature of the measure and this last factor meant that the measures did not 'relate to' (in the sense of being 'primarily aimed at') the conservation of exhaustible natural resources within the meaning of Article XX(g) (at para 5.33).

834 See Richard H Steinberg, 'Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development' (1997) 91 AJIL 231 at 235 n 20; Benedict Kingsbury, 'The Tuna-Dolphin Controversy, The World Trade Organization, and the Liberal Project to Reconceptualize International Law' (1994) 5 Yearbook of International Environmental International Law 1 at 20 n 47. According to Ward, n 762 at 608, the two Tuna panel reports give an unqualified negative answer to the question 'whether it should be legitimate for an importing State that suffers [transboundary environmental] damage to keep out imports of the offending products'. But these reports say nothing about whether the United States would have been entitled to protect its own environment, regardless of whether such damage is caused by a production method or by the product itself.

835 US-Tuna (1994), n 713, at paras 5.27 and 5.38-9 respectively. Cf Cheyne, n 734 at 453, who states that '[the panel] appears to accept that Article XX(g) can have extraterritorial reach, but only insofar as international law permits governments to exercise jurisdiction over their nationals

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adopt the term ‘extrajurisdictional,’ which was used by all the parties to the
dispute, and which has subsequently found its way into much of the literature on
the case.836

The question of jurisdiction arose for the third time in the Shrimp case. But in
contrast to its argument in the Tuna cases, in Shrimp the United States now
argued not only that the sea turtles were a ‘shared global resource’ but, in
addition, that ‘[a]ll species of sea turtles except the flatback (which was restricted
to waters around Australia) regularly spent all or part of their lives in waters
subject to US jurisdiction in the Atlantic and Pacific Oceans and the Caribbean
Sea.’837 (The flatback and olive ridley turtles were exempted from the measure).
This was a significant change of focus. However, it was misunderstood by the
panel at first instance, which conflated the two arguments. The panel said that:

   Information brought to the attention of the Panel, including documented
   statements from the experts, tends to confirm the fact that sea turtles, in
certain circumstances of their lives, migrate through the waters of
several countries and the high sea. This said, even assuming that sea
turtles were a shared global resource, we consider that the notion of
‘shared’ resource implies a common interest in the resource
concerned.838

and vessels outside their territory.’ The panel referred to these examples of extraterritorial
jurisdiction under general international law (para 5.17) but did not express a view as to other
bases of jurisdiction either generally or with respect to Article XX.

836 See references at n 802 and Esty, Greening, at n 762 at 106 n 5.

837 US-Shrimp (panel), n 803 at para 3.36.

838 Id at para 7.53.
By contrast, the Appellate Body rehabilitated the new ‘territorial’ element of the United States argument, and, indeed, made this the focus of its analysis. It stated that:

... sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas ... The sea turtle species here at stake ... are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claim any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat—the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature and extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).39

It is interesting, in passing, to note the similarity between this reference to ‘sufficient nexus’ and Mann’s concept of ‘meaningful connection,’ although whether this terminology was chosen by the Appellate Body for doctrinal reasons, or in order to avoid the more controversial alternative of basing an environmental measure on the ‘effects principle’40 is a matter of speculation. It also seems that although the

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39 US–Shrimp, n 696 at para 133. The panel in US–Shrimp (panel), n 803 expressly refused to deal with this question even though it was raised by the United States (at paras 50-51).

40 That this principle extends to measures having a substantial environmental effect on the territory of the state imposing the measure accepted by Louis Henkin, Observations, in Institute of International Law, n 742, at 167.
Appellate Body here expressly refused to rule on the ‘jurisdictional limits’ of Article XX, it did the next best thing. In permitting the regulation of an extraterritorial activity by non-nationals, the Appellate Body gave a strong indication that Article XX will allow a measure that can be justified under the rules of customary international law governing legislative jurisdiction.841

Some observations might also be made on the Appellate Body’s condemnation the measure because it was applied in a coercive manner in violation of the Chapeau:

Perhaps the most conspicuous flaw in this measure’s application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers.842

841 Cf Philippe Sands, “Unilateralism”, Values, and International Law’ (2000) 11(2) EJIL 291 at 297-8, quoting the relevant passage and stating that ‘[i]n many respects the case turns on this finding of fact, since it provides the basis for concluding that the United States has a sufficient interest in the resources and – unstated but implicit – an interest in the treatment by the four Asian states of the migratory turtle resources’.

842 Id at para 161. Similarly, the Appellate Body said later that ‘[i]t may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.’ Id at para 164.
It might firstly be noted that, in the particular context of Article XX, the Chapeau reflects, and may even go beyond, a proportionality requirement attaching to the exercise of extraterritorial jurisdiction under public international law. Second, and more importantly, it needs to be said that this finding of 'coercion' in Shrimp is predicated on a different basis from the finding of 'coercion' in the Tuna cases. In Shrimp, the Appellate Body had already found that the United States had jurisdiction to protect the migratory turtles: its complaint was rather directed at the way in which the United States had exercised that jurisdiction. This was quite different from the situation in the Tuna cases, where it was the absence of a jurisdictional basis for the relevant measures that led the panels in both cases to determine that these measures were coercive, and hence not justifiable under Article XX. The panel in the first Tuna case said the following:

The panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.\(^{43}\)

\(^{43}\) US – Tuna (1991), n 714 at para 5.27 (Article XX(b)) and see also at para 5.32 (Article XX(g)).
In the second *Tuna* case, while overturning the first panel on extraterritoriality, the panel used virtually the same language in justifying its interpretation of Articles XX(b) and (g) as not permitting coercive measures:

If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.  

While the panels in these cases were correct to address the question of jurisdiction, it is debatable whether they correctly applied the relevant rules of customary international law. The first panel misunderstood the nature of extraterritorial jurisdiction, while the second panel mistook an *effect* of an excess of jurisdiction (coercion) for the *rules* governing the proper exercise of jurisdiction in the first place. Though rare, there are situations (most obviously where there is an international agreement) in which a State *does* have jurisdiction to force another State to change its domestic policies. It is also a pity that, having

844 *US – Tuna* (1994), n 723 at para 5.26 (Article XX(g)) and see paras 5.38-39 (Article XX(b)).
845 As noted above at n 830, international law probably does not prohibit the use of economic coercion.
identified the importance to the case of rules on legislative jurisdiction, the panel failed to examine the application of these rules to the measure at hand. It may have been the case that the United States lacked any jurisdictional basis for its measure, or that the United States had a basis for the measure but acted disproportionately or otherwise impermissibly infringed the rights of other States, but one would never know it from the panel report. It is therefore perhaps not surprising that most commentators assume that this case (and the first Tuna panel) stand for the principle that coercive measures will not be permitted under Article XX, while the jurisdictional underpinnings of the decision are largely ignored.

(f) Trade measures permitted by the DSU

In light of these considerations, it seems preferable to see trade measures as potentially subject to the rules of customary international law governing legislative jurisdiction, so long as one limits the scope of any such review to measures with application to an extraterritorial subject matter. According to the hypothesis advanced above, one a trade measure can be justified under the rules governing the exercise of legislative jurisdiction, they should be justified under Article XX, subject to being for one of the purposes in the subparagraphs of that

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846 US – Tuna (1994), n 723 at para 5.17, observing that 'under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory.'

847 See n 750 and n 752.

848 Eg Roessler, n 702 at 50; Paul J. Yechout, 'In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards' (1996) 5 Minnesota Journal of Global Trade 247 at 275; Wold, n 828 at text to n 262.
provision and meeting the requirements of the Chapeau. However, for reasons specific to the WTO dispute settlement system, it is submitted here that there is an additional restriction applicable to such measures, and consequently that even some measures legitimate under customary international law may still not be permitted under Article XX.

We have already drawn a distinction between a State's legal interest in the protection of human rights abroad and its legal interest in the performance by another State of that State's obligations for the purposes of establishing a right to exercise extraterritorial legislative jurisdiction. Here we need to return to a similar distinction, but for a slightly different purpose. First, we need to distinguish between three different types of trade measure:

?? measures authorised by customary international law rules on legislative jurisdiction,

?? measures under an agreement (including measures mandated by a treaty, measures authorised by a treaty, and measures in support of a treaty), and

?? countermeasures in response to a violation of a prior obligation.

Despite the common description at least of the first and third of these types of measure as 'unilateral,' all of the measures in these three categories share the


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common feature that they depend on a prior rule of law. They differ in this respect from the definition of 'unilateral acts' adopted by the Special Rapporteur of the International Law Commission on Unilateral Acts. As he noted

... acts which constitute the exercise of a power granted by the provisions of a treaty or by a rule of customary law, although they appear to be strictly unilateral, are linked to a pre-existing international agreement or customary rule. Such acts do not produce legal effects except by virtue of a general rule of international law which establishes their conditions and modalities; the unilateral act is (in these cases) the condition for the application of a status or regime of international law.850

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850 International Law Commission, First Report on Unilateral Acts of States by Victor Rodríguez-Cedeño, Special Rapporteur, UN Doc A/CN.4/486, 5 March 1998 at paras 105-6. He continued (at paras 107-8) '[t]hese acts, which create rights for the State which performs them, appear to create new obligations for third States, a situation that would be incompatible with the well-established principle of international law reflected in article 34 of the Vienna Convention on the Law of Treaties ... The obligation of the third State, which seems to flow from the right which the author of the unilateral act establishes, actually exists prior to the formulation of that act. These are therefore declarative acts which reflect the existence of pre-existing norms, whether under international agreements or under customary law, as in the case of the rules for the establishment of the exclusive economic zone, which, while being of customary origin, are contained in international instruments.'

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In this *a contrario* example the Special Rapporteur was referring to the first and second types of measure identified above. However, he made a similar comment elsewhere with respect to countermeasures (the third category):

By their very nature, unilateral acts whereby a State applies countermeasures against another State must be excluded from the scope of the study of unilateral acts. Such acts, which are unilateral from a formal standpoint and are sometimes legal acts — when they are not actions or other conduct — are necessarily linked to a pre-existing commitment; in other words, to the prior agreement which the latter State is alleged to have breached.851

It may be that the Special Rapporteur’s definition of ‘unilateral acts’ is too narrowly drawn — all that remains are acts establishing the opposability of a legal position vis-à-vis those engaging in the acts (eg recognition and protest) and acts creating a legal commitment (eg declarations).852 If this were the case, it could be possible to extend the term ‘unilateral act’ to at least the first and possibly also the third of the categories of trade measure identified above. However, in light of the many different interpretations given to ‘unilateral acts,’ also here, it seems better here to avoid the term altogether and rely instead on the more cumbersome but more accurate definitions proposed here.


852 These examples are taken from Pierre-Marie Dupuy, ‘The Place and Role of Unilateralism in Contemporary International Law’ (2000) 11(1) *EJIL* 19 at 20, who additionally includes in his definition of ‘unilateral acts’ those acts aimed at exercising sovereign rights (such as the delimitation by a state of its territorial waters). Interestingly, this example seems to exclude for Dupuy the right to take countermeasures as a ‘unilateral act’.
The categories proposed above are all similar in the sense that all of these measures are based on the existence a prior rule of law. However, there is an important difference between the first two types of measure and countermeasures insofar as the former do not depend upon the violation of any obligation, but are taken by way of right (either customary or treaty-based).\footnote{In a related context, see James Crawford, 'The Relationship between Sanctions and Countermeasures,' 1999, available at www.law.cam.ac.uk/RCIL/ILCSR/Statresp.htm, stating that "... the Security Council, though it authorises coercive responses, does not impose "sanctions" in the strict sense. Its powers are described not in terms of responses to internationally wrongful acts but to situations which it characterises as threats to or breaches of the peace." Cf however Laurence Boisson de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' (2000) 11(2) EJIL 315 at 316, who states 'the unilateral measures which will be analyzed in the context of this paper should be distinguished from those which are exercised by a state or several states acting jointly pursuant to an authorization provided for by international law, be it customary or conventional. This is the case with measures such as retorsion, reprisals or sanctions, also covered under the heading of countermeasures, which are exercised in reaction to a violation of international law ...'\footnote{The term 'primary right,' complementing the term 'primary obligation,' while not common, does appear occasionally in the literature on state responsibility: eg Stephen C. McCaffrey, 'Current Development: The Thirty-Fourth Session of the International Law Commission' (1983) 77 AJIL 323 at 333, noting disagreement among members of the ILC on "whether self-defense fell within the scope of the legal consequences of an internationally wrongful act or whether it was a primary right, falling outside the scope of the topic."\footnote{ILC, Fourth Report on Unilateral Acts, n 851 at para 41 ('A unilateral act in the form of a countermeasure may be a conventional act despite its unquestionably unilateral character, as in}}

There is also a degree of overlap between these three categories. For instance, a countermeasure may take the form of the suspension of a treaty,\footnote{ILC, Fourth Report on Unilateral Acts, n 851 at para 41 ('A unilateral act in the form of a countermeasure may be a conventional act despite its unquestionably unilateral character, as in} and in such
cases it can be difficult to identify whether the law of treaties or the law of state
responsibility is better suited to a resolution of the problem. Similarly, a
measure imposed for the direct protection of the non-domestic environment (such
as a ban on trade in dolphin-unfriendly tuna) may also be seen as a
countermeasure designed to enforce another country's obligations (e.g., to protect
dolphins). Finally, when a treaty itself provides for 'sanctions' it can seem
artificial to treat these as primary rights and not as countermeasures, not only
because the purpose of the sanctions may be both to protect the injured party and

the case of the denunciation or suspension of a treaty by a State which considers that another
State has breached its international commitments thereunder.)

856 International Law Commission, Third Report on State Responsibility by Mr James Crawford,
Special Rapporteur, Addendum, A/CN.4/507/Add.3, 18 July 2000 at para 325, stating that
'[t]here is thus clear distinction between action taken within the framework of the law of treaties
(as codified in the Vienna Convention), and conduct raising questions of State responsibility
(which are excluded from the Vienna Convention). The law of treaties is concerned essentially
with the content of primary rules and with the validity of attempts to alter them; the law of
responsibility takes as given the existence of the primary rules (whether based on a treaty or
otherwise) and is concerned with the question whether conduct inconsistent with those rules can
be excused and, if not, what the consequences of such conduct are. Thus it is coherent to apply
Vienna Convention rules as to the materiality of breach and the severability of provisions of a
treaty in dealing with issues of suspension, and the rules proposed in the Draft articles as to
proportionality etc, in dealing with countermeasures.' See also Sicilianos, n 849 and Gabcikovo

857 Andreas Ziegler, 'WTO Rules Supporting Environmental Protection' in Friedl Weiss, Erik
dents and Paul de Waart (ed), International Economic Law with a Human Face, Kluwer Law
International, The Hague/Dordrecht/London, 1998 at 211, notes the sometimes artificial (but
necessary, in light of the Tuna cases) distinction between measures for the direct protection of the
non-domestic environment and measures for the indirect protection of the non-domestic
environment (which depend upon a change in the environmental policies of other WTO
Members).
to enforce the performance of obligations by the other party,\textsuperscript{858} but in addition because some treaties do not ‘multilateralise’ sanctions, but merely authorise a party to take measures on an individual basis. The sense of artificiality in this last case is heightened when the treaty specifically uses the language of countermeasures, as does the DSU.

Nonetheless, in the present context the distinction between primary rights and countermeasures is important. This is for the reason, as has been argued elsewhere, that it is only extraterritorial trade measures in the form of primary rights that can be permitted under Article XX.\textsuperscript{859} By contrast, countermeasures in response to the violation of another party of an obligation arising outside the WTO covered agreements are \textit{prima facie} excluded from the blessing of Article XX. Or, to put it more prosaically, WTO Members may exercise their primary rights under international law to ‘protect’ or ‘promote’ certain legally defined interests outside of their jurisdiction, and in certain cases even in the territory of another WTO Member, but they are unable to exercise their secondary rights ‘enforce’ that Member’s obligations in respect of the same matters. This is of immediate relevance to the human rights clause, as this constitutes one of the


\textsuperscript{859} For a more developed argument as to why trade measures used to enforce obligations under non-WTO agreements will, in principle, not be permitted under the DSU, see Lorand Bartels, ‘Article XX of GATT and the Problem of Extraterritorial Jurisdiction: the Case of Trade Measures for the Protection of Human Rights’ (2002) 36(2) JWT 353.
very few cases in which trade measures may be taken by way of a primary right against another Member who has violated human rights principles.⁶⁶⁰

(g) Conclusion

The results of this analysis are as follows: first, Article XX should be read consistently with the rules governing a WTO Member’s right to exercise legislative jurisdiction over activities and things located outside of its territory. In other words, a WTO Member should be entitled under Article XX to protect its legitimate interest in not participating in human rights violations occurring abroad. This could include, in appropriate cases, measures targeted at the process and production method of a particular product. On the other hand, under customary international law, the right of any State to exercise its legislative

⁶⁶⁰ See Barcelona Traction, Light and Power Co (Belgium/Spain) (Second Phase), [1970] ICJ Rep 3 (5 Feb), at 47, stating that ‘on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality’ and Nicaragua, Merits, n 830 above, at para 267, stating that ‘...where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves’. Another example could be Article 33 of the ILO Constitution provides that ‘[i]n the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.’ See Ward, n 762 at 622 for discussion on whether the ILO is competent to impose trade sanctions. Recently, the International Labour Organization has called for its members to ‘review their relations’ with Myanmar under this provision. Citing this resolution, the International Confederation of Trade Unions and the European Trade Union Confederation have called for trade sanctions to be imposed under this mandate Open letter on Burma from Bill Jordan (General Secretary) and Emilio Gabaglio (ETUC) to Pascal Lamy, EU Trade Commissioner, 5 November 2001, available at www.icftu.org http://www.icftu.org/.
jurisdiction extraterritorially is subject to considerations of proportionality, non-interference, and other norms applicable under international law to the balancing of the competing interests of States.

Second, measures specifically authorised under an agreement are not to be seen as countermeasures designed to enforce the obligations of other WTO Members and therefore not within the scope of Article XX, but rather as measures in exercise of a primary treaty right. Consequently, such measures – which include measures under the human rights clause – do not violate the rule prohibiting countermeasures in the WTO system. The agreement, and the exercise of any rights under the agreement, will not be able to modify the rights or obligations of third parties in violation of the pacta tertiis rule, but that is a question of international law, not WTO law.

3. The Article XX subparagraphs

This brings us to the next question, which is whether measures under the human rights clause fall within any of the exceptions in Article XX, in particular, the exceptions for measures 'necessary to protect human ... life or health' under Article XX(b), measures 'necessary to protect public morals' under Article XX(a), and measures 'relating to the products of prison labour' under Article XX(e). As a preliminary matter, it should be said that these provisions are to be read consistently with Article 31(3)(c) of the Vienna Convention, which, as noted above, that for the purpose of interpreting an agreement, an interpreter must take into account as part of the context 'any relevant rules of international
Furthermore, as noted above, these ‘relevant rules’ include those rules applying to the parties to the dispute. It is not necessary that these rules represent customary international law applicable to all the parties to the WTO Agreement.

As mentioned above, it is possible that ‘appropriate measures’ under the human rights clause could be justified on the grounds that continued trading relations, either generally, or with respect to particular products, would infringe the ‘public morality’ of the party imposing the measures, and that a trade measure of the kind imposed is ‘necessary’ to the objective of protecting public morality. In principle, the necessity of the measure will be determined according to whether there is an alternative measure reasonably available to the regulating Member that achieves its stated objectives. However, it could also be argued that the

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861 See n 696.
862 See n 723.
863 This test originated in United States – Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, at para 5.26, where the panel said that ‘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. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions’. It was applied to Article XX(b) in Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, DS10/R, BISD 37S/200, at para 74. The test was augmented in Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, adopted on 10 January 2001 (Korea–Beef), where the Appellate Body indicated that a measure might be considered more ‘necessary’ to an important aim than it would

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'necessity' of a measure should be assessed, in accordance with Article 31(3)(c), in terms of the human rights clause. That is to say, it could be argued that the parties to an agreement containing a human rights clause have already decided that the 'appropriate measures' under challenge are 'necessary' to the protection of the public morals of the other party. But even if this argument was successful, it is difficult to apply to human rights clauses that, as currently drafted, are too vague to say whether a measure is necessary. If, for instance, the human rights clause stated that the parties recognise that certain practices are an affront to public morality, this argument would stand a better chance. This means that one must revert to the conventional question whether the measures at issue are necessary to the protection of the public morals of the other party. As far as this is concerned, it would be easiest to make this out in the case of measures targeted at imports of products produced in violation of human rights standards, subject to the condition that the same standards are applied to domestic goods. It may be more difficult to show in the case of measures targeted at a country for other human rights abuses. Arguably, it could violate the public morality of a WTO Member to continue trading with a country with racist or genocidal policies.

Another possibility would be to justify 'appropriate measures' on the grounds that this is necessary to protect 'human ... life or health' under Article XX(b).

be to a less important aim (at paras 161-2). See also EC – Asbestos, n 579, at paras 169-175, where this reasoning was approved in relation to measures aimed at protecting human health.

This concept should be read in accordance with the norms of human rights law.\textsuperscript{865} But even on a generous reading of the term 'human life and health' it could be difficult to demonstrate that a measure is necessary to achieve this aim, in the sense that there is no alternative measure reasonably available that meets the objective. In this respect it is relevant that the Appellate Body has determined that a lesser standard might be applied in determining the necessity of a measure to an important aim, such as human health.\textsuperscript{866} Again, it will be easiest to justify measures under this provision where they relate directly to the manner in which a product is made. Indeed, given the well-documented adverse effects of sanctions on health in the populations of target States, it will be far more difficult to justify on this basis measures targeted at a population in general, or at specific persons in particular.\textsuperscript{867} This is particularly the case in relation to those human rights

\textsuperscript{865} See above at p 355. Note also Mexico's argument in United States – Restrictions on Imports of Tuna, unadopted, 3 September 1991, DS21/R, BISD 39S/155 at para 3.37 that '[Article XX(b)] referred solely to protection of the life or health of humans, animals or plants as a population (for instance in the case of epizootics), and not as separate individuals. If it could be invoked to avoid the death of individual animals as claimed by the United States, then countries could restrict imports of beef to prevent the killing of cows abroad, or prohibit imports of any product of a living organism claiming that the prohibition was aimed at protecting the life of that organism.' This argument would now have to be rejected in light of United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted on 6 November 1998, which emphasised the norms of international environmental law as directed at the protection of endangered species. To this extent, the fears expressed by Thailand in the Dispute Settlement Body following the Appellate Body's Shrimp report that trade restrictions might now be imposed on the basis of labour standards would seem to be justified. See Dispute Settlement Body, Minutes of Meeting held on 6 November 1998, WT/DSB/M/50, 14 December 1998, at p 4.

\textsuperscript{866} See n 863.

\textsuperscript{867} Eg Stephen P Marks, 'Economic Sanctions as Human Rights Violations: Reconciling Political and Public Health Imperatives' (1999) 89(10) American Journal of Public Health 1509; B. O.

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clauses (such as the one in the cooperation agreement with South Africa) that specifically oblige the parties to refrain from any measures that unduly harm the population of the target party.868

There is finally the possibility of justifying trade measures under the human rights clause under Article XX(e), which provides that a WTO Member may impose trade restrictions ‘relating to the products of prison labour.’ In Korea – Beef, the Appellate Body noted that:

This requirement is more flexible textually than the ‘necessity’ requirement found in Article XX(d). We note that, under the more flexible ‘relating to’ standard of Article XX(g), we accepted in United States – Gasoline a measure because it presented a ‘substantial relationship’, (emphasis added) i.e., a close and genuine relationship of ends and means, with the conservation of clean air. ... In United States – Shrimp we accepted a measure because it was ‘reasonably related’ to the protection and conservation of sea turtles.869

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Read in this broader light, it might be possible to apply this exception to measures targeted at products produced by means of sweatshop labour in violation of accepted labour standards. But, again, it is unlikely to extend to measures targeted at products produced in a manner unrelated to the human rights violation. In this context, one might also draw attention to the Community’s labour standards clause in its GSP Program, under which, as the European Parliament said in a report, ‘[i]t is not ... necessary to link forced labour directly to the production of any exported goods, but just to prove its existence’.

That would clearly not be permitted under Article XX(e).

In summary, it appears that, at most, it will only be possible to apply Article XX to trade measures specifically related to the process and production method of products. In other words, despite the fact that, according to the above argument, the human rights clause represents an exception to the general rule that Article XX does not apply to measures designed to enforce the human rights obligations of other States, this is not in the end of much assistance. Trade sanctions, popularly understood, are unlikely to be justified under Article XX. As far as process based measures are concerned however, the best chances for success are

1996, at p 18, the Appellate Body cautioned that this was not treaty language, but did not need to decide the point as the parties to the case had accepted this interpretation.

under Article XX(a), on the grounds that the sale of such products is necessary to protect the public morality of the importing country, and under Article XX(e), in the event that such products are produced in conditions approximating forced labour. It will be much more difficult, though not impossible, to show that measures are necessary to protect the 'life and health' of the workers making the products.

4. The Chapeau to Article XX

(a) Introduction

Even if a trade measure under the human rights clause is provisionally justified under one of the paragraphs of Article XX, according to the Chapeau to that provision, it must also be applied according to certain conditions.\(^7\) The precise wording of the Chapeau is as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement

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\(^7\) In *Gasoline*, the Appellate Body stated that while the paragraphs are concerned with the contents of the measure, the Chapeau is concerned with its application (at pp 21-22). This was confirmed in *Shrimp*. See further at text to n 927 below. The Appellate Body also established that Article XX requires a two-tiered analysis: first, provisional justification by reason of characterization of the measure under one of the paragraphs in Article XX; second, further appraisal of the same measure under the Chapeau (at p 22). In *Shrimp*, the Appellate Body strongly criticised the panel for having reversed this two-tiered analysis (at paras 117-122).
shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...^\textsuperscript{72}

These three prohibitions (arbitrary discrimination, unjustifiable discrimination and disguised restriction on trade) are of present relevance, given the fact that the Community appears to apply measures under the human rights clause in a highly selective manner.\textsuperscript{873} A 1997 report by the European Parliament on the human rights clause in the Lome IV Convention (the predecessor to the Cotonou

\textsuperscript{872} Some terminological points should however be made about the use of the word 'countries'. First, this is taken to apply to 'WTO Members,' some of which are not countries in the international law sense (e.g., Hong Kong, China, and Taiwan, Penghu, Kinmen and Matsu). Second, this term includes both exporting and importing WTO Members: see \textit{Gasoline} at text to and n 48. The Appellate Body also noted that the equivalent provision was expressed in terms of 'foreign countries' and 'third countries' in two pre-GATT trade agreements, \textit{id.} This assumption was referred to with apparent approval in \textit{Shrimp}, at para 150. Note also the rejection by the panel in \textit{Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather}, WT/DS155/R, adopted on 16 February 2001, of Argentina's argument that 'the Appellate Body adopted this interpretation of the phrase "discrimination between countries where the same conditions prevail" on the sole basis that, in that specific case, the parties had a common understanding of it' (para 11.314, n 568). The panel added that 'in our view, the phrase "discrimination between countries where the same conditions prevail" is also broad enough to encompass discrimination between products of the territories of those countries' (\textit{id}, para 11.314). Cf also Article 2.3 of the SPS Agreement, which states that 'Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members' (emphasis added).

Agreement) made some trenchant criticisms in this respect.874 The report noted that:

The absence of clear criteria leaves the Council and Commission a broad margin of manoeuvre in assessing human rights violations and taking decisions. There is thus a very real danger of arbitrary measures being taken or strategic interests being given precedence over compliance with principles.

There is also a vacuum as regards the procedure for resuming cooperation after it has been interrupted for a certain period. What criteria should the Council or Commission use to decide whether an ACP country that has been punished for human rights violations has met the conditions necessary for development aid under Lomé to resume or whether it should continue to face sanctions.875

In addition, the same report also notes that the Community’s practice in this field has been characterised by a high degree of selectively, not only in the light-handed treatment afforded to non-ACP countries compared with ACP countries, but also in the application of sanctions under the clause to the poorest countries in the ACP group.876 The report said in this respect that:

876 Committee on Development and Cooperation, Interim Report on the proposal for a Council Decision on a framework procedure for implementing Article 366a of the Fourth Lomé Convention (COM (96)0069 C4-0045/97-96/0050(AVC), A4-0175/97, 21 May 1997. The same

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If the European Union and the Member States wish to retain their credibility in the eyes of world public opinion and their partners in third countries, they must put an end to these double standards and set objective criteria for determining when human rights have been respected or breached and taking appropriate action.  

Committee has also ‘expresse[d] concern at the fact that, to date, sanctions (involving suspension of some or all the provisions of cooperation agreements) have only been adopted in respect of the member states of the Lomé Convention. Given the situation with regard to democracy and human rights around the world, this approach is difficult to understand, and our ACP partners have made it known within the ACP-EU Joint Assembly that they sometimes feel that the European approach is based on the old principle of different standards applying in different cases.' See Paragraph 10 of the Opinion of the Committee on Development and Cooperation (20 November 1996), contained in the European Parliament, Report on the Communication from the Commission to the Council and the European Parliament on 'the European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond' (COM (95) 0567 – C4-0568/95), A4-0409/98, 6 November 1998.

Committee on Development and Cooperation, Interim Report on the proposal for a Council Decision on a framework procedure for implementing Article 366a of the Fourth Lomé Convention (COM (96)0069 C4-0045/97-96/0050(AVC), A4-0175/97, 21 May 1997. The same Committee has also said that: '... the Committee on Development expresses concern at the fact that, to date, sanctions (involving suspension of some or all the provisions of cooperation agreements) have only been adopted in respect of the member states of the Lomé Convention. Given the situation with regard to democracy and human rights around the world, this approach is difficult to understand, and our ACP partners have made it known within the ACP-EU Joint Assembly that they sometimes feel that the European approach is based on the old principle of different standards applying in different cases.' See Paragraph 10 of the Opinion of the Committee on Development and Cooperation (20 November 1996), contained in the European Parliament, Report on the Communication from the Commission to the Council and the European Parliament on 'the European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond' (COM (95) 0567 – C4-0568/95), A4-0409/98, 6 November 1998. In European Parliament, Resolution on human rights in the world in 2000 and the European Union Human Rights Policy, 5 July 2001, para 13, the Parliament '[r]eiterates its concern about the fact that many international agreements by which the EU is bound and which include human rights clauses do not include implementing rules governing the suspension
This is, of course, exacerbated by the fact that, as noted above, not all of the trading partners of the European Community have agreements containing a human rights clause. On the other hand, this criticism does not apply directly to any product-based measures that might be imposed under the human rights clause, such as 'social labelling' initiatives. In this case, it might be easier for the Community to draft a measure that is at least facially neutral.

Against this empirical background, the following will discuss these three requirements under the Chapeau of unjustifiable discrimination, arbitrary discrimination and disguised restriction on international trade.

(b) Unjustifiable discrimination

(i) Measures targeted at PPMs

The meaning of 'unjustifiable discrimination' has been clarified to some extent by the Gasoline case and the two Shrimp cases.\textsuperscript{878} The first of these cases mechanism, as provided for in the ACP-EU Partnership Agreement, and insists, therefore, that adequate regulations should be adopted where necessary'.

\textsuperscript{878} United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted on 20 May 1996 (Gasoline); United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DSS8/AB/R, adopted on 6 November 1998 (Shrimp) and United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia, WT/DSS8/AB/RW, adopted on 21 November 2001 (Shrimp – Article 21.5). The non-discrimination requirements of the Chapeau had been applied in two GATT panel reports: United States – Imports of Certain Automotive Spring Assemblies, adopted on 26 May 1983, L/5333, BISD 30S/107, para 55 (measure not discriminatory because applied to products from all sources) and United States – Prohibition of Imports of Tuna and Tuna Products from Canada, adopted on 22 February 1982, L/5198, BISD 29S/91, para 4.8 (the panel stated that the measure 'might not necessarily have been arbitrary or unjustifiable' because it applied to products from various sources).
concerned a United States measure requiring foreign oil refiners to adhere to a statutory standard (a 'baseline') for air cleanliness which was likely to be more onerous than the individual baselines which domestic refiners were entitled to use. The other two cases concerned a United States measure requiring foreign shrimp exporting countries to obtain certification of the fact that their shrimp harvesting methods did not harm turtles.

These cases are particular in the sense that they involved measures targeted not at the consumption of products, but rather at their process and production methods (PPMs). This target of the measures at issue must be kept conceptually distinct from the harm that was sought to be prevented by the measure, and, of course the location of the harm. While the PPMs targeted by the measures in all cases occurred at least partly outside of the territorial jurisdiction of the regulating Member, this was not necessarily the case of the location for the harm.

In Shrimp, both the cause (the method of harvesting shrimp) and the harm (killing of turtles) were comprised by the same activity. Moreover, this activity took place both domestically (US vessels) and extraterritorially (foreign vessels). In Gasoline, by contrast, the harm (air pollution) was domestic. Partly, this harm was caused by the use of 'dirty' gasoline. However, it was also partly caused by the production of 'dirty' gasoline (the PPM), and it was at this indirect cause that the measure at issue was directed.879 In this respect, the measure was targeted at

879 It is surprisingly uncommon to find commentators referring to the Gasoline case in the context of PPMs. For rare examples, see Scott Vaughan, 'Reforming Environmental Policy: Harmonisation and the Limitation of Diverging Environmental Policies: The Role of Trade

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an activity (the production of the gasoline) that occurred outside of the jurisdiction of the regulating Member. It might be noted that in this respect, the *Gasoline* case was similar to the *Hormones* case, where the measure at issue was also targeted at a cause of potential harm at the point of production (the use of growth hormones) occurring outside of the jurisdiction of the regulating Member.880

What makes these cases particular, and the reason that they raise issues under the Chapeau, is that most other cases arising under Article XX involve a measure directed at a domestic harm caused not at the point of production, but rather at the point of distribution or the point of consumption of a product.881 Where


880 The relevant measure in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted on 13 February 1998, was a prohibition on the placing on the European market of both domestically produced and imported meat and meat products derived from farm animals to which growth hormones had been administered (see para 3). This may relevantly be distinguished, for instance, from the measure in *EC – Asbestos*, n 579, which was a prohibition on the sale of products containing asbestos fibres.

881 For a summary of the different stages in the production process at which environmental measures might be targeted, see the comments of the Swedish delegate, on behalf of the Nordic countries, in Group on Environmental Measures and International Trade, *Report of the Meeting held on 5-7 July 1993, Note by the Secretariat*, TRE/12, 30 July 1993, stating, at para 64, that '[a] measure which was directed at production, for example a fee or tax on polluting processes or input components as applied by most countries today, affected domestic producers only. Thus, the trade effects were favourable to foreign producers, who were not obliged to follow the regulations or pay the fees. However, this was not true if the measure was a process-based fee on a product. Depending on the circumstances, the fee could also be applied to imported products.'
measures targeted at the point of consumption are concerned, it is difficult to imagine any conceivable justification for discrimination between ‘like products’ (naturally, if they are not ‘like’ the measures will be justified under Articles I or III and Article XX will not be relevant). This is because there is no difference in the degree of risk arising out of the use of domestic and imported ‘like’ products.

When it comes to measures targeted at the point of distribution of a product, the situation becomes more complicated, because at this stage in the production chain the degree of risk at which the measure is targeted may differ between imported and domestic products. One example of such a measure may be seen in Korea—Beef, which concerned a dual retail system designed to reduce the risk of harm to consumers caused by fraudulent sales practices taking place in Korea.882 In this case, the justification for the discriminatory measure was that there was a legitimate difference in consumer perception between the imported and domestic products, which need to be protected. Another example is Argentina—Bovine Hides, which concerned a system of differential taxation on imported and local products was targeted at the risk of tax evasion occurring in Argentina.883 In this case, it was argued that there was a difference in the risk of tax evasion at various points in the distribution of imported and domestic products. In both cases, the

which caused problems of determining fair charges, of taking into consideration differences in environmental and economic situations of exporting countries, etc. The latter was referred to as the PPM issue, on which the Group would have to focus at some point.’


arguments failed on the facts: in Korea - Beef the measure was not ‘necessary’ under Article XX(d) and consequently the Chapeau was not raised;\(^4\) in Bovine Hides, the panel indicated that while the differential in initial taxation might be justified,\(^5\) the increased tax burden imposed on importers as a result of interest paid or foregone was not justified. But the result of these cases does not detract from the possibility of a Chapeau analysis for future measures targeted at the distribution of products.

To summarise, then, the Chapeau is most likely to be relevant in cases involving process and productions methods, and in cases involving discrimination at the point of distribution, because at this stage in the production chain the degree of the risk at which the measure is targeted may differ between imported and domestic products. But the Chapeau is unlikely to be relevant in cases involving the consumption or use of products that have already been decreed to be ‘like,’ because the conditions of risk associated with the use of these products will be identical for both imported and domestic products.

(ii) US - Gasoline

By way of introduction to the Gasoline case, something must be said about the unusual manner in which the Appellate Body posed the relevant issues. Prima facie, the measure at issue was clearly discriminatory, inasmuch as it applied


different treatment to foreign and domestic refiners. According to the Chapeau, the next question should have been whether this discrimination was 'justifiable'. It is remarkable, then, that the Appellate Body managed to avoid this question. It did so by phrasing its reasoning entirely in the negative, posing hypothetical alternative measures that would not have discriminated in the first place. It said:

There was more than one alternative course of action available to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners. The United States has put forward a series of reasons why either of these courses was not, in its view, realistically open to it and why, instead, it had to devise and apply the baseline establishment rules contained in the Gasoline Rule.\textsuperscript{86}

This method of analysis led the Appellate Body to be relatively vague about why, precisely, the measure at issue was not permissible. This can be seen in the conclusion to its reasoning:

We have above located two omissions on the part of the United States: ... In our view, these two omissions go well beyond what was necessary \textsuperscript{86} Gasoline, at p 25 (emphasis added). The evidently protectionist nature of the discrimination also led the Appellate Body to find that the application of the measure constituted a disguised restriction on trade, also in violation of the Chapeau. The domestic political need for discrimination in cases such as this is discussed in Frieder Roessler, 'Domestic Policy Objectives and the Multilateral Trade Order' in Frieder Roessler (ed), The Legal Structure, Functions and Limits of the World Trade Order, Cameron May, London, 2000, at 206-7.
for the Panel to determine that a violation of Article III:4 had occurred in the first place. **The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable.** In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute "unjustifiable discrimination" and a "disguised restriction on international trade."887

Of course, the real question is not whether the discrimination was 'foreseeable' or 'inadvertent or unavoidable,' but whether the discrimination was 'justifiable'.

Nevertheless, the alternative measures proposed by the Appellate Body are instructive in their own right. It is interesting to note, first of all, that they are based on an implicit rejection of the United States' claim that the discrimination was an attempt to respond to a difference in the conditions of risk between domestic and foreign refiners in terms of (a) problems with determining the refinery of origin, (b) fraud in claiming refinery of origin, and (c) an inability to assess and enforce the quality of the gasoline.888 Rejecting this, the Appellate Body found that the United States could have avoided discriminating not only by applying the more lenient baselines to foreign refiners but also by applying the more rigorous statutory baselines to domestic importers.

As to the first method, the Appellate Body found that the United States could have applied a measure granting market access on a non-discriminatory basis because sufficient data was available to impose individual baselines on foreign

887 *Gasoline*, pp 30-31 (emphasis added).
888 See *Gasoline*, at pp 25-6 for these claims.
refiners (an ‘autonomous market access measure’), and it also found that the United States could have called on the assistance of the affected WTO Member governments by pursuing ‘cooperative efforts’, presumably in the form of an agreement by those affected WTO Members to impose a type of regulatory regime (‘a regulatory regime measure’).

As to the second, the Appellate Body said that it was unjustifiable to count the costs for domestic but not foreign refiners. The clear implication is that the United States would not have discriminated in the first place had it imposed a statutory baseline on domestic refiners. This alternative is particularly interesting insofar as it raises issues of substantive equity. For instance, what if the costs of meeting that statutory baseline had been higher for foreign refiners than for domestic refiners? This might have been the case if the domestic producers were already using a higher level of technology. Would the United States still have been entitled to impose a measure that did not discriminate in form, but did discriminate in substance, by failing to take into account the economic and technical capacity of foreign refiners to meet the specific conditions in a measure designed to avoid the agreed risk? These are issues that arose again in the Shrimp cases.

889 Gasoline, p 26 (agreeing with a panel finding).
890 Gasoline, p 27 and also p 28.
891 Gasoline, p 28.
iii) **US—Shrimp: from the ‘same’ to ‘different conditions’**

As in *Gasoline*, *Shrimp* was concerned with a cause of harm (deaths of sea turtles as a result of shrimp trawling) that occurred both domestically (United States vessels) and abroad (foreign vessels). But this case raised a new issue, as the Appellate Body now accepted that there was at least a potential difference in the risk that harm would be caused by domestic practices as opposed to the harm that would be caused by foreign practices. The Appellate Body said that:

> We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

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892 As noted above, the harm had already been determined to be caused to the United States insofar as there was a ‘sufficient nexus’ between the turtles and the United States.

893 This may have had something to do with the identity of the parties pleading this difference in risk conditions. In *Gasoline*, it was the defendant that had argued (unsuccessfully) that there were different conditions of risk and that this justified the discrimination inherent in the measure at issue. In *Shrimp*, by contrast, it was the complainants that claimed that there were different conditions of risk, and that a failure to appreciate this difference had led to discrimination.

894 *Shrimp*, para 165. It is true that the Appellate Body made this last statement specifically in the context of criticising the United States for having required other WTO Members ‘to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated’ (*id*). However, it seems clear that the interpretation of the Chapeau to include different conditions prevailing applies more generally to *any* measure imposed by a regulating Member. The reason the Appellate Body limited its comment here in the requirement of the institution of a regulatory regime was because this was the sole manner in which the United States had *applied* the measure in the case at hand.
In this paragraph, the Appellate Body was dealing with a threshold issue: the need to ascertain – by ‘inquiry’ – the risk of harm against which the measure was designed to guard. It is to be emphasised that the ‘conditions prevailing’ are seen in terms of conditions of risk. This explains, incidentally, why cases involving measures targeted at the point of consumption (such as the Asbestos case) do not involve any issues of discrimination under the Chapeau. The risk caused by the use of the products in those cases is identical for domestic and foreign products. On the other hand, when it comes to measures targeted at the distribution of products (such as in Korea – Beef or Bovine Hides) there is a possibility that there is a differential in the risk of harm caused by the respective domestic and foreign products. It is not to be excluded that similar cases might even be justified under the Chapeau.

Any inquiry as to the difference in risk conditions was bound to raise a new question: namely, how is discrimination to be avoided in the event of different risk conditions? Or, to put it in Aristotelian terms: how is one to avoid the discrimination that results when unlike conditions are treated as like. It seems

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895 See Chris Wold, ‘Multilateral Environmental Agreements and the GATT: Conflict and Resolution?’ (1996) 26(3) Env L 841 at text to nn 254-255 at text to n 553, who suggesting that ‘conditions’ could be interpreted as the factual ‘ecological conditions’ affected by the process and production methods of the targeted product: ‘If ecological conditions constitute a ‘condition’ that justifies discrimination, then the finding satisfies the Article XX preamble requirements, because the detriment finding must be applied equally where conditions are similar, such as where trade would be detrimental to the survival of the species.’

896 See the comment of the Canada-United States Free Trade Agreement panel in its decision In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of UHT Milk From Quebec, USA-93-1807-01, 3 June 1993 that ‘since the time of Aristotle, at least two principles
to have been this question that the Appellate Body was answering when it said that:

It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.897

In interpreting this passage, it is perhaps useful to make one further point. The Appellate Body said that 'we believe that discrimination results ... when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing ...'. What is interesting is that in theory, the United States might have failed to undertake any inquiry and failed to take into consideration the different conditions prevailing and still not have discriminated. The Appellate Body could have been widely recognized with respect to the definition of equality. Firstly, equal treatment involves according the same treatment to the same facts. Secondly, equal treatment of dissimilar facts will not produce equality. The interpretation of the GATT has reflected both these propositions' (para 5.15). The panel referred in this respect to United States – Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, para 5.10.

897 Shrimp, at para 164. It is true that the Appellate Body uses the language of 'inquiry' and 'take into account' interchangeably, particularly in Shrimp – 21.5, eg in the passage quoted at n 919. However, the difference in the terminology as used here does indicate a difference in the concerns of the Appellate Body – first the need to assess the potential difference in risks, second the non-discriminatory treatment of these different risks.
therefore have restricted itself to a criticism of the discriminatory result of such conduct, or have said that discrimination is very likely to result when there is no inquiry.\textsuperscript{898} That it did not is significant. Indeed, it is suggested here that the Appellate Body was not content to describe obligations of result, but rather, it went further in imposing on the parties specific obligations of conduct.

(iv) Obligations of conduct and obligations of result

This distinction between obligations of conduct and of result, popular at one time, has fallen out of favour in recent years, largely as a result of having been abandoned by the International Law Commission in the context of drafting the new articles on state responsibility. The former draft articles had drawn a clear distinction between obligations of conduct, which were determinate,\textsuperscript{899} and obligations of result, which were indeterminate. The Commentary to the former Draft Article 20 said that:

\textsuperscript{898} Indeed, this is more or less what the Appellate Body said when it came to the question of prior negotiations. See p484.
\textsuperscript{899} Cf the earlier draft articles (International Law Commission, Draft Articles on State Responsibility Adopted on First Reading, Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10 (1996), available at www.un.org/ law/ ilc/archives/statfra.htm) Article 20 ("Breach of an international obligation requiring the adoption of a particular course of conduct") provided that "There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation." Article 21 ("Breach of an international obligation requiring the achievement of a specified result") provided, \textit{inter alia}, that '(1) There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

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What distinguishes the first type of obligation [conduct] from the second [result] is not that obligations ‘of conduct’ or ‘of means’ do not have a particular object or result, but that their object or result must be achieved through action, conduct or means ‘specifically determined’ by the international obligation itself, which is not true of international obligations ‘of result’.

As Crawford noted in his second report on state responsibility, this may have led to the mistaken impression that obligations of conduct were more onerous than obligations of result. He said that:

An obligation of conduct is an obligation to engage in more or less determinate conduct. An obligation of result is one that gives the State a choice of means. It is for this reason that obligations of result are treated in the commentary as in some way less onerous than obligations of conduct, where the State has little or no choice as to what it will do ...

In adopting what was originally a civil law distinction, the draft articles have nearly reversed its effect.

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*Originally published in (1977) II (Part 2) Yearbook of the International Law Commission; available also at www.law.cam.ac.uk/RCIL/ILCSR/Arts.htm

*International Law Commission, Second Report on State Responsibility by Mr James Crawford, Special Rapporteur, A/CN.4/498, 17 March 1999, at para 58. Partly as a result of this potential for confusion, and partly because he found the distinction unhelpful in any case, Crawford proposed abandoning the distinction altogether and his proposal is now reflected in the ILC’s new articles, which do not make this distinction (See International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/Res/56/83 (2001), available at www.un.org/ law/ cod/ sixth/ 56/ english/ a_res_56_83e.pdf). But while Crawford may have been correct to abandon the distinction for the particular purposes of determining the consequences of a violation of an obligation (Second Report, at paras 88-92), this does not mean that the distinction is useless for all other purposes.
In principle, an obligation of conduct may be discharged without achieving any result, and consequently an obligation of conduct cannot be more onerous than an obligation of result in terms of the actual result to be achieved. But this does not mean, as Crawford implies, that an obligation of conduct cannot be more onerous in terms of the manner in which that result is to be achieved. This may be illustrated by reference to Crawford’s example:

... in the civil law understanding, obligations of result involve in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one’s power to achieve a result, but without ultimate commitment. Thus a doctor has an obligation of conduct towards a patient, but not an obligation of result; the doctor must do everything reasonably possible to ensure that the patient recovers, but does not undertake that the patient will recover. Under this conception, it is clear that obligations of result are more onerous, and breach of such obligations correspondingly easier to prove, than in the case of obligations of conduct or means.902

It is, of course, true that the doctor in this example is under no obligation to ensure patient recovery, and so he is under no obligation of result. But Crawford arguably mischaracterises the obligation of conduct which usually applies in this type of situation. The point is precisely that these obligations are not the best endeavours obligations he indicates here. It would have been more accurate to say that the doctor was under an obligation to conduct an examination, to

diagnose in accordance with accepted methods, and in general to treat the patient in a certain accepted manner. This would have better reflected the fact that, as the Commentary to the former Draft Article 20 made clear, and indeed as Crawford himself recognises, the entire rationale of obligations of conduct is that they are specific and determinate, and this is for a good reason: they come into being precisely when there is a risk of not reaching a result. In other words, the mere existence of obligations of conduct assume the very point being made by Crawford – that they cannot be more onerous, in terms of the results demanded, than obligations of result. But obligations of conduct can be more onerous in terms of conduct. To give another example: the SPS Agreement attempts to provide specific modalities for determining when measures are unnecessary and unjustifiably discriminatory by stating (in Article 5.1) that measures must be based upon a proper risk assessment (defined in paragraph 4 of Annex 1). As a result, it is theoretically possible for a WTO Member to violate an obligation of conduct, by breaching this requirement without actually violating any obligations of result. To this extent, it could be argued that the SPS Agreement has gone too far; and that in attempting to give a concrete modality for determining unnecessary measures and unjustifiably discriminatory measures, it has also applied an unduly onerous requirement applicable also to other cases.

903 Indeed, one is tempted to see the development of law in general as a move from obligations of result to more specific obligations of conduct. One might, for instance, see the free-standing obligations regarding risk assessment (Article 5) in the SPS Agreement as more specific obligations of conduct derived from a more general obligation of result to ensure that measures do not constitute arbitrary or unjustifiable discrimination.
These considerations are further borne out by the Dissenting Opinion of Judge Schwebel in the *ELSI* case, which concerned a claim that action had violated a treaty provision forbidding discriminatory or arbitrary measures (the terms were disjunctive). After referring to the former draft articles, Judge Schwebel posed to himself the question whether the obligation was one of conduct or result, and continued as follows:

The particular objects of the obligation not to subject such corporations to arbitrary or discriminatory measures are very specifically set out. But the particular means of achieving these objects are not. Thus, in terms of the analysis of the Commission, the obligation of Article I would seem to be an obligation not of means but of result, as international treaty obligations concerning the protection of aliens and their interests normally are. Nevertheless, it does not follow in the current case that Italy is absolved of its arbitrary treatment of ELSI and the interests of its shareholders in ELSI by reason of the administrative and judicial proceedings which followed the requisition ... In the current case, Italy did not achieve the specified result, namely, relieving ELSI of the effects of the arbitrary measure of requisition.904

This passage supports two conclusions drawn from the preceding analysis. First, while the former draft articles may have given the impression that obligations of conduct are *less* onerous than obligations of result, this is at most an impression, 

904 *Ellectronica Sicula SPA (US/Italy)*, [1989] ICJ Rep 15 (20 Jul), at p 117. The Court found no evidence of discrimination (para 122) and denied that the act in question had been arbitrary (para 130). Referring to this passage, Crawford questions whether the distinction drawn by Judge Schwebel assisted his analysis in any way. To this, it is commented here that while the distinction did not assist the analysis, this is precisely because Judge Schwebel decided that there was no obligation of conduct in the first place.
and does not truly reflect the difference between the two concepts. Second, while it may be right to abandon the distinction between the two types of obligation for the particular purpose of determining liability for breach, this does not mean that the distinction is not relevant for the purpose of describing, at a theoretical level, the advantages of obligations of conduct in terms of their greater precision. Indeed, it might be further be suggested that in setting out obligations of conduct in Shrimp, the Appellate Body has does precisely what Judge Schwebel determined had not been done in the provision with which he was concerned, namely, to set out the precise means by which arbitrary and discriminatory action on the part of WTO Members exercising their rights under Article XX of GATT might be avoided.

(v) Obligation to conduct an inquiry: conditions as ‘risk’

If, in Shrimp, the Appellate Body impose on the parties specific obligations of conduct, it remains to be seen what these obligations comprised.

As noted already, in Shrimp there was a question whether the United States had accurately assessed the degree of risk existing in the absence of the US measure. This raises very similar issues to those involving risk assessments under the SPS agreement: in particular, the obligation to conduct a risk assessment, and the obligation to base a measure on that risk assessment.

Before discussing this further, it is necessary first to point out that there were, in fact, two separate measures at issue in this case. Described positively (as they usually are), the United States had made available two types of ‘certification’. A country could be certified as having a fishing environment that poses no threat of
incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. Alternatively, a country could be certified as having adopted a regulatory program comparable to that of the United States and having a rate of incidental take of sea turtles that is comparable to the average rate for United States vessels.\textsuperscript{905} Described \textit{negatively}, these certification options may be reconceived as two separate import prohibitions: one applying in cases where there was no risk of harm to turtles, and another applying in cases where there was no regulatory program comparable to the domestic program. But this leaves a third situation: where there is \textit{some} risk of harm to turtles, but this risk is comparable or lesser than that occurring domestically, there is a \textit{prima facie} prohibition on imports and exporters seeking market access are required to institute the same regulatory regime as applies domestically.\textsuperscript{906}

A number of parties in the \textit{Shrimp} case made arguments to the effect that the various import prohibitions were not based on a proper risk assessment. Malaysia pointed out that the United States applied its import ban to shrimp from non-certified countries even when these had been caught using the same methods

\textsuperscript{905} \textit{Shrimp} – \textit{Article 21.5}, paras 139-140.

\textsuperscript{906} To some extent, the Appellate Body addressed this issue in the context of analysing whether the measure was 'even-handed' in its application to domestic and foreign trawlers for the purposes of the requirement in Article XX(g) that the measure must be 'made effective in conjunction with restrictions on domestic production or consumption'. It held that the measure was even handed essentially because it applied to both domestic and foreign trawlers (\textit{Shrimp}, paras 144-145). But the appraisal of this question under Article XX(g) is inherently less critical than under the Chapeau.
(Turtle Excluder Devices, or TEDs) as was used by United States vessels.\footnote{Shrimp, para 49. Malaysia also argued that the import prohibition covered the taking of some turtles that did not occur in Malaysian waters (id at para 50). This argument was weak in that it did not, of course, mean that there was no risk to any turtles in Malaysian waters.} Hong Kong, China agreed, and additionally noted that automatic certification was not available in the case of different methods with a similar risk.\footnote{Shrimp, para 77.} Finally, Australia argued that the United States had failed to account for any turtle conservation measures that might have compensated for any risk to turtles.\footnote{Shrimp, para 61.}

The Appellate Body did not specifically address these arguments, although it hinted that there was some merit to the argument that certification should have been available for shrimp caught using TEDs. In a relevant passage, the Appellate Body said that:

> Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United

\footnote{Shrimp, para 49. Malaysia also argued that the import prohibition covered the taking of some turtles that did not occur in Malaysian waters (id at para 50). This argument was weak in that it did not, of course, mean that there was no risk to any turtles in Malaysian waters.}
States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.\textsuperscript{910}

This passage begins by noting a problem with the first type of certification (automatic certification), but it unfortunately ends with a criticism of the second type of certification (regulatory regime). One never again hears of the important question whether the first type of certification (automatic certification) should have been more broadly available – there is no further analysis of whether the United States was under an obligation not to prohibit imports of shrimp before establishing that the method of catching these shrimp caused a greater risk of harm to turtles than it accepted domestically.

In focusing on the second type of certification, the Appellate Body found that, in practice, the United States’ administrative authorities simply looked to whether a country employed turtle excluder devices (TEDs),\textsuperscript{911} without inquiring into other conservation measures\textsuperscript{912} and without inquiring into the actual extent of the risk to turtles as a factual matter.\textsuperscript{913} It was this failure to inquire into the different conditions prevailing (of which these risk factors are examples) that led the

\textsuperscript{910} Shrimp, para 165.

\textsuperscript{911} Shrimp, para 162.

\textsuperscript{912} Shrimp, para 163.

\textsuperscript{913} Shrimp, para 164.
Appellate Body to criticize the United States for requiring ‘all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers’.  

1. **Shrimp – Article 21.5**

By the time of Shrimp–Article 21.5, the United States had revised its guidelines to take into account the criticisms of the Appellate Body regarding the second method of certification. On the other hand, the criteria for automatic certification still failed to allow for certification in cases of risk comparable to the US risk, and it is unclear whether this was addressed by the parties in argument. In any case, the United States had revised its guidelines to take into account the criticisms of the Appellate Body regarding the second method of certification. On the other hand, the criteria for automatic certification still failed to allow for certification in cases of risk comparable to the US risk, and it is unclear whether this was addressed by the parties in argument.  

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914 *Shrimp*, para 161.

915 See para 14 of the 1998 Revised Guidelines (reprinted in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted on 21 November 2001, at pp 104, and compare the corresponding paragraph in the 1996 Guidelines (61 FR 17342), available at www.westlaw.com. Admittedly, the 1998 Revised Guidelines also state that ‘[t]he Department of State has determined that the import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtle species: ... (d) Shrimp harvested in any other manner or under any other circumstances that the Department of State may determine, following consultation with the NMFS, does not pose a threat of the incidental taking of sea turtles. The Department of State shall publish any such determinations in the Federal Register and shall notify affected foreign governments and other interested parties directly’ (reprinted in *Shrimp – Article 21.5* (panel), at p 103). However, this exception only applies to cases where there is no risk at all.

916 It may be that Malaysia was addressing this point when it argued that the Revised Guidelines failed to take into account the fact that the risk to turtles in Malaysia had nothing to do with fishing for shrimp, but was rather a by-product of fishing for fish, although it could also have been referring to the second method of certification. (*Shrimp – Article 21.5*, para 24). To this, the United States responded that ‘this “vague, undeveloped argument” does not rebut the prima facie

*Footnote continued*
case, this was not addressed by the Appellate Body in its report, which again focused on the second method of certification (the regulatory regime). As far as this was concerned, the Appellate Body now approved the Revised Guidelines, noting that:

In our view, there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme comparable in effectiveness. Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory.917

To summarise, then, the Appellate Body held that when a regulating Member requires exporters to institute a regulatory regime, it cannot merely mandate the institution of the same process and production method that had been found appropriate to the conditions applying in the territory of the regulating Member; it must instead allow the exporting Member to take into account relevant risk factors, presumably including the possibility of methods carrying the same risk case that the revised United States guidelines do in fact allow for flexibility and consideration of local conditions.1 (Shrimp – Article 21.5, para 42). If the United States was referring to automatic certification, this statement does not reflect the problem that such certification was not available in cases of comparable risk; if it was referring to the second method of certification, it is beside the point.

917 Shrimp – Article 21.5, at para 144.
as that accepted by the regulating Member domestically.\textsuperscript{918} This emphasis on risk assessment, to transplant this term from the SPS context, is a clear illustration of the present contention that the Appellate Body has introduced precise obligations of conduct into the Chapeau not to discriminate unjustifiably or arbitrarily between countries where the same (or different) conditions prevail.

However, insofar as the Appellate Body insisted that only a regime that allows for a proper risk assessment (by accounting for alternative production methods or compensating factors) will be permitted, it somewhat undermined its earlier assumption that it was proper in the first place to allow a regulating Member to require, as a condition of market access, that an exporting WTO Member have instituted a particular regulatory regime. A regulating Member should be under an obligation to provide automatic market access in cases where there is not just no risk, as under the US regulatory regime, but also when there is a comparable risk to that accepted domestically.

2. Administration of multiple risk assessments

In Shrimp—Article 21.5, the Appellate Body also made certain findings regarding the rights and duties of a Member to undertake multiple risk assessments. This needed to be addressed by the Appellate Body because of the unusual fact that

\textsuperscript{918} See para 1 of Article 4 (Equivalence) of the SPS Agreement, which states that 'Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.'
Malaysia had refused to apply for certification within the system of market access offered by the United States.

The primary finding of the Appellate Body in this respect was that the obligation to ‘inquire’ does not require a regulating Member to launch an investigation into the impact of a measure on every possibly affected WTO Member. Instead, the Appellate Body held that it was sufficient for the United States to establish an administrative system open to all WTO Members:

> These provisions of the Revised Guidelines, on their face, permit a degree of flexibility that, in our view, will enable the United States to consider the particular conditions prevailing in Malaysia if, and when, Malaysia applies for certification. As Malaysia has not applied for certification, any consideration of whether Malaysia would be certified would be speculation.

We need only say here that, in our view, a measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in any exporting Member, including, of course, Malaysia. Yet this is not the same as saying that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in every individual exporting Member. Article XX of the GATT 1994 does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and evolving in every individual Member.919

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919 *Shrimp* – Article 21.5, at paras 148-9. It is interesting to note, parenthetically, that the Appellate Body here preferred to phrase the relevant obligation as ‘taking into consideration’ the conditions prevailing, apparently abandoning the slightly more onerous phrasing of an obligation to ‘inquire’ into these conditions, which had been used synonymously in *Shrimp*.
Extrapolating from this slightly, it seems that a regulating Member has a duty to notify its market access conditions to all Members, but also that its obligation to ‘inquire’ into different conditions prevailing is triggered only on the application of any individual Member for market access rights. But what we do not yet know is whether an applicant Member is under any further obligation to provide information to the regulating Member as to the conditions prevailing in its territory, or whether it is entirely up to the regulating Member to then undertake an assessment of the situation on its own before applying a measure. It is likely, given the relative lack of information available to a regulating Member, that the obligation on an affected Member to apply for market access also carries with it some obligation to provide the information necessary to a determination by the regulating Member as to whether the market access conditions have been met.

Another interesting aspect of this ‘subsystem’ is that the obligation to provide information would have an impact on the regulating Member’s burden of proving that its measure is justified under Article XX in the context of dispute settlement proceedings. In *Gasoline* the Appellate Body had said that:

The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception.\(^{920}\)

\(^{920}\) *Gasoline*, at p 22.
But if there is an obligation on an affected Member to provide information to the administrative agencies of the regulating Member, then it seems that, at some level, this burden of proof has been reversed. Indeed, this may be illustrated by the fact that, in the case at hand, the Appellate Body dismissed Malaysia’s argument that ‘shrimp trawling is not practised in Malaysia; shrimp is a by-catch from fish trawling and therefore, the incidental catch of sea turtles is due to fish trawling, not shrimp trawling’\(^{921}\) simply on the grounds that Malaysia had failed to apply for certification. This is an important result, and deserves to be treated in more detail.

In order to understand how the United States’ burden of proving that its measure did not discriminate against Malaysia was somehow converted into an obligation on Malaysia to give the United States the chance to discriminate, it is necessary to make some observations on the difference between a measure and the application of a measure. It is suggested here that a ‘measure’ is essentially an exercise of legislative power (the setting of general rules applicable in a variety of situations), while the ‘application’ of the measure is an exercise of discretionary executive power (the application of general rules in specific cases) as seen in _administrative practice_. Of course, this does not mean that the legislature always grants the executive any discretion in the way that legislation is to be applied, nor that the executive will always itself retain the discretion that it has been given. It is obvious that both the legislature (through legislation) and

\(^{921}\) _Shrimp - Article 21.5_, at para 145 n 106.
the executive (through executive acts) can remove executive discretion in the application of a measure in administrative practice.

Furthermore, legislation and executive acts can remove executive discretion in two ways: either by mandating that a rule be applied in any given case, or by mandating that a rule may not be applied in any given case. As a result, there is no rationale for any formal difference in treatment of an act depending on whether it originates with the legislature or the executive, although the fact that executive acts are usually more specific will naturally raise a presumption that an executive act does not constitute a rule, as such, but is better seen in terms of administrative practice. This has two consequences. In the case of legislation or an executive act mandating the application of a rule in a given case, there will be no difference between the design of the measure and its application, and these acts should be scrutinised both under the Article XX paragraphs and under the Chapeau. But it also means that where legislation or an executive act mandates the non-application of a rule in any given case, then by definition these acts should be treated as part of the design of the 'measure' for the purposes of

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922 Thus the panel in Bovine Hides was probably wrong to draw a distinction between the 'general design and structure' of a border tax collection and withholding mechanism applying only to imports (which it held was 'necessary' under Article XX(d) to combat tax evasion (para 11.307)) and the 'application' of the measure in the form of a higher rate of tax collected on imports (which it found represented an unjustifiable discrimination under the Chapeau (at para 11.330).) It is clear from the facts of that case that the higher rate of tax applied was not applied on a discretionary basis, but was applied on a mandatory basis pursuant to a combination of legislation and executive decrees implementing the legislation (id at Section VI).
assessing whether the measure is provisionally justified under the paragraphs of Article XX.

On this basis, we may make some sense of the ambivalent characterisation by the Appellate Body in *Shrimp* of the relevant administrative guidelines as either part of the measure itself (defined as Section 609) or the application of this measure. Thus, in determining whether Section 609 fell within the terms of Article XX(g), the Appellate Body had no difficulty in including the 1996 Guidelines within its definition of the 'measure' insofar as these Guidelines limited the scope of application of the measure. Thus, it said that '[f]ocusing on the design of the measure here at stake, it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species.' This ruling was undoubtedly correct.

Secondly, insofar as the 1996 Guidelines mandated the application of the measure in any given case, the Appellate Body treated these Guidelines as part of the application of the measure for the purposes of the Chapeau. Indeed, the Appellate Body here made much of the distinction between the measure, defined

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923 This summarised the Appellate Body's findings that 'Section 609, *as elaborated in the 1996 Guidelines*, excludes from the import ban shrimp harvested “under conditions that do not adversely affect sea turtles”'. Thus, the measure, by its terms, excludes from the import ban: [various types of shrimp] * (at para 138) and that '[u]nder these provisions [Section 609(b)(2)(A) and (B)], as further elaborated in the 1996 Guidelines, a country wishing to export shrimp to the United States is required to adopt a regulatory program that is comparable to that of the United States program and to have a rate of incidental take of sea turtles that is comparable to the average rate of United States' vessels' * (at para 140).
as Section 609, and 'the actual application of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators',\textsuperscript{924} the latter being too 'rigid and unbending' to survive the Chapeau.\textsuperscript{925} This ruling was similarly correct. But it leaves open the question why this mandatory aspect of the Guidelines was not also treated as part of the design of the measure for the purposes of Article XX(g). In an attempt to clarify the situation, it is suggested here that a rule removing executive discretion not to apply a measure in any given case should be considered part of the design of the measure itself regardless of whether this rule is contained in an executive act (as here) or in legislation.

This last GATT-illegal aspect of the 1996 Guidelines (mandatory application) was no longer a feature of the Revised Guidelines at issue in \textit{Shrimp–Article 21.5}. The Appellate Body consequently treated the Revised Guidelines in the same way as it had treated the first aspect of the 1996 Guidelines (mandatory non-application) in \textit{Shrimp}, which is to say, as part of the measure itself. The Appellate Body stated that:

\begin{quote}
The measure at issue in this dispute consists of three elements: Section 609 of the United States Public Law 101-162 (‘Section 609’); the Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the ‘Revised Guidelines’); and the application of both Section 609 and the Revised Guidelines in the practice of the
\end{quote}

\textsuperscript{924} \textit{Shrimp}, at para 163.

\textsuperscript{925} \textit{Shrimp}, at para 177.
United States. Both the United States and Malaysia agree on this definition of the measure. So does the Panel. So do we.926

But here it might be objected that the Appellate Body made a different mistake altogether. Whereas before it had failed to treat a rule in terms of the measure itself, here it assimilated administrative practice to the status of a rule. In fact, the third element identified here – the application of both Section 609 and the Revised Guidelines in the practice of the United States – is not really part of the measure itself. It is not a rule, as such, but is in a proper sense the application of the measure constituted by the first two rules set out in legislation (Section 609) and an executive act (the Revised Guidelines).

This has a consequence of some importance for our understanding of Shrimp–Article 21.5. If we focus on the measure as being the rules establishing the system of market access conditions, including the system of certification, and the application of the measure as the granting or refusal of market access within this system by way of administrative practice, then the conclusion is unavoidable that, because Malaysia had not applied for certification, the measure was simply not applied to Malaysia.927 To return to our original question, the reason that the Appellate Body was able to ignore Malaysia’s arguments as to whether the

926 Shrimp – Article 21.5, at para 79.
927 It might be pointed out that the subsystem of conditional market access established under Article XX differs significantly from the system of unconditional market access rights granted under the remainder of GATT. In that system, it is sufficient for a measure to be sufficiently ‘chilling’ to alter the agreed conditions of competition. Under Article XX, by contrast, it is precisely those conditions of competition that need to be established.
measure had been applied in a discriminatory manner was because, on the facts, the measure had not been applied.\textsuperscript{928} Indeed, one might speculate that the Appellate Body might have dismissed the case on these grounds alone, were it not for the important fact that Malaysia was under no obligation to establish any ‘legal interest’ in the matter.\textsuperscript{929}

(vi) \textit{Taking into account the different conditions prevailing: conditions as \textquote{technical and economic capacity’}}

If the result of the ‘inquiry’ is that there are indeed different risks – which is to say ‘conditions’ – prevailing, the next question is: what constitutes discrimination between these different conditions? It is suggested here that in answering this question the Appellate Body introduced an additional requirement involving the technical and economic capacity of an affected private party (in the case of autonomous market access measures) or of a Member (in the case of regulatory regime measures) to respond to the conditions required by a measure. It follows from this that a regulating Member is under an obligation not to discriminate without taking this ‘capacity’ into account. Furthermore, it seems that a regulating Member has two options for discharging this obligation: it may avoid discrimination altogether by taking into account the different technical and economic capacities of the affected private parties or Members to comply with its

\textsuperscript{928} The Appellate Body said that ‘[a]s Malaysia has not applied for certification, any consideration of whether Malaysia would be certified would be speculation’ (\textit{Shrimp – Article 21.5, para 148}).

\textsuperscript{929} \textit{EC – Bananas, n 571, at paras 135-6}. 

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measure, or, alternatively, it may discriminate if this can be *justified* on the basis of the relative difference in their technical and economic capacity.

1. **Option 1: avoid discriminating**

In *Gasoline*, it will be recalled, one of the United States’ arguments was that it was not economically feasible for domestic refiners to adhere to the higher statutory baseline and so it was justified in allowing them to rely instead on less onerous individual baselines. (The other argument was more ‘scientific’ in the sense that it referred to an absence of data and control). Significantly, the Appellate Body did not deny that the economic capacity of meeting the conditions set out in a measure could, in principle, be a relevant consideration, but stated that it could only be taken into consideration if the United States also took into account the costs to foreign refineries.930 What is interesting is that the Appellate Body hinted that the United States might have avoided discriminating altogether had it ‘counted the costs’ of imposing statutory baselines for foreign refiners, as it did for domestic refiners.931 This raises the possibility that a WTO

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930 *Gasoline*, p 28. This was therefore stricter than the test in Article 5.6 of the SPS Agreement which requires that a measure must be no more trade restrictive than necessary to achieve its objective, *taking into account technical and economic feasibility*. Had this been an SPS measure, the United States would at this stage have been able to argue that alternative measures would have been too costly without taking into account the costs to foreign refiners, regardless of whether those costs amounted to the ‘same’ or ‘different’ conditions. On the other hand, the United States might have had the same difficulty in arguing its case under Article 2.3 of the SPS Agreement, which more or less reiterates the language of unjustifiable discrimination in the Chapeau.

931 See the passage from *Gasoline* quoted at text to n 886.
Member may be able to avoid discriminating in the first place by meeting the costs of complying with its measure in the territory of affected Members.912

We can see how this might work in practice by reference to the facts in *Shrimp*. In this case, the Appellate Body insisted that when a WTO Member imposes a measure requiring another Member to institute a particular regulatory regime, it remains subject to a 'second order' obligation to take into account different conditions prevailing in the territories of the affected Members (understood in terms of the technical and economic feasibility of the exporting Member to institute the required regulatory regime).933 The United States had demonstrated 'differences in the levels of effort made by the United States in transferring the required TED technology to specific countries',934 and had also allowed them different phase in periods.935 This meant that the United States had discriminated

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912 Compare an affected Member's entitlement to compensation, in the form of a 'mutually satisfactory adjustment' (DSU, Article 26.1(b)) as a result of a non-violation complaint (brought under XXIII:1(b) of GATT) against a measure justified under Article XX. This availability of a remedy for non-violation in such cases was approved by the Appellate Body in *EC – Asbestos*, n 579, para 191.

933 See Chris Wold, 'Multilateral Environmental Agreements and the GATT: Conflict and Resolution?' (1996) 26(3) *Env L* 841, at text to n 352, stating that '[b]ecause developing countries generally do not have the means to safely dispose of the hazardous waste, they might be viewed as countries with different prevailing conditions. Nonetheless, individual facilities might be able to dispose of the waste safely, or countries could contract with experienced facilities to ensure safe disposal'). See also Annick Emmenegger Brunner, 'Conflicts between International Trade and Multilateral Environmental Agreements' (1997) 74 *Annual Survey of International and Comparative Law* 74 at 96-97.

934 *Shrimp*, para 175.

935 *Shrimp*, para 174.
by treating differently countries where the same (technical and economic) conditions prevailed.

But what if the United States had simply imposed its measure, both domestically and abroad, without offering any technical assistance or, for that matter, any phase-in periods? In such a case there would be no formal discrimination between countries, because the measure would apply equally to domestic and foreign products. But arguably there would be discrimination in the sense that the measure would have been imposed without taking into account the different conditions prevailing between the United States and the exporting countries.936

This means that in order to avoid discriminating against WTO Members under the Chapeau there may be a requirement to provide compensation. This has obvious application of the Chapeau to measures under the human rights clause. In order to avoid discrimination, it will not just be sufficient for a party to impose

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936 See also United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, adopted on 23 August 2001, para 84, where the Appellate Body commented on the terms 'reasonable period' under Article 6.8 and a 'reasonable time' under paragraph 1 of Annex II of the Anti-Dumping Agreement that '[w]hat is “reasonable” in one set of circumstances may prove to be less than “reasonable” in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the Anti-Dumping Agreement, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.' I am grateful to Gabrielle Marceau for drawing this reference to my attention. See also below at p 481 and following on the question of whether the duty to negotiate varies according to technical and economic capacity.
measures equally to all other parties if it does not compare their conditions with its own, and, if appropriate, compensate them accordingly.937

Another possibility not addressed by Shrimp was that the conditions prevailing in the territories of the affected WTO Members might differ inter se.938 This raises the question whether the obligation of a WTO Member to take into account the conditions prevailing in the territories of these WTO Members also entails a difference in treatment between these Members. To give an example from Shrimp: could the United States really require developing WTO Members to implement a TED requirement simply by demonstrating that it required developed countries to do the same? More likely, a regulating Member would need to take into account the different technical and economic conditions prevailing in the territories of those countries inter se by, for example, providing developing countries with financial compensation and technical aid sufficient to enable them to comply with the measure.

2. Option 2: discriminate on a justifiable basis

Taken to extremes, the result of this compensation strategy would be a version of the ‘regulatory takings’ doctrine, which might chill regulation and restrict the regulatory choices available to WTO Members for legitimate purposes. But it is not necessary to reject the above analysis on the basis of these quite legitimate


938 I owe this point to Alexia Herwig.
concerns, so long as it is remembered that the Chapeau does not, in fact, prohibit all discrimination, but only unjustifiable and arbitrary discrimination. As the panel said in *Bovine Hides*, ‘the prohibition on unjustifiable discrimination in the application of a measure by necessary implication leaves room for justifiable discrimination.’ In this regard, the Chapeau is more similar to the SPS Agreement, which similarly contains no prohibition on discrimination *per se*, only a prohibition on unjustifiable and arbitrary discrimination. This is probably no accident: like the Chapeau, the SPS Agreement is very much concerned with risks occurring at the point of production, which is to say, risks that can differ according to the origin of products.

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939 *Bovine Hides*, para 11.315.

940 The SPS Agreement does not contain most-favoured-nation or national treatment obligations, unlike, for example, the TBT Agreement (Article 21). It is consequently possible to find a measure justified under the SPS Agreement, either with or without discrimination, without finding any initial violation of such obligations, which would be required under the TBT Agreement. It is not correct merely to treat Article 2.3 of the SPS Agreement (which reflects the Chapeau) as a non-discrimination principle. This provision states that ‘Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.’ See also Article 5.5.

941 It may also be relevant that both the SPS Agreement and the Chapeau only apply to a measure once it has been established that the purpose of the measure is legitimate: by definition, the SPS Agreement only applies to measures with a legitimate objective (reduction of risk of diseases to plant and animal life and health). See also Alex Desmedt, ‘Proportionality in WTO Law’ (2001) *Journal of International Economic Law* 441, at 458 (drawing a distinction between the SPS Agreement and Article 2.2 of the TBT Agreement in this respect). Similarly, the Chapeau, not this time by definition, but rather by way of procedure, only applies to measures the purpose of which has assessed been already at the first tier stage of reviewing the measure under the subparagraphs of Article XX.
In *Bovine Hides* Argentina had argued that it was not economically or technically feasible for it to choose a less restrictive taxation measure than the one applied because of local ‘conditions’ of tax evasion. Rejecting this argument, the panel stated that:

> Argentina has not been able to convince us that, in the present case and for purposes of applying the chapeau, ‘the same conditions [do not] prevail’ between Argentina and the European Communities. In particular, the fact that Argentina is a developing country Member which has to contend with low levels of compliance with its tax laws, does not, in our view, provide a justification for discriminating against imported products under the facts of the present case.942

It is arguable that the panel went further than necessary, insofar as it could have found that the relevant conditions were different between Argentina and the European Communities. But even so, the panel made an important point: the mere existence of difference in the domestic and foreign conditions could not logically justify Argentina’s discrimination; rather, this difference in conditions had to be the reason for the discriminatory treatment.

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942 *Bovine Hides*, para 11.315 n 570. The panel also said that ‘[i]t should be recalled, moreover, that the Appellate Body in *United States–Gasoline* – a case which also involved discrimination between imported and like domestic products – did not specifically examine and make a finding on whether the “same conditions prevail[ed]” between Brazil and Venezuela, on the one hand, and the United States, on the other hand’ (*id*). This is technically accurate, but it ignores the fact that the Appellate Body identified an obligation not to discriminate between countries where different conditions prevail only in the later case of *Shrimp*. It also ignores the fact, emphasised here, that the Appellate Body did hint that the costs to domestic refiners might have been taken into account so long as the costs to foreign refiners were also taken into account.
This does not answer the question when a discriminatory measure based on a difference in conditions may be justified. Some guidance in this respect might be derived from Korea-Beef and EC-Asbestos, in which, as noted above, the Appellate Body recognised that the 'necessity' of a measure to its objective might depend on the importance of the values being protected. From a human rights perspective, that might mean that a serious human rights infringement might justify discriminatory treatment, whereas this might not be the case in a situation not meeting this standard, or not in violation of customary international law obligations.

(vii) The 'obligation' to negotiate

These considerations of substantive equity – so much at odds with the liberal paradigm of the WTO system – perhaps explains the preference of the Appellate Body in both Gasoline and the Shrimp cases for multilateral negotiations. The assumption is presumably that such negotiations would represent a proper forum for taking into account the different conditions prevailing between regulating and affected Members and between affected Members inter se, and it would be helpful for the Appellate Body to rely on such negotiations as evidence (or perhaps even as estoppels) of the technical and economic feasibility of a measure for all parties concerned.943 But whether this preference for multilateral negotiations amounts to an obligation to negotiate is another question entirely.

943 It has been suggested that the 'conditions prevailing' should include whether a targeted Member has ratified or complied with a particular treaty. See, eg, Steve Charnovitz, 'Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on

Footnote continued
1. **Is there any obligation to negotiate?**

In saying this, it must be recognised that many of the parties to *Shrimp* — except for the United States — assumed that the United States was under an obligation to negotiate a multilateral agreement before applying its measures.\(^\text{944}\) That this is an

Footnote continued

\(^{944}\) The Joint Appellees in *Shrimp* argued that Article XX had been abused because 'Section 609 was applied without a serious attempt to reach a cooperative multilateral solution with Joint Appellees.' (para 41). The European Communities argued that a unilateral measure should be permitted but only if the regulating Member had first offered to negotiate with the exporting Members (para 73). Australia, similarly, stated that '... the United States has sought to impose a
unnecessary assumption is indicated, among other things, by the fact that Article XX does not itself distinguish between multilateral and unilateral measures.\textsuperscript{945} It has been pointed out in this respect that a claim that unilateral measures are prohibited 'would also be inconsistent with the use of the singular noun in Article XX, which permits "any contracting party" to adopt the measures in question.'\textsuperscript{946}

It is therefore telling that in both Gasoline and Shrimp the Appellate Body addressed the issue with some care. In Gasoline, the Appellate Body considered the failure to negotiate in terms of evidence that another less discriminatory course of action was reasonably available to the United States, though it raised this in the context of reasoning that the United States might have better avoided its risk, rather than in the context of reasoning that the United States should have met the costs of the measure. In Shrimp, where negotiation was mentioned in

unilaterally determined conservation measure through restrictions on trade, and has not explored the scope for working cooperatively with other countries to identify internationally shared concerns about sea turtle conservation issues and consider ways to address these concerns. Therefore, the United States has imposed Section 609 in a manner that constitutes unjustifiable discrimination between countries where the same conditions prevail and also a disguised restriction on international trade.' (at para 54)


\textsuperscript{946} Howard F. Chang, 'Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case' (2000) 74(1) \textit{Southern California Law Review} 31, at 42. He further states that 'a unilateral measure would not violate the GATT if even-handed negotiations do precede the imposition of the measure' (at 43). This does not imply the contrary, that a failure to enter into prior negotiations will be fatal to a measure.
both of these contexts, the Appellate Body also framed the United States’ failure to negotiate in terms of evidence of discrimination. It said that:

Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.947

The Appellate Body noted that the US Congress,948 the WTO itself and other international forums949 all recognised the need for and the appropriateness of such efforts, and, furthermore, that the United States had, in fact, negotiated an agreement: The Inter-American Convention.950 This Convention ‘provide[d] convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609’.951 But at no point in this first Shrimp case did the Appellate Body point to any obligation incumbent upon the United States to enter into negotiations before having recourse to unilateral measures. At most,

947 Shrimp, para 166.
948 Shrimp, para 167.
949 Shrimp, para 168.
950 Shrimp, para 169.
951 Shrimp, para 171.
the Appellate Body pointed to the *discriminatory effect* of not negotiating in good faith:

The *effect* is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative *effects* of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements. The principal *consequence* of this failure may be seen in the resulting unilateralism evident in the application of Section 609. ... The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 *heightens* the disruptive and discriminatory influence of the import prohibition and *underscores* its unjustifiability.

In *Shrimp–Article 21.5*, Malaysia adopted a broader interpretation of this passage, not only accepting that the Appellate Body had imposed upon the United States a duty to negotiate, but drawing from the above passage an obligation to conclude an agreement.\(^952\) This argument was given short shrift by the Appellate Body, which stated that ‘it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding “arbitrary

\(^{952}\) *Shrimp – Article 21.5*, paras 16-17.
or unjustifiable discrimination" under the chapeau of Article XX. We see, in this case, no such requirement.\(^3\)

But if the Appellate Body saw no requirement to conclude an agreement, did it see a requirement to negotiate one? It certainly went much closer than in _Shrimp_ to identifying such an obligation. Thus, commenting on its earlier ruling, it said that:

> We concluded in _United States–Shrimp_ that, to avoid ‘arbitrary or unjustifiable discrimination,’ the United States had to provide all exporting countries ‘similar opportunities to negotiate’ an international agreement.\(^4\)

That this amounts to little more than a commentary on the facts of the case seems to be confirmed by the Appellate Body’s further observation that:

> Given the specific mandate contained in Section 609, and given the decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles that were cited in our previous Report, the United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other.\(^5\)

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\(^3\) _Shrimp – Article 21.5_, para 124.

\(^4\) _Shrimp – Article 21.5_, at para 122.

\(^5\) _Shrimp – Article 21.5_, para 122.
It is unlikely that the Appellate Body was proposing that either domestic law or
the ‘preference voiced by WTO Members and others in the international
community in various international agreements for the protection and
conservation of endangered sea turtles’ were to be considered as applicable
sources of law giving rise to an obligation to negotiate under the Chapeau.
Rather, it seems that the Appellate Body’s approach to these instruments was as
evidence that a failure to negotiate would result in arbitrary or unjustifiable
discrimination. This is confirmed by the Appellate Body’s further observations
that ‘[s]o long as such comparable efforts are made, it is more likely that
“arbitrary or unjustifiable discrimination” will be avoided between countries
where an importing Member concludes an agreement with one group of
countries, but fails to do so with another group of countries’ and its later
comment that it ‘saw the Inter-American Convention as evidence that an
alternative course of action based on cooperation and consensus was reasonably
open to the United States [and that] we used the Inter-American Convention to
show the existence of “unjustifiable discrimination”’.

If the Appellate Body did seek to impose on the parties an obligation to
negotiate, it did so in a particularly unconvincing manner. This is all the more

956 See also Gabrielle Marceau, ‘A Call for Coherence in International Law: Praises for the
Prohibition Against “Clinical Isolation” in WTO Dispute Settlement’ (1999) 33(5) JWT 87, at
136. Marceau additionally makes the ‘more provocative’ argument that a failure to negotiate
might contravene a requirement in the Chapeau that measures not be applied in bad faith. It is
suggested here that the Appellate Body did not go this far in the two Shrimp cases.
957 Shrimp – Article 21.5, para 122 (emphasis added).
958 Shrimp – Article 21.5, para 128.
surprising given that customary international law does impose on States an obligation to negotiate in the case of a dispute involving overlapping rights, of which Shrimp would appear to represent a fine example. In the *Fisheries Jurisdiction* Case, the International Court of Justice said that:

The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case.959

In this context, Martin Rogoff has commented that:

The reasoning of the *Fisheries Jurisdiction* case has far-reaching implications with regard to the obligation to negotiate. Once it is determined as a matter of conventional or customary international law that the extent of particular rights of a state must be defined in relation to and in consideration of the rights of another state, it follows that in case of a dispute between those states regarding the precise definition of their respective rights, those states are under an obligation to negotiate. Moreover, this obligation does not stem from a specific customary norm mandating the settlement of this particular type of dispute through a negotiated agreement, as in the North Sea Continental Shelf cases, but rather from a principle of international law requiring negotiation of

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959 *Fisheries Jurisdiction (UK/Iceland)*, [1974] ICJ Rep 3, at 32. Cf also *North Sea Continental Shelf Case*, [1969] ICJ Rep 3, at 47, although, as Rogoff notes, in this latter case 'while the ICJ did find an obligation to negotiate on the part of the states involved in continental shelf boundary disputes, it found that obligation specifically in the substantive customary law regime of the continental shelf. The ICJ did not derive the obligation from more general principles of international law requiring peaceful settlement of disputes, but rather from the specific rules and principles of customary international law applicable to the delimitation of continental shelf areas between adjacent states.' (Martin A. Rogoff, 'The Obligation to Negotiate in International Law: Rules and Realities' (1994) 16 *Michigan Journal of International Law* 141, at 157).
disputes in situations where the extent of the rights of states are limited by the rights of other states.\footnote{Id, at 158-9.}

It is to be regretted that the Appellate Body did not refer to customary international law, as set out in *Fisheries Jurisdiction*, when it discussed the obligation to negotiate in the Chapeau. This is not just because this is a more compelling source of law than domestic law and WTO Member 'preferences;' but a reference to *Fisheries Jurisdiction* would also have enabled the Appellate Body to limit the obligation to cases involving shared resources, which necessarily involve a balancing of overlapping rights. But given that it did not, it is likely that, as the law now stands, the Chapeau does not require any WTO Member to negotiate an international agreement prior to applying unilateral measures, a situation which is somewhat more restrained than is the case under international law.

2. **Does the ‘duty’ to negotiate vary with technical and economic capacity?**

In a footnote to *Shrimp–Article 21.5*, the Appellate Body rejected the panel’s argument that the United States was under a greater duty to negotiate than other States because of its own greater technical and economic capacity.\footnote{It should be noted that this argument was not decisive to the case, and also that it is disputed later in this section whether there is, in fact, any obligation to negotiate under the Chapeau.} On its face, this would seem to contradict the above argument that in order to avoid unjustifiable discrimination, the parties should take into account the economic
and technical capacities of affected Members to meet the conditions specified in a measure.

In rejecting the panel’s position, the Appellate Body stated that the principle of good faith in the Chapeau, which it had identified in *Shrimp* 862 ‘applies to all WTO Members equally’. 863 To this it must be responded that, while the obligation to act in good faith certainly applies equally to all States, under international law this does not necessarily mean that in any given case the standard of due diligence required to discharge the obligation does not differ according to the actual capacities of a State. 864 This was stated by the International Court of Justice in a general sense in the *Tehran Hostages* case, where it found that one of the reasons that Iran had failed to discharge its obligations to the United States was that the Iranian authorities had ‘the means at their disposal to perform their obligations’. 865

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862 *Shrimp*, para 158.
863 *Shrimp* – Article 21.5, para 134 n 97.
In other contexts, and particularly in international environmental law, the 'means' at the disposal of a State have been treated in terms of the economic and technical capacity of a State to perform the obligation.\textsuperscript{966} What is more, this factor has even been seen as relevant in the case of an obligation to negotiate, which – as the Appellate Body seemed to assume – looks on its face to be the type of obligation that would apply to all States equally. For example, in relation to the duty to cooperate set out in Article 4 of the Draft Articles on Injurious Consequences,\textsuperscript{967} the International Law Commission noted the view expressed in the Sixth Committee of the UN General Assembly that:

... there was a need for a differentiated application of the due diligence obligation proportional to the economic and technological development of the States concerned and that, accordingly, in order to enhance and


\textsuperscript{967} Article 4 provides that 'States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more international organizations in preventing, or in minimizing the risk of, significant transboundary harm.'
harmonize the prevention capacity of individual States, the provisions on cooperation and implementation in draft articles 4 and 5 should be further articulated and provide for more stringent rules.\textsuperscript{968}

Closer to home, it is relevant to note that even the WTO Agreements themselves afford consideration to the technical and economic capacity of its Members, not only generally, in terms of the principle of special and differential treatment, but also specifically in the context of obligations to negotiate. In particular, Article 4.3 of the SPS Agreement provides that:

Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, …

and Article 2.6 of the TBT Agreement similarly provides that:

Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products …

It remains unclear why it would be more difficult for developing country WTO Members to negotiate the agreements mentioned in these provisions than the \textit{ad hoc} agreements relevant under the Chapeau. This leads to the conclusion that the panel may in fact have been correct to state that, relatively speaking, the standard of due diligence required of the United States in discharging its obligation to

negotiate (such as this is) is greater than that of less developed WTO Members, and the Appellate Body should not be supported in its rejection of this finding.

(c) Arbitrary discrimination

In Shrimp—Article 21.5 the Appellate Body ruled on both ‘arbitrary’ and ‘unjustifiable’ discrimination without making any distinction between the two terms. In the earlier Shrimp case, on the other hand, the Appellate Body treated the two obligations differently. It found that there was arbitrary discrimination on two grounds: first, because of the rigidity of the certification process,969 and second because there were problems with procedural fairness, namely the lack of notification of decisions, the absence of any possibilities of appeal. In this context the Appellate Body also referred to Article X:3 of GATT, which provides for the fair administration of domestic laws and regulations.970

969 Shrimp, para 177.
970 Shrimp, at paras 178-186.
One may certainly agree that procedural fairness is a proper element in the context of arbitrary discrimination. On the other hand, one may object to the Appellate Body's reference in this context to the rigidity of the certification process. This is for two reasons. First, insofar as the rigidity of the certification process flowed necessarily from the certification system itself, it does no more than reapply the test of unjustifiable discrimination. To this extent there appears to be no difference between the two tests of arbitrary and unjustifiable discrimination. More problematic, however, is the fact that this emphasis on the rigidity of the measure does not fully reflect the notion of arbitrariness. In the ELSI case, which similarly concerned a claim of arbitrary discrimination, the International Court of Justice said that:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' (Asylum, Judgment, ICJ Reports 1950, p 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.971

It is therefore suggested that, at least in the context of regulatory regimes, the proper interpretation of arbitrary discrimination is precisely the opposite of that proposed by the Appellate Body. It is not when a system provides for too little flexibility that it is arbitrary, but rather when it provides for too much. A good

971 Electronica Sicula SPA (US/Italy), [1989] ICJ Rep 15 (20 Jul), at para 128. The Court also noted, relevantly, that the fact that a measure was found unlawful in municipal law does not necessarily mean that it is arbitrary under international law (para 124).
example of arbitrary discrimination in a context not very far removed from the present is the manner in which the Community awards preferences under its GSP Regulation to countries engaged in programs to combat the production or trafficking in drugs.972 As was made evident in the recent addition of Pakistan to the list of beneficiary countries of this scheme (which previously applied only to the Andean and Central American countries), trade preferences under this system are awarded not on any objective or even published criteria, but simply on the basis of a decree by the Commission.973 There is also no possibility for other countries to apply to receive these preferences. In this case, one might say that there is in reality no ‘system’ recognisable by the rule of law.974


973 See the Explanatory Memorandum concerning amendment of the Commission’s proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, in order to include Pakistan in the list of beneficiary countries of the special arrangements to combat drug production and trafficking, published in Amended proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, COM (2001) 688 final, 14 November 2001.

974 See also Petros C Mavroidis, ‘Trade and Environment after the Shrimps-Turtles Litigation’ (2000) 34(1) J WT 73, at 81, where he makes a similar criticism of the Appellate Body report. Mavroidis proposes that arbitrary discrimination should refer to a failure of governments to establish the new competitive conditions when they intervene. He gives the example of the measure in the Tuna cases, which prohibited imports of tuna which when fished led to an incidental taking of dolphins at 1.25 times more than the incidental taking of dolphins by US fishermen, and points out the necessity of establishing what 1 refers to. On the other hand, one might disagree with his view (bid, at 81, n 28) that paras 176 and 177 represent conflicting obligations. According to Mavroidis, para 176 has the effect that ‘in order to comply with the “unjustified discrimination” requirement, WTO Members must not distinguish between countries where the same conditions prevail. One para. later (177), the AB opts for the proposition that

Footnote continued
In the case of the human rights clause, similar criticisms might be made, although, unlike in this regime for preferences for countries to combat the production and trafficking of drugs, it is not necessarily inherent in the clause itself that measures be applied arbitrarily. The claim would rather have to be that the measures are in fact applied on an arbitrary basis.

(d) **Disguised restriction on trade**

The third condition in the Chapeau is that a measure may not be applied in a manner that constitutes a ‘disguised restriction on international trade’. That the factors that make a measure unjustifiable or arbitrary discrimination can also lead to an adverse finding on this point was made clear by the Appellate Body in *Gasoline*. This condition is targeted at protectionist policies. While it cannot be excluded that a human rights measure is also protectionist, this will depend very much on the facts of the case. It is therefore not worth speculating further at this stage as to how this test might be applied to any given measure under the human rights clause.

5. **Conclusion**

From the discussion of the above cases, one can draw the following conclusions. First, the Chapeau entitles parties to impose both ‘autonomous market access rigid and inflexible application of a national measure can lead to arbitrary discrimination.’ However, these are not conflicting obligations if one understands para 176 to refer to the obligation not to discriminate between countries where different conditions prevail, and para 177 to refer to the obligation not to discriminate between countries where the same conditions prevail. *Gasoline*, at pp 24-5.
measures' based on demonstrated process and production methods and 'regulatory regime measures' based on the existence of a certified program in the exporting country. However, these measures are subject to various conditions. The first set of conditions is a function of the requirement that the measures not be applied in a manner that constitutes unjustifiable discrimination. This has two elements: first, any measure must be based on a proper assessment of the risks against which the measure is designed to guard. In the case of measures under the human rights clause, that would mean determining that sanctions or standards would be effective. On the other hand, a party does not need to undertake a risk assessment in every country to which the measure applies. It is sufficient to establish some sort of administrative system entitling exporting Members to apply for certification. The second element of this requirement is that a failure to take into account the technical and economic capacity of the affected Members to address the relevant risks, as required by the measure, will constitute discrimination. So far, the Appellate Body has restricted itself to cases in which measures have not been discriminatory because the regulating party has made offers of technical assistance. It seems, therefore, that a party wishing to impose measures has the option of compensating the other party for the costs of imposing the measures. However, there is also the possibility of not compensating, but claiming rather that the resulting discrimination is justified. Finally, in this context the Appellate Body has expressed a preference for negotiated settlements, but it has refrained from deeming this to be an obligation as such. In relation to the human rights clause, this would mean that measures imposed following consultations would be treated more favourably than measures imposed 'in cases of special urgency' without such consultations.
A second set of conditions springs from the requirement in the Chapeau that measures not discriminate arbitrarily between affected WTO Members or between affected WTO Members and the regulating Member. This requirement is most easily understood in terms of due process and the rule of law. The imposition of measures without any system whatsoever is likely to violate this condition. In the case of the human rights clause, this type of violation would most likely occur in the case of measures taken in cases of ‘special urgency’. By contrast, where there is the possibility of consultations, it is unlikely that measures will be applied in an arbitrary manner, although naturally the possibility cannot entirely be ruled out.

Finally, the Chapeau imposes a requirement that measures not be applied in a manner that constitutes a disguised restriction on international trade. Not much can be said about this requirement in the abstract, but it must be borne in mind by a party seeking to impose measures under the human rights clause that it is under this requirement that the protectionist element of any measures will most likely be addressed.

F. Security exceptions (Article XXI)

Another potentially applicable exception for trade measures taken under this human rights clause is Article XXI, which states, relevantly, that:

Nothing in this Agreement shall be construed: ...

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ...
(iii) taken in time of war or other emergency in international relations; or

c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.976

Speaking generally, various authors have discussed the connection between national and international security and human rights violations,977 and some authors have specifically addressed this topic in the context of the human rights clause.978 Ryan Goodman has conveniently summarised the three main arguments connecting these two areas of security and human rights:

976 It should be recalled that Article XXI does not appear in the list of permitted exceptions set out for regional trade agreements in Article XXIV:8, but, as noted above, this provision may be considered to apply between members of a regional trade agreement by its own terms. See p 326.
977 Ryan Goodman, 'Norms and National Security: The WTO as a Catalyst for Inquiry' (2001) 2 Chicago Journal of International Law 101; Fred Grünfeld, 'Human Rights Violations: A Threat to International Peace and Security' in Monique Castermans-Holleman, G J H van Hoof and Jacqueline Smith (ed), The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy: Essays in Honour of Peter Baehr, Kluwer Law International, 1998, at 434–6, for a discussion of the UN resolutions in response to the human rights violations in the Great Lakes region (especially Resolution 1078) and in Rwanda (especially Resolution 918). Grünfeld concludes that 'we are beginning to discern ... a development from the initial situation in which the UN referred to human rights violations as the cause, or effect, of conflicts, while qualifying the conflicts themselves as a threat to the peace (Resolution 918), towards the view that human rights violations per se constitute a threat to the peace (Resolution 1078).

Footnote continued
1. a regime committing widespread and severe human rights violations heralds a threat to harmony among nations;

2. the level and severity of the violations produce substantial destabilizing effects on proximate states such as refugee-related emergencies; and

3. such violations constitute an offence against humanity and thus a threat to international peace.979

These arguments all seem perfectly reasonable in theory. For our purposes, in practice, it needs merely to be commented that they all present extreme cases in which the human rights clause might be used.

1. The jurisdiction of panels to hear claims relating to Article XXI

A preliminary question is whether a panel or the Appellate Body has any jurisdiction to determine the GATT consistency of trade restrictions justified by a WTO Member under Article XXI. This question is complicated by the fact that, on the one hand, there are a number of treaty instruments indicating that such measures are justiciable, and, on the other, a reasonably consistent practice suggesting the contrary. The question is therefore not easy to determine. The following section will address this question, followed by an analysis of the provisions of Articles XXI(b)(iii) and (c) and their applicability to trade infringement of social standards in one WTO Member will not, in fact, affect the security interests of another WTO Member. He consequently considers it unnecessary to refer to Article XXI in this context.

measures under the human rights clause, with particular attention to the rights of the European Community under these provisions.

(a) Text and practice under WTO law

(i) The applicable instruments

The vast majority of academic writing takes the view that measures under Article XXI are justiciable, although prior to establishment of the WTO, with its


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binding dispute settlement system, some authors took the contrary view. The consensus view is well founded in the *travaux préparatoires* to Article XXI and in the applicable WTO instruments.

The first relevant instrument is a Decision Concerning Article XXI of the General Agreement, which has its origins in discussions within the GATT Council on the sanctions imposed by various Contracting Parties against Argentina in 1982. This Decision provides, *inter alia*, that:

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When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.984

The second relevant instrument is the Dispute Settlement Understanding and, in particular, Article 1.1, which provides that:

The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement rules and procedures of the ... 'covered agreements'.

This provision, which applies to the GATT 1994, makes no exception for matters falling under Article XXI. While this is not conclusive, it certainly detracts from the case for auto-interpretation with respect to matters falling under this provision.985

984 Decision Concerning Article XXI of the General Agreement, Decision of 30 November 1982, L/5426, BISD 29S/23. In United States – Trade Measures Affecting Nicaragua, L/6053, unadopted, 13 October 1986 at para 4.8, Nicaragua noted that 'it has also been recognized both by the drafters of the General Agreement (EPCT/A/SR.33) and by the CONTRACTING PARTIES (BISD 29S/29) that an invocation of Article XXI did not prevent recourse to Article XXIII.' In this case, the panel had been established on the express condition, at the insistence of the United States, that it could not examine or judge the validity of or the motivation for the invocation of Article XXI:(b)(iii) by the United States. For the terms of reference, see GATT Council, Minutes of Meeting held on 10 October 1985, C/M/192, 24 October 1985, referred to in Negotiating Group on GATT Articles, Article XXI – Note by the Secretariat, MTN.GNG/NG7/W/16, 18 August 1987 at para 23.

Nevertheless, there is much practice of WTO Members that is to the contrary. This practice may be divided into declarations that GATT is simply not relevant to ‘political’ disputes, and declarations that Article XXI is non-justiciable.

1. Declarations that GATT not applicable

One example of the first type of claim dates from 1970, when, in its accession negotiations, Egypt refused to discuss its embargo against Israel and secondary embargo against countries against firms having relations with Israel, on the grounds that this embargo was of a ‘political’ character. The same argument was made in 1974, when Germany imposed countermeasures in the form of a ban on landing rights on Iceland in response to Iceland’s failure to participate in proceedings before the International Court of Justice. Germany stated that:

In the light of these circumstances he [the delegate] felt that the ban on direct landings was a justified countermeasure fully in line with the general principles and rules of international law. There was therefore nothing to support the Icelandic Government’s assertion that GATT provisions were applicable and that they had been violated by the German Government.

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988 GATT Council, Minutes of Meeting held on 3 and 7 February 1975, C/M/103, 18 February 1975, at p 11. See also, at p 12, the statement that ‘The representative of Germany remarked with respect to the relationship between the general rules of international law and GATT rules that if

Footnote continued
Another statement to similar effect was made by Canada in the context of the discussion on sanctions against Argentina, when its delegate said that:

Canada was convinced that the situation which had necessitated the measures had to be satisfactorily resolved by appropriate action elsewhere, as the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised. His delegation could not, therefore, accept the notion that there had been a violation of the General Agreement.\textsuperscript{989}

Finally, before a panel established in 1984 to assess its embargo against Nicaragua, the United States claimed that 'it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms'.\textsuperscript{990} The panel noted this statement, and 'therefore did not examine whether the reduction in Nicaragua's quota could be justified under any such provision'.\textsuperscript{991}

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the ban on direct landings was justified as a countermeasure under generally recognized rules of international law it could not be illegal under the GATT. The General Agreement did not represent an isolated legal system. Rather, it was embedded in the general rules of international law. Otherwise, any State could constantly violate the economic interests of its neighbouring State which would be forced to renounce any countermeasure it wanted to take.' The case is discussed in Michael J Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1991) 12 Michigan Journal of International Law 558, at 572-3.

\textsuperscript{989} GATT Council, \textit{Minutes of Meeting held on 7 May 1982}, C/M/157, 22 June 1982, at p 8.

\textsuperscript{990} United States - Imports of Sugar from Nicaragua, L/5607, unadopted, 13 March 1984, at para 3.10.

\textsuperscript{991} \textit{Ibid}, para 4.4. Michael J Hahn, \textit{Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie}, Dissertation, Heidelberg, 1996, at 325, mentions one additional case in which Article XXI was not raised (UK sanctions against Rhodesia), but notes that this seems to have

Footnote continued
2. Claims that panels lack jurisdiction over measures justified under Article XXI

It has been more common, however, for the parties to agree that Article XXI had at least to be cited as a justification, and to challenge the jurisdiction of panels over measures justified under Article XXI. The following describes some of these cases.

**US–Czechoslovakia (1949).** In relation to trade measures imposed by the United States against Czechoslovakia in 1949, the United Kingdom said that ‘since the question clearly concerned Article XXI the United States action would seem to be justified because every country must have the last resort relating to its own security’.

**Ghana–Portugal (1962).** In relation to the sanctions imposed by Ghana imposed on Portugal in 1962 in response to Portugal’s policies in its African territories,

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been for the specific reason that the GATT Secretariat refused to recognise the breakaway Rhodesian government as representing the country.


Ghana claimed that 'under ... Article [XXI] each Contracting Party was the sole judge of what was necessary in its essential security interests'.994

EC, Australia, Canada–Argentina (1982). In relation to the sanctions imposed by the European Communities, Australia and Canada against Argentina in 1982,995 the Communities claimed that 'the exercise of these rights [under Article XXI] constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement.'996 The United States added that 'GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise in the view of the United States, since no country could participate in GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests.'997

United States–Nicaragua (1985). In relation to the trade measures imposed by the United States against Nicaragua in 1985, the United States claimed before a panel that 'by its clear terms, [Article XXI] left the validity of the security justification to the exclusive judgement of the contracting party taking the action.

996 GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, 22 June 1982.
997 Ibid.
The United States could therefore not be found to act in violation of Article XXI. Interestingly, however, the United States also ‘recognized that a measure not conflicting with obligations under the General Agreement could be found to cause nullification and impairment and that an invocation of Article XXI did not prevent recourse to the procedure of Article XXIII.’ This at least opens up a review of the trade effects of measures justified under Article XXI, although the legality of such measures is still beyond a panel’s jurisdiction.

EC–Yugoslavia (1991). In relation to the suspension of the European Communities’ preferential trade agreement with Yugoslavia in 1991, the Communities claimed that where the Community stated that ‘[t]hese measures are taken by the European Community upon consideration of its essential security interests and based on GATT Article XXI’ but it did not indicate its position as to the justiciability of the measures. This is inconclusive as the Community’s view on the justiciability of Article XXI.


999 Ibid, para 4.9

US-EC (1996). The United States did not respond, as such, to the Communities' claim against its sanctions against Cuba (the Helms-Burton Act) in 1996, but it is clear that it considered the legality of the measures to be non-justiciable.  

Nicaragua–Colombia (2000). An interesting recent case involves the trade measures imposed by Nicaragua against Colombia. Here, in a striking reversal of its view in 1985, the Nicaraguan representative said that ‘by the very nature of the provisions of Article XXI of the GATT 1994, invoked by my country in this dispute, which confirm the inherent right of a State to protect its security and constitute an exception to the multilateral trade rules, these provisions cannot be subjected to an examination by a panel.’ He continued by saying ‘[t]his position of principle has been endorsed by GATT practice and is enshrined in the Decision of 30 November 1982 by the CONTRACTING PARTIES concerning Article XXI of the General Agreement. The understanding reached by the Council on 10 October 1985 that the Panel could not examine or judge the validity of or the reasons for the invocation by the United States of Article XXI (b)(iii) should be considered as having normative force, since it is a decision endorsed by the CONTRACTING PARTIES to GATT.’ It is somewhat difficult to understand Nicaragua’s interpretation of the 1982 Decision, which, relevantly, is not cited by other defendants claiming that Article XXI is non-

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1003 Ibid.
justiciable. The second reference has no normative value outside of the particular context of that dispute.

(b) Other treaties

The justiciability of Article XXI is, to some extent, confirmed by decisions by other courts on 'security' clauses. The International Court of Justice has dealt with very similar security clauses in two cases. First, in *Nicaragua (Merits)*, the Court had to consider whether it could review whether a trade restriction fell within the national security exception in Article XXI of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 21 January 1956. This exception referred to 'necessary' measures, which differs from Article XXI of the GATT, which refers to measures which a party 'considers necessary'. The Court held that the provision was justiciable, saying as follows:

Being itself an article of the Treaty it is covered by the provision in Article XXIV that any dispute about the 'interpretation or application' of the Treaty lies within the Court's jurisdiction.\(^{1004}\)

The Court furthermore approved its ruling in *Oil Platforms*, which concerned an identical clause in an agreement between the United States and Iran, stating that 'the Court sees no reason to vary the conclusions arrived at in 1986'.\(^{1005}\)


Interestingly, for our purposes, in *Nicaragua (Merits)* the Court referred specifically to Article XXI of GATT as an example *a contrario*, stating that:

Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXI.1006

This decision has been interpreted as meaning that Article XXI of GATT is, by implication, non-justiciable.1007 But the better view is that this was merely an *a fortiori* example, and does not amount to a determination by the ICJ that Article XXI of GATT is not justiciable.1008

Similar issues have arisen, with the same result, in the context of reservations to the compulsory jurisdiction of courts, and in particular the International Court of Justice. In the *Nuclear Tests Cases*, the International Court of Justice had to consider a reservation in which France had excluded the Court’s jurisdiction on the subject of ‘national defence’. The Court held that France did not have a full discretion to determine whether nuclear weapon development fell within the

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concept of ‘national defence’, stating that ‘if this reservation is to be regarded as
a self-judging reservation, it is invalid.’

The situation under the EC Treaty is somewhat different. Although Article
296(1)(b) EC is in terms virtually identical to those of Article XXI of GATT,
Article 298 specifically states that the Commission may bring a matter before the
European Court of Justice:

... if it considers that another Member State is making improper use of
the powers provided for in Articles 296 and 297. The Court of Justice
shall give its ruling in camera.

This disposes rather smartly of the question of justiciability. But it is still
relevant to note the willingness of the Court to undertake a proper review of the
Member State’s claims regarding the security dimension of its measures. This

\[1009\] Nuclear Tests, Order, (Australia/France), [1973] ICJ Rep 99 (22 June) at 102. See Hans van
international 34 at 45-6. Discussing the related issue of ‘automatic reservations’ (eg a reservation
relating to ‘matters which are essentially within the national jurisdiction, as understood by the
Government of the French Republic’), Markus A Reiterer, ‘Article XXI GATT: Does the
National Security Exception Permit “Anything Under the Sun”? ’ (1997) 2 Austrian Review of
International and European Law 191 notes conflicting opinions between Robert Jennings,
‘Recent Cases on “Automatic” Reservations to the Optional Clause’ (1958) 7 ICLQ 349, at 363
(clauses valid) and Judge Lauterpacht in a Separate Opinion in Certain Norwegian Loans
(France/Norway) [1957] ICJ Rep 9 (6 July), at 34 ff and in a Dissenting Opinion in Interhandel,
(Switzerland/United States of America) (Preliminary Objections), [1959] ICJ Rep 6 (21 March)
(clauses invalid).

\[1010\] See Panos Koutrakos, ‘Is Article 297 EC a “Reserve of Sovereignty”? ’ (2000) 37 CMLR
1339, at 1355, concluding that ‘[t]he above analysis leads to the conclusion that, in a significant
number of cases with foreign policy and security dimensions, the Court did not absolve itself
from its duty to exercise its jurisdiction in order to make sure that the “law is observed”.’
not to say that there will not be a substantial degree of deference. Thus, in *Commission v Greece*, Advocate General Jacobs stressed that a Member State would only be making improper use of its powers ‘if [the] real purpose in imposing an embargo on trade with a third State [is] not to prosecute any political dispute with the third State but to protect its own economy or the interests of domestic traders.’

(c) Conclusion

On the question whether panels have jurisdiction to hear claims based on measures justified under Article XXI, there is a degree of inconsistency between the relevant WTO texts, which give no indication that panels lack jurisdiction to hear claims that Article XXI has been violated, and the practice of defendant parties. As to this practice, Article XXI is generally considered to be applicable to political disputes. This represents a shift from the earlier view that no GATT provision had any application to political disputes. But while it is difficult entirely to ignore the practice of a large number of WTO Members who claim that Article XXI lies beyond the realm of dispute settlement, it does still seem that the better view, in light of both the 1982 Ministerial Decision on Article XXI and the DSU, is that panels have the jurisdiction to hear claims brought in relation to Article XXI. This also accords with the comparative practice of other tribunals faced with similar problems. Even so, one might expect that there will be a certain degree of judicial deference in relation to the determination of these

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'high political' questions. How much deference needs to be shown will be discussed in the following sections.

2. Article XXI(b)(iii)

Article XXI(b)(iii) has on a number of occasions been used to justify trade sanctions imposed on political grounds,1012 most recently by Nicaragua in defence of sanctions imposed in a maritime dispute with Colombia and Honduras.1013 It was also invoked in connection with the EC sanctions against Yugoslavia in 19911014 and an early instance of the US sanctions against Cuba.1015 The main


1014 EEC - Trade Measures Taken for Non-Economic Reasons: Recourse to Article XXIII:2 by Yugoslavia, DS27/2, 10 February 1992. The reference in this document is merely to Article XXI, but the discussion of 'essential security interests' in GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, 22 June 1982 makes it clear that Article XXI(b)(iii) is at issue.

1015 Contracting Parties, 43rd Session, Cuba - Statement by Mr. Alberto Betancourt Roa, Vice-Minister, Ministry of Foreign Trade, SR.43/ST/10, 18 December 1987. The Article XXI exception was raised in the recent challenge to the sanctions against Cuba by the European

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points of contention are the definitions of the terms: ‘[action] which it considers necessary,’ ‘for the protection of its essential security interests’ and ‘taken in time of war or other emergency in international relations’.

The first of these terms gives WTO Members a substantial degree of leeway in determining the content of the other two terms, which must be determined more objectively. As far as ‘essential security interests’ are concerned, it seems that a more objective approach is warranted. In the Nicaragua case in 1985, Nicaragua denied that it constituted a security threat to the United States, claiming that ‘[o]bviously, a small developing country such as Nicaragua could not constitute a threat to the security of the United States. The embargo was therefore not necessary to protect any essential security interest of that country’. One would probably have to revise this assessment in light of the terrorist attack on the United States in September 2001.

The definition of ‘war’ seems to present few problems, though this is not to say that the issue is entirely clear. There could be a question, for instance, as to whether an armed conflict is required, and, if so, to what extent. Do sporadic border incidents, such as occur between Pakistan and India, amount to a war? As

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Community (see United States – The Cuban Liberty and Democratic Solidarity Act – Request for the Establishment of a Panel by the European Communities, WT/DS38/2, 4 October 1996).


to an ‘emergency in international relations,’ it is also relevant that in the
Nicaragua case, Nicaragua denied that the situation was one of ‘international
emergency’. It pointed out that ‘Nicaragua and the United States were not at war
and maintained full diplomatic relations.’ Nicaragua also made the interesting
point that:

If there was tension between the two countries, it was due entirely to
actions by the United States in violation of international law. A country
could not be allowed to base itself on the existence of an ‘emergency’
which it had itself created. In that respect, Article XXI was analogous to
the right of self-defence in international law. This provision could be
invoked only by a party subjected to direct aggression or armed attack
and not by the aggressor or by parties indirectly at risk.\textsuperscript{1018}

The answer to this question is yet to be determined, but it is in any case unlikely
to be relevant to the human rights clause.

Finally, a determination by the Security Council under Article 39 of the UN
Charter that a situation is a threat to ‘international peace and security’ would
very likely entitle a WTO Member to rely on Article XXI(b)(iii), although the
absence of such a determination is not conclusive.\textsuperscript{1019} Some authors have
suggested that there is a precondition that there have been an international wrong

\textsuperscript{1018} Ibid, at paras 4.5 and 4.6.

\textsuperscript{1019} Kees Jan Kuilwijk, ‘Castro’s Cuba and the US Helms-Burton Act: An Interpretation of the
GATT Security Exemption’ (1997) 31(3) JWT 49, at 54 (clearly preferring the view that the
absence of a Security Council declaration mitigates against a finding of an international
emergency)
sufficient to justify the taking of economic reprisals. But not only is there no textual support for this precondition; it is quite likely that an emergency could exist without any international wrong having been committed. As Markus Reiterer notes in this context, one can imagine territorial disputes not amounting to an international delict.

In conclusion, it is difficult too many conclusions in the abstract, other than to say perhaps that in the absence of any actual or potential threat to national security, Article XXI(b)(iii) is unlikely to apply to trade sanctions under the human rights clause, but that a substantial degree of discretion would be afforded to a party claiming that a situation did constitute such a threat. On the more objective questions of 'war,' and 'international emergency' a panel might have more scope for review.

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1020 Ibid, at 54, and Michael J Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie*, Dissertation, Heidelberg, 1996, at 358 (speaking of international delicts, though with the qualification (at 359) that the delict must be relevant to a State's security), and similarly Michael J Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1991) 12 *Michigan Journal of International Law* 558, at 593-4. Here Hahn (at 595) also notes that in every case except the Swedish shoes case in which Article XXI(iii)(b) was invoked, there had in fact been a prior wrongful act.


3. **Article XXI(c)**

Article XXI(c) entitles a WTO Member to take measures inconsistent with GATT obligations 'in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'. Some authors have taken a very wide view of the scope of this exception for human rights measures. It has been said, for instance, that:

The emergence of the Universal Declaration as the authoritative elaboration of human rights obligations contained in the UN Charter means that any international agreement conflicting with the Declaration is to be subordinated to that document through the operations of Article 103. International agreement, in this context, would clearly include international trade and investment treaties, including the WTO. At present, Article XXI of the GATT indicates that nothing in the GATT prevents 'any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.' Article 103 of the UN Charter has the effect of broadening this exception to include any obligation under the U.N. Charter, including the promotion and protection of human rights.\(^{1023}\)

But a closer look at the relevant provisions of the UN Charter, and of Article XXI(c) of GATT reveals cause for scepticism as to such views.

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(a) Obligations to respect human rights

It is not clear that the UN Charter imposes any obligations on the Members of the United Nations to protect human rights. Article 56 provides that ‘[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.’ These purposes include the ‘promotion of ... c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’ These provisions probably do not amount to a binding obligation to respect human rights, or at least not all human rights. But even if they did, they do not oblige other UN Members to enforce these obligations by way of countermeasures. Article 56 specifically says that the obligation is to be discharged ‘in co-operation with the Organization’. Indeed, this provision probably does not even authorise States to enforce other States’ human rights obligations. This is consistent with the view advanced above that, under customary international law, human rights obligations are not necessarily coincident with a right of enforcement by other States.

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1027 See p 65 ff.
At a minimum, then, some UN involvement will be necessary to trigger enforcement obligations (or even rights) under the UN Charter. Moreover, it seems that mere recommendations and findings of the various United Nations organs will not necessarily be sufficient. It has been said that mere recommendations by the Security Council under Article 39 of the UN Charter will not prevail over treaty obligations, and the same has been said with regard to General Assembly resolutions (which are only recommendatory).

There are nevertheless countervailing views. For instance, Robert Ago, the former Rapporteur for the International Law Commission said, discussing the legitimacy of a measure taken pursuant to a decision of an international

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organisation, that ‘a decision of an international body such as the United Nations’ would justify ‘the severance by a State of economic relations with another State to which the first State is bound by an economic or trade cooperation treaty’.\footnote{1030} He maintained this position in the face of a more sceptical position taken by Schwebel, another member of the ILC.\footnote{1031} But even if Ago’s position could be correct as a general rule, which is at least doubtful,\footnote{1032} the fact that Article XXI(c) of GATT specifically requires that a measure be taken ‘in pursuance of a Member’s obligations under the United Nations Charter’ would seem to indicate that the distinction between mandatory and recommendatory resolutions is an important one in this case. Specifically in this context, it has been said that Article XXI(c) only covers Security Council

\begin{footnotes}
\footnote{1030}{Robert Ago, ‘Eighth Report on State Responsibility’ (1979) II(1) Yearbook of the International Law Commission 27 at 119 para 14.}\[\vspace{2pt}
\footnote{1031}{To a question by Schwebel suggesting that a distinction be made between binding and recommendatory resolutions, Ago said that '[i]t was sufficient that a measure was carried out in implementation of a decision of a competent international organization, even if the measure was not obligatory and had simply been recommended: \textit{Ibid} I at 57 (Schwebel) and at 63 (Ago); see also Hans van Houtte, ‘Treaty Protection against Economic Sanctions’ (1984-5) \textit{Revue belge de droit international} 34 at 51.}\[\vspace{2pt}
\footnote{1032}{See the reply by Hans van Houtte to a question by Mr Lauwaars in Various, ‘Discussion des rapports de MM Carreau et Van Houtte sous la présidence de M Rigaux’ (1984-5) \textit{Revue belge de droit international} 54 at 74 that ‘… the UN Charter often is too vague to prevail over firm bilateral treaty commitments. A human rights exception to such commitments, based on the UN Charter and/or UN General Assembly resolutions, could only be enforced on \textit{jus cogens} grounds of general international law. Such an enforcement would not rely directly on the legal authority of the UN Charter nor of UN General Assembly resolutions. The UN resolution concerning Namibia illustrates the point. This resolution supersedes precise treaty commitments only to the extent that it is considered to be an expression of \textit{jus cogens}.'}\end{footnotes}
resolutions actually mandating (not recommending) economic sanctions against a particular country.\textsuperscript{1033}

(c) International peace and security

Even if mere recommendations were sufficient, they would in any case only be relevant if the fell within the subject matter stated in Article XXI(c), which only authorises measures 'in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security'. As is evident from the three situations in which human rights violations represent a threat to international peace and security, it may be concluded that these obligations do not automatically include the matters set out in Articles 55 and 56.\textsuperscript{1034}


\textsuperscript{1034} See n 979.
Another qualification must be made in response to the claim, made recently by
the International Confederation of Free Trade Unions (ICFTU), that Article
XXI(c) could be triggered by a decision of the International Labour Organization
(ILO).\textsuperscript{1035} In this context, one must take account of the decision of the
International Court of Justice dismissing the application by the World Health
Organization (WHO) for an Advisory Opinion on the legality of the use of
nuclear weapons. In this case, the Court held that a principle of specialty
operated to confine the powers of the WHO. International organizations, in the
view of the majority, 'are invested by the States which create them with powers,
the limits of which are a function of the common interests whose promotion
those States entrust to them.'\textsuperscript{1036} A narrower version of the principle of specialty
meant that the responsibilities of the WHO were with respect to the sphere of
public "health" and cannot encroach on the responsibilities of other parts of the
United Nations system.\textsuperscript{1037} In the case of the ILO, these considerations would
seem to apply \textit{mutatis mutandis} to exclude the possibility of any
recommendation determining that there has been a breach or threat to
international peace and security. Consequently, Article XXI(c) will not be

\textsuperscript{1035} International Confederation of Free Trade Unions, 'Why Trade Measures to Implement the
ILO Resolution on Burma would be Entirely Compatible with WTO Rules,' 31 October 2001,

\textsuperscript{1036} \textit{Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion

\textsuperscript{1037} \textit{Ibid}, para 80.
triggered by any such ILO recommendation, unless there is also a corresponding resolution of the Security Council, which is charged specifically with making such findings.

(e) European Community

Finally, there is a question arising in connection with any measures taken by the European Community whether this provision can apply in any case, given that the Community is not, strictly speaking, under any obligations under the UN Charter, given that it is not a Member of the United Nations and has not assumed its Member States' obligations in this respect.\footnote{See Georg Matthias Berrisch, Der völkerrechtliche Status der Europäischen Wirtschaftsgemeinschaft im GATT: eine Untersuchung der Sukzession der EWG in die Stellung ihrer Mitgliederstaaten als Vertragspartei einer internationalen Organisation am Beispiel des GATT, Florentz, Munich, 1992 at 200-201 (arguing that as an international organization the Community is unable to assume its Member States' obligations under the UN Charter); Jean-Pierre Puissoclet, 'The Court of Justice and International Action by the European Community: The Example of the Embargo against the Former Yugoslavia' (1997) 20 Fordham International Law Review 1557 at 1570-1; Eckart Klein, 'Sanctions by International Organizations and Economic Communities' (1992) 30 Archiv des Völkerrechts 101 at 108-9 (position unclear both under Article 48(2) of the UN Charter and under Community law); Sebastian Bohr, 'Sanctions by the United Nations Security Council and the European Community' (1993) 4 EJIL 256 ('[a]s a preliminary conclusion it can be asserted that the EC is not bound by public international law to implement sanctions adopted by the Security Council' at 265, but '[a]s a matter of Community law, the EC is responsible for implementing Security Council resolutions' at 268); Kathrin Osteneck, 'Die völkerrechtliche Verpflichtung der EG zur Umsetzung von UN-Sanktionen' (1998) 1 Zeitschrift für Europarechtliche Studien 103 (Community has not succeeded to the Member States' obligations under the UN Charter). Whether the Community is a 'regional organization' within the meaning of Article 53 of the UN Charter able to take sanctions under Article 41 of the Charter is also debated. See Torsten Stein, Die Gemeinsame Außen- und Sicherheitspolitik der Union unter besonderer Berücksichtigung der Sanktionsproblematik, Schriftenreihe des Forschungsinstitutes für Europarecht der Karl-Franzens-Universität Graz, Vol}
earlier, it seems that the Community accepts this position, given its argument, noted above, that the suspension of the agreement with Yugoslavia was justified on grounds of national security.1039

4. Conclusion

The conclusions to this section are as follows: first, in theory Article XXI may apply to measures taken under the human rights clause, though this is likely to be limited to extreme cases in which the relevant human rights violations lead to a destabilisation of the political situation. Second, despite a reasonable number of objections on the part of defendant WTO Members, the better view seems to be that Article XXI is fully justiciable by panels, although a substantial degree of deference to national views will also be expected. It is more difficult to reach conclusions on the applicability of the national security exception in Article XXI(b)(iii) to trade measures taken under the human rights clause, except perhaps to say that in the absence of any actual or potential threat to national security, the provision is unlikely to apply. On the more objective questions of whether there is a 'war' or an 'international emergency' a panel might have more scope for review. As to whether trade measures might be justified on the grounds that they are taken in pursuance of a Member's obligations under the United Nations Charter for the maintenance of international peace and security, it may be concluded that Article XXI(c) only applies in the case of trade measures

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5, Forschungsinstitut für Europarecht, Karl-Franzens-Universität Graz, Wien, 1993 at 15 (arguing against the proposition).

1039 See n 669.
implementing a binding resolution of the United Nations Security Council mandating economic sanctions in response to a determination that there exists or is a threat to international peace and security. In addition, the European Community may not be entitled to benefit from this provision at all, given that it is not, strictly speaking, under any obligations to implement resolutions of the Security Council.
Part 5

General Conclusions

A. Introduction

Having investigated various legal aspects of the human rights clause, it is now appropriate to draw some general conclusions and make some recommendations for the Community's future policy regarding the inclusion of human rights clauses in its international agreements.

B. The operation of the human rights clause

In doing so, it is necessary first to stress that the clause is not simply a tool designed to enable the Community to force other countries to comply with specified human rights standards. It also has two additional features: first, it operates on a reciprocal basis, and, second, it operates as a mechanism, at the international level, enabling the Community to comply with domestic conditions requiring its policies comply with human rights norms. This may be understood as the internal dimension of the clause.

Another important aspect of the human rights clause is that, in its modern form, a party wishing to take ‘appropriate measures’ in response to a human rights violation is constrained by a requirement to choose measures that ‘least disturb the functioning of the agreement’. In practice, this means that trade measures imposed under the clause are unlikely to involve the suspension of the agreement as a whole. Instead, these measures must in the first instance be limited to product specific measures.
C. The Community's power to include human rights clauses in its international agreements

These considerations have an important bearing on the analysis undertaken in this thesis of the legislative power of the Community to include the clause in its international agreements or to take 'appropriate measures' under the clause. This question arises because, despite the fact that the Community has certain legislative powers in the field of human rights, it has no general power to force other countries to comply with human rights obligations, or to implement 'positive' human rights obligations internally. It is perhaps in recognition of this deficit in legislative power that the Council has proposed that the Community has an inherent right to suspend agreements under the human rights clause, without regard to the reasons for such an action. But this ignores the fact that all legislative acts, including those relating to the suspension of treaties, must be taken on the basis of the limited legislative powers of the Community. If the Community has limited powers in relation to the protection of human rights, it cannot simply be assumed that the Community will be able to take measures under the human rights clause, or even to include such a clause in its agreements.

Nevertheless, it has been suggested in this thesis that, at a minimum, the Community does possess a subsidiary implied power sufficient to ensure that its legislation and policies comply with domestic conditions requiring respect for fundamental human rights. It follows that the human rights clause can, in principle, be justified as a means of ensuring that the Community's international agreements do not lead to any violation of this domestic condition. This does not, however, mean that the Community has the power to apply appropriate
measures under the clause for the purpose of enforcing compliance with human rights standards by other countries. Nor, significantly, does this mean that the Community has the power to perform the human rights obligations to which it has bound itself under the clause. The first of these aspects determines the extent to which the Community may apply human rights clauses in practice, while the latter determines the overall legislative power of the Community to include such clauses in its international agreements.

As to the first of these points, the analysis undertaken in this thesis leads to the conclusion that the Community has the power to take measures for the purpose of promoting and protecting human rights in the following cases: where there is a proper authorisation by the European Council in the context of the Common Foreign and Security Policy, in the context of its development cooperation policies, and probably also in relation to the specific field of antidiscrimination. However, neither the Community's powers to legislate and conclude agreements in the field of trade, nor its powers to conclude association agreements, extend so far as to enable the Community to include clauses in its international agreements, or to take appropriate measures under such clauses where they exist.

The second of these points entails more serious consequences for the future policy of the Community in relation to the human rights clause. It has been argued in this thesis that not only the essential elements clause but, more particularly, the first paragraph of the non-execution clause, establish 'positive obligations' for the Community to secure respect for human rights within the scope of its responsibilities under the respective agreement. It follows from the wide scope of the human rights in the essential elements clause, together with the
limited nature of the Community's legislative powers in the field of human rights, that, in principle, the Community is unable to perform all of these obligations. Whether this is fatal to the human rights clause, regardless of the possibility that the clause might be supported on the basis of a subsidiary implied power, depends on whether the clause is contained in a pure Community agreement or in a mixed agreement concluded jointly as one 'party' with the Member States.

As far as pure Community agreements are concerned, it is concluded in this thesis that the Community has no power to include human rights clauses in these agreements. Not only does the Community lack the power to perform all of the obligations incorporated into the essential elements clause, but this clause cannot be excused as an 'ancillary clause' imposing no more than 'ancillary obligations' on the Community. This conclusion does not entail any disagreement with the ruling of the European Court of Justice in *Portugal v Council* that a human rights clause in a development cooperation agreement with India was within the Community's powers under Article 181. That clause was marked by two unusual features: not only did it lack a non-execution clause, but its essential elements clause was expressed as a condition on the legality of the agreement, rather than as a normative obligation requiring the parties to take positive steps to perform human rights obligations under the agreement.

Consequently, the Community should cease its existing practice of including human rights clauses, in their current form, in any pure Community agreements, including, for that matter, its development cooperation agreements. Whether they may be permissible in a modified form will be discussed shortly.
The situation is somewhat different in the case of mixed agreements, which, in practice, includes all of the Community's association agreements. The extent to which the Community and its Member States are responsible for the performance of obligations set out in mixed agreements is somewhat unclear, not least because the Court has been somewhat reluctant to enter into any serious discussion of the issue. In principle, the Court has approved mixed agreements without any clear demarcation of responsibilities at the international level, with the rare exception (inapplicable here) of agreements which not only contain a dispute settlement mechanism but also, as a matter of substance, overlap largely with Community law. It may therefore be concluded that mixed agreements containing a human rights clause will not raise competence issues.

On the other hand, in anticipation of a determination by an arbitral tribunal, or the other contracting party, that the Community is responsible for the implementation of obligations under the human rights clause in an area in which it lacks legislative power, it was suggested in this thesis that the Member States are under limited 'Community obligations,' enforceable by the Commission, to perform those obligations binding on the Community under public international law. The same 'Community obligations' bind the Member States in relation to human rights clauses in pure Community agreements concluded ultra vires. On the other hand, it was also noted that the Member States may themselves lack the legislative power to perform these obligations. This would be the case, for instance, where the violation occurs in the form of primary Community law.

If one were to make recommendations regarding the future of the human rights clause, it would perhaps be appropriate to reformulate these conclusions in a
more positive light. Seen in this way, the Community does have the power to include human rights clauses in pure Community agreements, as long as it is clear that the Community is under no obligation to legislate in areas in which it lacks power. One way of ensuring this would be to revert to the model of the human rights clause used for the agreement in Portugal v Council, which established no obligations, as such, but merely expressed conditions on the continuing validity of the agreement. Another method would be to limit any obligations by express reference to the Community’s powers under Community law, as determined by the European Court of Justice. If this were done, the Community would be able to exercise its implied power to ensure that its external policies remain in compliance with domestic human rights conditions.

In theory, the Community would also be entitled to include a clause in its development agreements allowing it unilaterally to enforce the human rights obligations of third countries in the area of development cooperation (and, after the Treaty of Nice, in the area of economic, financial and technical cooperation). The Community might also seek an authorisation from the European Council to include a clause in its agreements, and to take measures under such clauses, based on its sanctions powers under Article 301. However, any clause providing for such action would have to ensure that the Community remain immune from reciprocal measures designed to force the Community to comply with human rights norms, unless it is specified that the Community is responsible only to the extent of its powers under Community law. But in practice, it is very difficult to imagine a third country accepting such a lopsided clause.
As far as mixed agreements are concerned, it follows from the above analysis that the Community is entitled to continue its existing practice, subject to the possibility that the Commission might have to resort to enforcing the 'Community obligations' of the Member States in the event that the Community is held liable for human rights violations in an area in which it has no legislative power. On the other hand, on the basis that the Member States may themselves be unable to remedy the situation, it may also be preferable in these situations to include a proviso in the human rights clause to the effect that the Community and its Member States are only liable to the extent of their legislative powers, as determined by the European Court of Justice.

D. The legality of trade measures under the human rights clause

Rather different issues arise in connection with the legality under WTO law of any of the trade measures that could be taken under the human rights clause. These would include measures providing for the suspension of concessions, the imposition of trade embargoes, and the institution of measures such as 'social labelling' initiatives. It seems highly likely that, prima facie, such measures will infringe one or other of the obligations set out in the GATT to afford most-favoured-nation treatment to all WTO Members, not to violate the terms of a bound schedule of concessions, to afford national treatment to imported products, and not to impose quantitative restrictions on trade. There are, however, a number of potential exceptions that could be applicable to such measures.

A first question is whether any such measures might be justified under the limited exceptions applicable to regional trade agreements under Article XXIV of GATT and agreements authorised by a special waiver under Article IX:3 of
the WTO Agreement (namely the Cotonou Agreement). The main feature of these exceptions, however, is that they only apply to measures taken for the purpose of the exception, which is to say, the formation of regional trade agreements, in the one case, and the measures specifically mentioned in the waiver, in the other. The conclusion reached in this thesis is that neither of these exceptions are applicable to trade measures imposed for the purpose of protecting human rights in other countries. On the other hand, the mere fact that an agreement contains a human rights clause does not, per se, remove the entire agreement from the protective scope of these exceptions. It is only when measures are taken under such a clause that there will be a failure to meet the conditions required for the application of the exceptions.

This raises the question whether trade measures for the purpose of protecting human rights in another country can be justified under the general exceptions under Article XX. One preliminary question in this context is whether the exceptions established under Article XX can authorise measures taken to protect interests located in another country. It was suggested here that this question depends in the first instance on the application of the rules of public international law governing the exercise of extraterritorial legislative jurisdiction, that these rules allow a WTO Member to protect its legitimate interests regardless of where they are located, and that these interests include the protection of human rights in other countries, subject to considerations of proportionality. Even with this 'extraterritorial' hurdle out of the way, for measures under the human rights clause to be justified under Article XX it would still be necessary for any such measures to fall within the description of Article XX(a) as relating to the protection of public morals (defined as the morals of the regulating Member) or
that of Article XX(b) as necessary for the protection of human life or health. It
would also be necessary, under the Chapeau to Article XX, to ensure that the
measures taken do not discriminate unjustifiably or arbitrarily between any WTO
Members, including the regulating Member, and that they do not constitute a
disguised restriction on international trade.

In practice, this means that a party to the human rights clause would, for
instance, be entitled to take measures in relation to core labour standards, as long
as it is clear that these rights are not being protected in that country, and provided
that all exporting Members are treated in the same way, having regard to their
labour conditions and their technical and economic ability to resolve the issue
domestically. Again, doctrine is unsettled on this point, but it is foreseeable that,
in order to avoid unjustifiable discrimination, the Community might be required
to compensate financially or technically for any adverse effects caused by its
trade measure. The Community should also draw up guidelines to ensure that
any trade measures under the human rights clause are taken according to due
process, in order to avoid any arbitrary discrimination. It goes without saying
that trade measures may not be used for protectionist purposes.

Finally, in extreme cases, trade measures may be justified under the exceptions
for national or international security in Article XXI of GATT. In practice, this
exception will be reserved for large scale violations of human rights leading to
international instability, or, for instance, refugee flows. From a theoretical
perspective, the key question here is whether panels have any jurisdiction to
review measures claimed by a defendant to fall under Article XXI. This is an
issue of some sensitivity, but the better view appears to be that panels do have
jurisdiction to review such measures for compatibility with the terms of Article XXI. However, at least in the case of measures for national security, a panel will clearly have to demonstrate a substantial degree of deference to the views of the regulating Member as to what is required for national security and perhaps even as to whether there is the ‘war’ or ‘international emergency’ necessary for the application of this exception. The question whether trade measures might be justified on the grounds of international security depends on whether they are taken in pursuance of a Member’s obligations under the United Nations Charter for the maintenance of international peace and security. This is a relatively limited authorisation, and probably only extends to measures taken pursuant to binding resolutions of the UN Security Council. Moreover, it is not even certain whether this provision applies to the European Community, which, strictly speaking, has no obligations under the UN Charter. Subject to these conditions, however, it is possible, in principle, for trade measures taken under the human rights clause to be justified on these grounds.

E. Final conclusion

As a final statement, it may be said that with certain refinements to ensure that the Community does not overstep the bounds of its limited legislative powers in the field of human rights, and with due regard to the necessity of justifying any trade measures taken under the clause, the human rights clause can function as an effective tool for the European Community to ensure the protection of human rights in the world.
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