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Introduction: The Purpose and Frame of this Inquiry

I. INTRODUCTION

THE ACCELERATION OF globalisation through the later stages of the twentieth century, bringing new forms of governance operating at different levels (regional and international/transnational) and accompanied by the emergence of new, specialised, increasingly sophisticated and demanding legal regimes, gives rise to a pressing range of challenges for the international community. How does the international community[1] give effect to varying, potentially conflicting objectives? How do these legal orders interact? How can the diverse requirements of these new legal orders and governing entities be met and, in particular, how can commitments which are traditionally presented as conflicting be simultaneously fulfilled? For a variety of reasons, these challenges are particularly acute in the context of legal regulation of international trade.

The international community has in one context developed a highly sophisticated regime pursuing the liberalisation of trade, originally the General Agreement on Tariffs and Trade (GATT) and latterly under the auspices of the World Trade Organization (WTO). In other contexts the international community has committed itself to the protection of (for example) the environment and human rights, and has given substance to those commitments through the creation of international declarations and obligations. Relatively little attention has been paid (including where commitments are entered into) to the question of how diverse international regimes and commitments interact, yet there are instances in which they do collide. This book is particularly concerned with how trade liberalisation regimes (specifically that of the European Union (EU) and the WTO) interact with obligations concerning the protection of 'non-economic' interests.

[1] In some contexts 'international community' is presented as a loaded term, suggesting the inclusion of some and the exclusion of other states. In this book the term 'international community' is used simply to represent the collective of international actors, primarily states, but including international organisations such as the WTO itself and the United Nations (UN).

The question of how to reconcile the pursuit and protection of economic and non-economic interests in the context of international trade is one of the great challenges facing the international community in the twenty-first century. On the one hand, neoliberalism gathered force as the dominant orthodoxy in the last decades of the twentieth century—driving the trade liberalisation agenda. At the same time, non-economic interests, including environmental and human rights protection, emerged as significant policy and popular concerns. Economic interests (pursued, inter alia, through trade liberalisation) and non-economic interests (including human rights and environmental protection) are frequently presented as inherently conflicting. This book contests this characterisation, recognising that contemporary global challenges, such as climate change, ask new questions of the existing legal architecture and require integrated responses that challenge traditional regulatory approaches. It is argued in this book that far from being essentially inherently conflicting, economic, environmental and social objectives are ultimately inter-related objectives, as is manifest in the concept of sustainable development.

In the global context, the relationship between environmental protection and free trade has provoked vigorous academic debate as well as public protest. Similarly, the relationship between WTO law and human rights has attracted increasing attention: from the question of whether the WTO should provide for, or permit, the exception of labour standards from its standard rules, to more recent questions concerning whether the relationship with 'human rights' per se should be addressed within the WTO legal framework.

The immediate prima facie conflict between these interests is clear: any national (or international) regulatory measure aimed at either human rights or environmental protection carries with it the capacity to restrict international trade. Similarly, the pursuit of trade liberalisation, carrying, as it does, obligations to remove barriers to trade, can restrict the freedom of states to regulate in order to protect non-economic priorities. A fundamental difficulty arises from the fact that international environmental law, human rights law and trade law have all developed in parallel with relatively little connection between them, despite evident overlap in application. Dealing with these issues is not straightforward, yet the impact of WTO dispute settlement rulings, combined with growing popular concern, requires that the international community engage with these questions.

A. The Objectives of this Book

This book seeks, pragmatically, to facilitate a deeper understanding of the regulatory inter-relationship between economic and non-economic interests per se, in order to better equip the international community to address this

set of very real challenges. The EU is an organisation which has moved from a primary focus upon market rules and liberalisation to a broadly based constitutional order, embracing a wide range of economic and non-economic concerns and pursuing a diverse range of, as it acknowledges, integrated objectives. Recognising this, the core of this book comprises an examination of the EU experience regarding both the emergence of non-economic interests within its legal order and the relationship between those new non-economic interests and its original economic objectives. The purpose of this examination is to identify what may be learnt from that experience, which may be of relevance for the broader international community. The analysis carried out raises many questions regarding the institutional and conceptual framework through which the international community can work towards achieving balance in the pursuit of economic and non-economic objectives.

B. Why Human Rights and the Environment?

In exploring the relationship between economic and non-economic interests, this book focuses upon the protection of human rights and the environment. This selection of interests requires explanation. Primarily, human rights and the environment were the most celebrated and pursued non-economic interests of the late twentieth century. The significance of these interests remains undisputed—indeed, it has arguably grown: the imperative to address climate change is one of the most pressing challenges facing local, national and international communities. This is a challenge which undoubtedly engages environmental, social and economic interests.

Yet, in spite of the broad consensus as to their significance, the pursuit of both human rights and environmental protection has always been controversial. Despite this controversy, however, the EU has developed the protection of each of these interests, both internally and externally, in its relations with third states. Furthermore, environmental protection and social interests (including human rights) are tied together with economic interests in the principle of sustainable development.[2]

It is argued that a more holistic approach to the consideration of 'development', encompassing economic and non-economic concerns, that is, 'sustainable' development, is not only desirable in principle but also realisable in practice. Crucially, no single interest can or should have absolute prioritisation: balance must be found.

[2] Discussed further below.

C. The Significance of the EU Experience

The EU has developed a deeper level of integration than any other regional trading bloc, not only in economic but also in political terms. Traditionally recognised as an economically powerful and politically influential organisation, its actions may be significant in the international progress towards balancing and resolving the potential conflict between economic growth and trade liberalisation on the one hand, and the protection of non-economic interests on the other. In addition, the EU has a history, as an economically and politically powerful actor, of actively seeking to pursue these interests in its external relations and thus actively seeking to influence other states in pursuit of these interests. Regardless of future EU developments (and the direct impact or not of EU policy in this field), the experience of the EU to date provides a case study worthy of further analysis. Having developed internal policies pursuing the reconciliation and integration of economic and non-economic interests, and having subsequently sought to export this integrative approach by including the protection of certain non-economic interests as elements (and indeed as conditions) of its cooperation with third states, the EU experience can provide a wealth of insight regarding the interrelationship between these interests. Consequently, the progress the EU has made, and the factors which have facilitated this progress, have relevance for the wider international community. At the very least, a systematic engagement with these issues, comparing and contrasting their development in the EU, identifying certain common elements but substantial differences and extrapolating from this can inform the discussion, debate and policy making in addressing this issue in the international community. This is the case notwithstanding that the reconciliation of economic and non-economic interests is, of course, not static, but dynamic: it evolves over time and also differs according to context. At the very least, the achievement of simultaneous pursuit of these interests demonstrates that they are not inherently in conflict. This indicates that the pursuit of these diverse interests could also be reconciled globally, although, crucially, not necessarily to the same effect.

The comparative analysis of the emergence of human rights as an EU concern (and now objective) and environmental protection as an EU objective allows breadth as well as depth of analysis. Triangulating the conclusions as to how the EU has responded to the tension between economic and non-economic interests in one context (economic liberalisation and human rights) by comparison with another (economic liberalisation and environmental protection) allows both the identification of key common elements for the reconciliation of distinct instances of conflict, such as consensus as to the value to be protected, and the exclusion of certain factors which do not apply in both contexts. This analysis includes an exploration of the particular institutional and legal conditions which have contributed to the emergence

of these interests in the EU context. It also facilitates the 'cross-fertilisation' of lessons arising from the experience of different approaches in the different contexts.[3] Building on this, it is also constructive to apply a joined-up approach to unpacking the relationships with the third element of sustainable development, economic development.

The conclusions from the analysis of the EU experience are as follows. First, it *is possible* to reconcile the *pursuit* of both economic and non-economic interests, that the EU has found a mechanism by which to do so and that the application of the principle of *proportionality* is fundamental to the realisation of this. It is argued that the EU approach can be characterised as a practical application of the principle of *sustainable development*. Second, certain conditions are identified as crucial to achieving this 'reconciliation' in the EU context. These conditions are identified through the examination of relevant policy emergence in the EU.

i. The Relevance of the EU Experience for the WTO

With these conclusions in mind, it is possible to evaluate the extent to which the lessons of the EU experience may inform the approach utilised in the international context. This raises the question of whether the conditions identified as crucial to the EU approach are present in the international context and also whether absent conditions may be realised. In addition, it requires an examination of the existing international legal architecture and its capacity to respond to contemporary global challenges. The nature of this existing international institutional and regulatory framework is such that the focus in the second part of this book (chapters six to nine) inevitably falls upon the institutions and legal order of the WTO.

A factor of crucial significance to any comparison between the EU and WTO approaches concerns the very basis, the fundamental purpose, of each organisation. In the EU context there is a clear underlying objective: the development of economic inter-dependency as a means of maintaining international security and enhancing welfare. In pursuing these objectives the EU has developed a deep level of integration and in this a very tangible developing polity is apparent. As will be seen below, a comparison of the

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

development and the approaches taken to the environment and human rights in the EU exposes the significance of this polity. The EU has developed a level and range of governance that is absent from other international organisations, including the WTO. Together, these have the capacity to bestow legitimacy upon decision making that may otherwise be lacking. This polity and range of governance approaches is dependent upon a consensus as to certain fundamental values; there can be little doubt that this consensus reflects the relative homogeneity of EU Member States. As such, the EU is a unique organisation and its approach may not be replicable, and is certainly not directly transferable to any other organisation.

The purpose of the WTO has arguably been more contested. While the GATT emerged in the same post-Second World War context, sharing the EU's objective of securing peace and stability, there is no doubt that in the second half of the twentieth century, neoliberalism became the driving, dominant orthodoxy.[4] The implications of this regarding the potential role of the WTO in the reconciliation of the pursuit of economic and non-economic interests are significant. Whether the objectives of the WTO can be reclaimed from neoliberalism, and to what end, will inevitably shape its future role. When exploring these issues, the starting point must be the recognition that the WTO, as a trade organisation, is by definition a much narrower organisation than the EU and therefore cannot develop in the same way that the EU has. At the same time, its membership is far broader and more diverse. Lacking the relative homogeneity of the EU Member States, it also lacks the consensus of values that shaped the evolution of the EU.[5] However, it should be recognised that the international legal context and architecture is such that outcomes within the WTO legal order have the capacity to spill over and carry effects into the wider international legal order.

This research therefore does not propose to identify an EU 'model' which can be transferred to the international context or applied by the WTO. Rather, an examination is undertaken of the way in which the EU, and in particular the Court of Justice of the European Union (European Court of Justice), has dealt with the tension arising in specific instances from its pursuit of trade liberalisation, as manifested in the rules relating to the regulation of the internal market, while also seeking to respect human rights or protect the environment.[6] Lessons concerning the means by which the EU has tackled this issue are derived from this practical experience. This is distinct from the question of the extent to which the EU approach can be directly transferred to the international context, which would depend, among other factors, upon the extent to which conditions which

[4] Discussed in ch 9.

[5] See ch 2.

[6] See chs 2 and 3. In particular, the European Court of Justice has considerable experience of determining the legitimacy (or not) of national regulatory measures that constitute a restriction of trade.

have led the EU to handle this tension in a particular way also apply in the international context.

D. The Starting Point for this Inquiry: Pragmatism Rather than Ideology

As indicated above, the subject matter of this book emerges from the observation of a practical and imperative challenge facing the international community, that is, how to manage the relationship between, and pursuit of, diverse commitments and agreed objectives. This particular challenge is a consequence of the 'fragmentation' of international law. Responses to it may clearly be ideologically driven. However, in line with its foundation in the observation of this challenge, this book looks to pragmatic responses. Yet it must be acknowledged that in criticising or applauding certain approaches, decisions and developments, judgments are made which inevitably reflect a particular worldview.

The starting point for the present work is a rejection of a view that either economic or non-economic objectives should automatically and absolutely prevail in every circumstance: such a dogmatic approach would compromise the achievement of the other interests. This cannot be satisfactory unless the commitment to these other interests were explicitly secondary. The international community could choose to make it so, but has not, at this point, done so; indeed, in embracing the principle of sustainable development, the international community has done the reverse.

Recognising that contexts vary internationally, an answer or approach which is appropriate in one context may not be applicable in another (being dependent, for example, upon the state of economic development or the mandate of the particular decision maker). A crucial measure of the integrity of the decision maker concerns the manner in which it approaches its dual obligations. However, this too is tempered by the limits placed upon the decision maker. Accordingly, it is worth reiterating that what is learned from and understood of the EU experience, that is the 'lessons' from that experience, do not provide a prescriptive model to be applied in other contexts. They are instead lessons concerning the nature of a particular experience, in a particular context, the understanding of which may inform decision making in the international context, having regard to particular institutional and legal conditions and characteristics.

E. Framing the Inquiry: Sustainable Development and Proportionality

At the heart of the present analysis are two principles that emerge as significant early on and that are subsequently referred to, relied upon and

drawn from: these are the principles of sustainable development and proportionality. Neither of these is uncontested; indeed, each is renowned for its vagueness. Therefore, it is worth spending a little time setting these out and delimiting their scope in this particular context.

i. Sustainable Development

It is argued in this book that sustainable development can be used as a conceptual lens through which to view the relationship between economic and non-economic interests. This perspective facilitates a joined-up, integrative approach to development. Although the content and scope of sustainable development remain controversial,[7] the Brundtland Commission Report of 1987[8] clearly embraces the environment and humans and their needs.[9] Sustainable development is seminally defined therein as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[10] The foreword to the Report emphasises that to have concentrated only on environmental problems would have been erroneous since the environment is inherently inter-related with human actions, and that to attempt to focus exclusively upon the environment creates, in certain contexts, a connotation of naivety.[11] The

[7] For discussion of 'sustainable development', see: J Wetlesen, 'A Global Ethic of Sustainability?' in W Lafferty and O Langhelle (eds), *Towards Sustainable Development: On the Goals of Development and the Conditions of Sustainability* (New York, St Martin's Press, 1999); P Sands, 'Sustainable Development: Treaty, Custom and the Cross-fertilization of International Law' in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford, Oxford University Press 1999); V Lowe, 'Sustainable Development and Unsustainable Arguments' in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford, Oxford University Press 1999); K Lee, 'Global Sustainable Development: Its Intellectual and Historical Roots' in K Lee, A Holland and D McNeill, *Global Sustainable Development in the 21st Century* (Edinburgh, Edinburgh University Press, 2000); A Holland 'Sustainable Development: The Contested Vision' in K Lee, A Holland and D McNeill, *Global Sustainable Development in the 21st Century* (Edinburgh, Edinburgh University Press, 2000); P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edn, Oxford, Oxford University Press, 2009) ch 3; J Ellis, 'Sustainable Development as a Legal Principle: A Rhetorical Analysis', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319360; Geert van Calster, 'The Law(s) of Sustainable Development' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147544; Alhaji BM Marong, 'From Rio to Johannesberg: Reflections on the Role of International Legal Norms in Sustainable Development' (2003–04) 16 *Georgetown International Environmental Law Review* 21; Opinion of Vice-President Weeramantry, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1998] 37 ILM 162, 204–13.

[8] *Report of the World Commission on Environment and Development: Our Common Future* (1987) (hereinafter referred to as the Brundtland Report), available at: www.un-documents.net/wced-ocf.htm.

[9] It has, however, been argued that sustainable development is a purely physical concept: see Wetlesen (n 7).

[10] Brundtland Report, at 43 (a consideration known as 'Social equity').

[11] ibid xi.

Report subsequently dismisses the purely physical concept of sustainable development on the grounds that the protection of this may not be achieved without consideration of issues such as *access* to resources.[12] It is crucial to note that sustainable development does not prioritise any interest over the others, but instead requires consideration of each in relation to development issues. This was subsequently made explicit in the 2002 Johannesburg Declaration, which recognised:

> [A] collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection—at the local, national, regional and global levels.[13]

Yet, accepting the benefits of considering the environment and basic needs together does not explain why a link should be made between the environment and human rights (or even social interests). The Brundtland Report, however, states as a pre-requisite to the fulfilment of everyone's needs that everyone has 'the opportunity to satisfy their aspirations for a better life'. The fulfilment of aspirations may not easily be separated in practice from the enjoyment of fundamental human rights, yet it is recognised that *collective* needs for the 'fulfilment of aspirations' may be quite different from the requirements for absolute protection of *individual* rights: there is thus a tension between the protection of collective and individual rights. Similarly, the particular human rights protected or prioritised may give rise to quite different results regarding the 'fulfilment of aspirations' or welfare gain. For example, the prioritisation of a 'right to trade' as the fundamental guarantor of human dignity may give rise to quite a different set of consequences from the protection of labour rights.[14]

This raises an issue which is worth highlighting. When the relationship between economic and non-economic interests or between trade, environment and human rights is discussed, there can be a tendency to treat this in binary terms: trade versus human rights; trade versus environment. In fact, human rights and environmental protection may themselves come into conflict (for instance, protecting biodiversity might require a restriction upon an individual's enjoyment of his or her property). Similarly, as noted above, specific human rights can be in opposition. These tensions, including the disjuncture between individual and collective interests, must be addressed. That there are fundamental political choices to be made in this regard should be openly acknowledged. Therefore, balancing the protection

[12] ibid 43.

[13] Article 5 of the Johannesberg Declaration on Sustainable Development, www.un-documents.net/jburgdec.htm.

[14] See discussion in ch 8.

of these interests is very much a process that should be undertaken on a case-by-case basis.

Much ink has been spilt over the question of the status of 'sustainable development': what the commitment to it means; whether it is a legal principle; whether it is too vague to be meaningful. However, in the present context the focus with regard to sustainable development is upon what it is and offers rather than what it lacks. Thus, the significance of sustainable development lies in its integrated approach and its recognition that development requires a holistic approach. Sustainable development is therefore used as a lens through which the question of the relationship between economic and non-economic interests can be examined, a perspective from which this question, at the heart of a complex set of global challenges, can be approached.

a. Sustainable Development and the EU

The EU (then the EC) adopted 'sustainable development' as a guiding principle in the 1990s[15] and, in so doing, appears to have adopted the Brundtland[16] definition of the concept. It has explicitly recognised the role of human rights in sustainable development:

> Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.[17]

Despite the common suggestion that sustainable development is so vague as to have little practical application or utility, analysis of the EU experience of ensuring the fulfilment of environmental and human rights obligations within the framework of the requirements of the internal market will demonstrate a practice which appears to have the characteristics of practical application of sustainable development.[18] This supports the emphasis in this book upon what sustainable development is and thus has to offer rather than what it lacks.

[15] See ch 2.

[16] The Brundtland Report was the report of an independent body established by the UN in 1983. It articulated what has become the most commonly accepted definition of sustainable development, which sought to integrate apparently conflicting interests and identify a common goal for these.

[17] Article 9 of the Cotonou Convention, signed 23 June 2000, available at: http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf.

[18] See the discussion of Case C-112/00 *Schmidberger, Internationale Transporte und Planzuge v Austria* [2003] ECR I-5659 and subsequent case law in ch 3. In *Schmidberger* the protection of fundamental rights, specifically the rights to protest and freedom of assembly, collided with the internal market requirement of the free movement of goods. In this case, the Court of Justice required not only that the measure undertaken to ensure the enjoyment of fundamental rights was the least trade-restrictive, but also that the enjoyment of the right to the free movement of goods was achieved through the least possible encroachment upon the enjoyment of fundamental rights.

b. Sustainable Development and the WTO

The preamble to the WTO Agreement includes reference to the 'objective of sustainable development':

> 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, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[19]

This statement is, however, unquestionably ambiguous: does it mean that sustainable development is thus a WTO objective? Or is it a reference simply to the wider, general commitment of the international community? Since the reference is made in the context of use of the world's resources, referencing environmental protection, is sustainable development here conceived of as a purely environmental principle? The latter would seem unlikely; the first paragraph of the Preamble to the WTO Agreement is, in its entirety, consistent with the principle of sustainable development. The requirement that trade and economic endeavour should be directed towards goals clearly concerned with improvements in welfare, social development and the expansion of trade, while taking account of environmental considerations and levels of economic development, could have been explicitly shaped by the principle of sustainable development.

The very 'vagueness' for which sustainable development is criticised is a reflection of the fact that it is not a principle which can provide single, definitive substantive answers. Fundamentally, at its most pared-down level, in view of the relativity of the contexts and the consequent specificity of responses to particular given situations, the application of sustainable development must concern process rather than substantive outcomes.[20]

Sustainable development provides a lens through which the interdependence of social, environmental and economic development can be conceptualised and consequently managed. Adopting the three-pillar characterisation of the Johannesburg Declaration, it requires that each pillar (social, environmental and economic) is considered and that action pursuing one pillar of development takes account of the impact upon the others. This does not prescribe particular outcomes, giving rise to the charge of

[19] Paragraph 1 of the Preamble to the Marrakesh Agreement Establishing the World Trade Organization.

[20] This is characterization of sustainable development is a key element of Weeramantry's Opinion in *Case Concerning the Gabcikovo-Nagymaros Project* (n 7). For further discussion see Ellis; Van Calster; Marong, n 7.

vagueness. However, this process of consideration ensures that where the interests represented by these pillars prima facie conflict, a balance is struck between them. This is what the ECJ achieved in *Schmidberger*.[21] The particular balance to be struck will vary according to the circumstances. As such, sustainable development does not provide an answer to the balancing exercise—it does not determine the decision to be reached—rather, it provides a structure for that process.

ii. The Principle of Proportionality

Having recognised the potential contribution of the principle of sustainable development in terms of managing the relationship between economic liberalisation and the pursuit of other interests, a means must be found through which to make a decision in particular instances of conflict. There is a risk that any such decision may be, or may be perceived to be, partial. A crucial measure of the integrity of the decision-making system is the manner in which it approaches its 'conflicting' obligations. Yet this is tempered by the limits placed upon the decision maker. As noted above, criticism of, or praise for, particular developments can reflect both a particular standpoint and the specific context. In analysing the pursuit and reconciliation of economic and non-economic interests, a key question concerns the criteria by which successful reconciliation may be measured. At the simplest level, the criterion for success is whether conflicting interests are being 'effectively' balanced against one another, with due regard for costs and benefits in the instances in which one must make concessions for the other. Similarly, the starting point for criteria to assist the judicial inquiry in dealing with an economic/non-economic conflict must be this same condition: there must be due consideration for each interest where they come into conflict, with the prioritisation of one being weighed against the restraining effect upon the other. Such an approach, which may be characterised as based on 'proportionality', avoids the danger arising from the prescription of specific approaches which could lack sensitivity to particular contexts and values.

In this context it is therefore proposed that 'proportionality' is used as an instrument to assist the decision maker (administrative or judicial) in finding the appropriate balance for the particular circumstances. The open-endedness of proportionality means that it offers considerable flexibility as a basis for judicial review of decision making. However, this same open-endedness means that the test must be clearly defined in order to ensure that it can provide the desired legitimacy.

[21] Above n 18.

a. Defining Proportionality

Tridimas characterises proportionality 'at its most abstract level [as requiring] that action undertaken must be proportionate to its objectives'.[22] This definition can be elaborated upon with reference to the application of the principle of proportionality. The application of the principle has been traditionally described, in the EU context, as a three-part test.[23] Thus, the court assesses whether a measure is: first, appropriate to achieve the desired aim; second, whether it is necessary (defined as requiring that there is no less restrictive alternative); and, third, whether it is proportionate *strictu sensu*—that there is no overly restrictive effect. The application of this third element of the test is rather thin: Tridimas observes that in its analysis the court does not distinguish between the second and the third elements. Furthermore, he highlights that:

> In some cases the Court finds that a measure is compatible with proportionality without searching for less restrictive alternatives or even where such alternatives seem to exist. The essential characteristic of the principle is that the Court performs a balancing exercise between the objectives pursued by the measure in issue and its adverse effects on individual freedoms.[24]

Proportionality has been a key element of the review of the compatibility of national regulatory measures with the economic integration provisions in the context of the EU internal market.[25] Under Article 34 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 30 European Community Treaty (TEC), state measures restricting the free movement of goods between Member States are prohibited, subject to limited grounds of derogations that are listed in Article 36 TFEU. A national regulatory measure pursuing one of the Article 36 derogations is subject to a test of 'proportionality'. In this context, proportionality has been used as an instrument of market integration, of economic liberalisation, while at the same time it has been used as an instrument ensuring the protection of the fundamental rights set against economic liberalisation.[26] Maduro has explicitly characterised the Court of Justice's approach in the seminal *Dassonville* and *Cassis de Dijon* cases as 'establishing the foundations of a cost/benefit analysis (a balance test)' under Article 30 (now Article 34 TFEU).[27]

[22] T Tridimas, *The General Principles of EU Law* (2nd edn, Oxford, Oxford University Press, 2006) 136.

[23] See, for example, ibid 139.

[24] ibid.

[25] See further ch 3.

[26] See further ch 3.

[27] Maduro goes on to explain that 'the costs of the measure are to be assessed according to their effect on trade under the *Dassonville* formula and the *Cassis de Dijon* mutual recognition principle; the benefits of the measure are to be assessed under the mandatory requirements and Article 36 tests': MP Maduro, *We the Court: The European Court of Justice and the*

Flexibility in the notion of proportionality allows the Court to use it for a variety of purposes, including the imposition of a relatively rigorous scrutiny where there is a clear indication of policy consensus at the EU level. On the other hand, where the Court does not want to substitute its view for that of the national decision maker, it can apply a relatively light touch. However, this flexibility requires transparency in order to ensure the integrity and legitimacy of the process, and this includes teasing out the interests at stake and the nature of the balancing process. Jans concludes that:

> The proportionality principle is an instrument which allows the Court of Justice to make a balanced assessment of the legality of national restrictions of free movement and, in doing so, to take account of the sensitive nature of the division of powers between judiciary and legislature and between the EC and its Member States.[28]

b. The Approach Adopted in this Book

One of the observed difficulties regarding the application of 'proportionality' concerns the challenge posed by measuring, or quantifying, the benefit and/or cost attributed to a particular policy interest. Thus, whereas it might be relatively straightforward to identify the cost or benefit to trade associated with a particular regulatory measure, it is much more difficult to quantify the cost or benefit of that same measure to social policy. There is a common-sense argument for considering 'costs' and 'benefits' of particular regulatory measures. However, equally, there is something fundamentally discomfiting about attributing a quantitative, monetary value (or cost) to, for example, human life or environmental goods and then weighing that in the balance against the costs to trade of a particular regulation. As Ackerman and Heinzerling put it:

> The basic problem with narrow economic analysis of health and environmental protection is that human life, health and nature cannot be described meaningfully in monetary terms; they are priceless.[29]

Thus, the arguments for a 'cost-benefit' analysis drawn from classical economics should be handled with caution.[30] Because of its associated economic connotations, I therefore eschew both the language and the form of 'cost-benefit' analysis, preferring the more flexible, less economically loaded language of 'proportionality'.

European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty (Oxford, Hart Publishing, 1999) 52.

[28] Jan H Jans, 'Proportionality Revisited' (2000) 27(3) *Legal Issues of Economic Integration* 239, 264.

[29] Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York, New Press, 2004) 8.

[30] See Cass Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago, American Bar Association, 2002) 26.

The fact that the Court of Justice has tended not to provide a detailed economic analysis, preferring a broader balancing approach, can in this regard be viewed as a strength. In their unbridled, and persuasive, critique of the economic emphasis of cost-benefit analysis, Ackerman and Heinzerling demonstrate by reference to the 1970 US Clean Air Act that 'it is sometimes possible to make very good decisions without benefit of intricate economic analysis, and even without noticeable attention to market mechanisms'. They highlight one of the fundamental problems with cost-benefit analysis: it 'frequently turns out to be "complete cost-incomplete benefit" analysis'. Consequently, they seek a means of decision making that 'reflect[s] values without prices'.[31]

Consistent with this approach, in the present context, proportionality is to be understood by reference to its meaning in the EU internal market context and as applied by the Court of Justice (which will be explored in chapter three), but which crucially, as noted above, does not engage in forensic unpacking of the interests at stake or in any attempt to apply monetary values to interests or values which are priceless; rather, the focus is upon a broad balancing process. One question which will be considered is the extent to which it should be left to the 'judicial' decision maker to perform this function, or not. These issues will be examined in greater detail below with reference to the case law of both the Court of Justice and the WTO Dispute Settlement Body.

II. STRUCTURE OF THE BOOK

The first part of this book (chapters two to five) examines the extent to which the EU has indeed succeeded in reconciling the pursuit of economic and non-economic interests, and the extent to which non-economic objectives are integrated into the EU legal order. To this end, chapter two examines the emergence of human rights and environmental protection as concerns of and within the EU. In doing so, the development of human rights and environmental protection in the EU is traced through treaty provision, the contribution of the Court of Justice and secondary legislation. In considering the contribution of the Court of Justice, the role of the national courts cannot be ignored. The significance of the relationship between the Court of Justice and the national courts, and between EU law and national law, has repercussions for any attempt to compare the development of protection of non-economic interests in the EU with this potential process in the WTO. Chapter three examines the enforcement and protection of non-economic interests in the EU and the balance that has been struck between

[31] Ackerman and Heinzerling (n 29) 206–08.

the economic and non-economic interests assessed. Despite the rhetoric and the very tangible progress in the context of the internal market, it appears that the mechanisms for the enforcement of both environmental protection and human rights are not yet altogether satisfactory.

In chapter four, the focus moves to the EU's external actions. The nature and extent of the EU's general external competence is examined first, with subsequent specific analysis of its competence to pursue environmental protection and human rights externally. Particular attention is paid to the development of implied powers and analysis of the relationship between concurrent and 'complementary'[32] powers. The effect of international agreements concluded by the EU is also examined. The reason for this consideration of the EU's external action is straightforward: alongside their emergence as internal EU concerns, the EU has actively pursued both human rights and environmental protection in its relations with third states. This is significant in terms of establishing what the EU is empowered to do (from an internal perspective). However, it is also significant in view of the capacity for EU action to influence the international approach to managing the relationship between pursuit of economic and non-economic interests. To what extent is the EU setting the agenda in this context? Chapter five examines the development and substance of clauses protecting human rights and the environment in the EU's external agreements, and compares the relative force given to each interest in the EU's relations with third states. This presents a curious paradox when compared with the nature and extent of the EU's internal competence and action. The manifestation of these clauses is not the whole story, however, and this chapter also explores questions concerning their application and potential difficulties regarding their enforcement, as well as other instruments such as the Generalised System of Preferences.

An examination of these questions leads into the crucial question of what may be extrapolated from the EU experience to inform the approach adopted at the global level. In the second part of this book (chapters six to nine) the focus therefore shifts to the interaction between economic and non-economic interests in the international context, and in particular within the WTO, where the relationship between economic and non-economic interests is currently being developed. In the WTO, the differences between the approach to environmental protection and to the debate surrounding 'human rights' issues are even more pronounced than in the EU. Consequently, a detailed examination will be made of each of these

[32] Although not generally recognised as a term of art, the notion of 'complementary' powers arises, from the expression of Community competence in relation to, inter alia, development cooperation (Article 177 (ex 130u) EC): 'Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster….'

individually, before drawing conclusions on an appropriate international approach.

Chapter six presents a brief analysis of the relationship between WTO law and 'international law' and of the potential for the WTO legal order to accommodate non-economic interests under the current rules. Chapter seven specifically analyses the potential for protection of the environment under WTO law, focusing primarily upon the GATT, although some consideration is given to the other WTO Agreements. In so doing, it compares the balance achieved under the original GATT dispute settlement process with that under the WTO. In this analysis questions are raised as to whether the rulings of the dispute settlement panels and the Appellate Body are consistent with what might have been the intention of the Members in formulating the GATT public policy exceptions. This is particularly significant given the developing normativity of the panel findings. There has been a perceptible shift in the rhetoric of WTO panels and the Appellate Body in particular with regard to the environment, notably in relation to extra-territorial action. This shift, which is manifested in the recognition in principle of the potential legitimacy of an extra-territorial, unilateral environmental measure as an exception to the rules of the GATT,[33] is examined, as are its practical implications. The approaches of the WTO dispute settlement panels and the Appellate Body are compared to that of the Court of Justice in the resolution of disputes—analysing the application of different tests in each jurisdiction.

Chapter eight explores the relationship between international human rights law and international trade law. It examines the two levels upon which this relationship has developed: exploring on the one hand a case study relating to labour standards (or, more recently, labour rights) and on the other hand exploring the relationship between international human rights law per se and the WTO. This chapter examines the significance of the centrality of labour standards to the human rights/international trade discourse, which is in sharp contrast to the EU approach.[34] It continues to highlight, in particular, the incoherence in international law, which leads into an exploration of the conceptual framework for the international trading system, which is raised in the concluding chapter.

[33] See discussion of the *Shrimp Turtle* dispute in ch 7 below; Appellate Body Report in *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4 WT/DS58/R (98-0000) (1998) 38 ILM 121, 12 October.

[34] It is submitted that the development of labour standards in the EU occurred originally as a means of removing competitive distortions rather than as a 'rights' issue and has only relatively recently grown into a 'rights' issue. In contrast, 'labour standards' and 'labour rights' in the WTO context have from the outset ostensibly been pursued as a 'rights-based' issue rather than a means of levelling the economic playing field. However, there has been considerable suspicion from developing states that this is a manifestation of protectionism. Consequently, this thesis focuses on the WTO debate, but does not explore the development of social rights in the EU in any detail.

In chapter nine, some consideration is given to the potential roles of both the WTO and the EU in the development of international law, and additionally in the normative process towards reconciling economic and non-economic interests. The conclusions to chapters six to eight raise the question whether the current legal and institutional framework is capable of achieving the legitimate reconciliation of economic and non-economic interests. In light of this, chapter nine proposes that a different conceptual approach to the legal regulation of international trade, reframed through the lens of sustainable development, might help to resolve some of the apparent incoherence between different international legal systems.

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