Human Rights Within a Multilayered Constitution: The Example of Freedom of Expression and the WTO

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Abstract

This article focuses on the interface of the WTO with a quintessential civil and political right, the right to freedom of expression. It analyses both potential synergies and conflicts between WTO law and free speech. Since the WTO operates within a multilayered governance structure, the article adopts a comparative approach, examining the protection and relationship of free speech and free trade on the domestic, regional and global layers. Building on these findings, the article argues that the WTO judiciary should interpret exception clauses broadly and grant members sufficient leeway to implement free speech-enhancing policies. Such "defensive uses" of freedom of expression should be admissible even if they are not underpinned by a universally shared conception of free speech. By contrast, "offensive" uses of freedom of expression require a more cautious approach. They should preclude the justification of a WTO inconsistent measure in two cases: firstly, when it was found in breach of free speech by an international human rights monitoring body, and secondly, when it consists in a policy of state censorship and repression targeting political speech, broadly defined, and thus contravenes customary international law. Both defensive and offensive uses of free speech are ultimately supportive of the WTO's legitimacy and mandate.

Keywords

Multilayered Governance; Freedom of Expression; WTO; Trade and Human Rights; Global Constitutionalism

I. Introduction

How do human rights and the law of the WTO relate to each other? This "trade-and" question[1] has attracted much attention and spawned

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1 This expression is inspired by J.P. Trachtman, "Trade and … Problems, Cost-Benefit Analysis and Subsidiarity", *EJIL* 9 (1998), 32 et seq.

considerable controversy.[2] Trade specialists have argued that "human rights and trade are mutually supportive. Human rights are essential to the good functioning of the multilateral trading system, and trade and

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[2] For general studies on the relationship between human rights and the WTO, see S. Joseph, *Blame it on the WTO?*, 2011; S. Joseph/ D. Kinley/ J. Waincyme (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives*, 2009; J. Harrison, *The Human Rights Impact of the World Trade Organization*, 2007; C.J. Lopez Hurtado, *The WTO Legal System and International Human Rights*, 2006; D. Kinley, *Civilising Globalisation: Human Rights and the Global Economy*, 2009, in particular at 60 et seq.; T. Cottier/ J. Pauwelyn/ E. Bürgi Bonanomi (eds), *Human Rights and International Trade*, 2005; W. Benedek, "The World Trade Organization and Human Rights", in: W. Benedek/ K. De Feyter/ F. Marrella (eds), *Economic Globalisation and Human Rights*, 2007, 137-169; B. Konstantinov, "Human Rights and the WTO: Are They Really Oil and Water?", *JWT* 43 (2009), 317 et seq.; R. Wai, "Countering, Branding, Dealing: Using Economic and Social Rights in and Around the International Trade Regime", *EJIL* 14 (2003), 35 et seq.; C. Dommen, "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies", *HRQ* 24 (2002), 24 et seq.; S. Leader, "Trade and Human Rights II", in: P.F.J. Macrory/ A.E. Appleton/ M.G. Plummer, *The World Trade Organization: Legal, Economic and Political Analysis,* Vol. 2, 2005, 664-695; A.E. Appleton, "The World Trade Organization: Implications for Human Rights and Democracy", *Thesaurus Acroasium* 29 (2000), 415 et seq.; R. Howse/ M. Mutua, "Protecting Human Rights in a Global Economy. Challenges for the World Trade Organization", in: *Rights and Democracy*, 2000; J. Bhagwati, "Trade Linkage and Human Rights", in: J. Bhagwati/ M. Hirs (eds), *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel*, 1998, 241-250; S.H. Cleveland, "Human Rights Sanctions and the World Trade Organization", in: F. Francioni (ed.), *Environment, Human Rights and International Trade*, 2001, 199-261; T. Flory/ N. Ligneul, "Commerce international, droits de l'homme, mondialisation: les droits de l'homme et l'Organisation mondial du commerce", in: *Commerce mondiale et protection des droits de l'homme: les droits de l'homme à l'épreuve de la globalisation des échanges économiques*, 2001, 179-191; H. Lim, "Trade and Human Rights: What's At Issue?", *JWT* 35 (2001), 275 et seq.; A.H. Qureshi, "International Trade and Human Rights from the Perspective of the WTO", in: F. Weiss/ E. Denter/ P. de Waart (eds), *International Economic Law with a Human Face*, 1998, 159-173; P. Stirling, "The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization", *Am. U. J. Int'l L. & Pol'y* 11 (1996), 1 et seq.

WTO rules contribute to the realization of human rights."[3] Human rights lawyers, by contrast, tend to highlight the different normative foundations of international trade and human rights law and the potential for conflict between the two regimes, accusing the other camp of conflating economic interests with rights derived from human dignity and protecting the most fundamental interests of humanity.[4] A report of the former Sub-Commission on the Promotion and Protection of Human Rights went as far as to describe the WTO as a "nightmare for human rights in developing countries."[5] Reflecting these antagonistic

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3 Speech by P. Lamy at the Colloquium on Human Rights and the Global Economy, Geneva, 13 January 2010, <http://www.wto.org>; the mutually reinforcing nature of trade and human rights has been mainly stressed in the writings of Petersmann. See e.g. E.U. Petersmann, "From 'Negative' to 'Positive' Integration in the WTO: Time for 'Mainstreaming Human Rights' into WTO Law", *CML Rev.* 37 (2000), 1363 et seq.; id., "Human Rights and the Law of the World Trade Organization", *JWT* 37 (2003), 241 et seq.; id. "Trade and Human Rights I", in: Macrory/ Appleton/ Plummer, see note 2, 623-662; id., "Time for a United Nations 'Global Compact' for Integrating Human Rights Law of Worldwide Organizations: Lessons from European Integration", *EJIL* 13 (2002), 621 et seq.; id., "Human Rights, International Economic Law and Constitutional Justice", *EJIL* 19 (2008), 769 et seq. The human rights dimension of the WTO is also emphasised by Qureshi, see note 2 and Lim, see note 2.

4 P. Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann," *EJIL* 13 (2002), 815 et seq.; Lopez Hurtado, see note 2, 22 et seq. M. Cohn, "The World Trade Organization: Elevating Property Interests Above Human Rights", *Ga. J. Int'l & Comp. L.* 29 (2001), 247 et seq.; A.C. Habbard/ M. Guiraud, "The World Trade Organisation and Human Rights", FIDH Position Paper, November 1999, <http://www.fidh.org/rapports>; F. Garcia, "Global Market and Human Rights: Trading Away the Human Rights Principle", *Brook. J. Int'l L.* 25 (1999), 51 et seq. (63), holding that the normative foundations of international trade law and human rights are "if not incompatible, then at least in fundamental tension"; for a comment, see S. Charnovitz, "The Globalization of Economic Human Rights", *Brook. J. Int'l L.* 25 (1999), 113 et seq.; for a more general claim that classical economics and human rights are incompatible, see M. Couret Branco, *Economics versus Human Rights*, 2009, 3-4.

5 J. Oloko-Onyango/ D. Udagama, "The Realization of Economic, Cultural and Social Rights: Globalization and its Impact on the Full Enjoyment of Human Rights", Report of the Expert Group of the Sub-Commission on the Promotion and Protection of Human Rights, 15 June 2000, Doc. E/CN.4/Sub.2/2000/13, also known as the "Nightmare Report"; for a

views, the relationship between trade and human rights has been described as a "history of suspicion,"[6] "governed by distrust."[7] The communication between human rights and trade lawyers was referred to as a dialogue of the deaf.[8]

So far, most studies have focused either on the general relationship between human rights and trade regimes or on the impact of the WTO on second and third generation rights (e.g. economic and social rights and solidarity rights),[9] in particular labour rights, the right to health, the right to food and the right to development. The link between the multilateral trading system and first generation rights (e.g. civil and po-

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critical analysis, see P. Ala'i, "A Human Rights Critique of the WTO: Some Preliminary Observations", *Geo. Wash. Int'l L. Rev.* 33 (2000-2002), 537 et seq. For a more nuanced analysis, see the more recent reports by the Office of the High Commissioner for Human Rights (OHCHR), "Liberalisation of Trade and Services and Human Rights", Doc. E/CN.4/Sub.2/2002/9, 25 June 2002 (Report on GATS); id., "Globalisation and its Impact on the Full Enjoyment of Human Rights", Doc. E/CN.4/2002/54, 15 January 2002 (Report on the Agreement on Agriculture); id., "The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights", Doc. E/CN.4/Sub.2/2001/13, 27 June 2001 (Report on the TRIPS Agreement); for an analysis of these reports, see Harrison, see note 2, 127 et seq.

6 Lamy, see note 3.

7 Ibid.

8 T. Cottier/ J. Pauwelyn/ E. Bürgi Bonanomi, "Linking Trade Regulation and Human Rights in International Law: An Overview", in: Cottier/ Pauwelyn/ Bürgi Bonanomi, see note 2, 7, referring to the controversy between Alston and Petersmann in the *EJIL* 2002 (see the references under note 3 and note 4). Criticism of Petersmann's work has also been voiced by R. Howse, "Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann", *EJIL* 13 (2002), 651 et seq.; id., "Human Rights, International Economic Law and Constitutional Justice: A Reply", *EJIL* 19 (2008), 945 et seq., replying to Petersmann 2008, see note 3; for a reply by E.U. Petersmann, see id., "Taking Human Dignity, Poverty and Empowerment of Individuals more Seriously: Rejoinder to Alston", *EJIL* 13 (2002), 845 et seq. and "Human Rights, International Economic Law and 'Constitutional Justice': A Rejoinder by E.U. Petersmann", available under <http://www.ejiltalk.org>.

9 On the classic distinction between three generations of human rights and a critical assessment, see e.g. C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2008, 25-68; T. Meron, "On a Hierarchy of International Human Rights", *AJIL* 80 (1986), 1 et seq.

litical rights) has received far less attention.[10] This study is aimed at filling this gap. It will explore the interface between the WTO and a quintessential first generation right, the right to free speech. Following Howse's criticism of the excessively abstract nature of the "trade and human rights debate",[11] the present contribution will reject the assumption that the relationship between free speech and free trade can be adequately described in terms of *either* synergies *or* conflicts.

Using the example of free speech, this article also purports to nuance another divide between trade and the human rights specialists: some of the former argue that the "WTO is more than a commercial agreement; it is a human rights agreement",[12] designed to protect economic and property rights which are not essentially different from human rights.[13] Human rights lawyers retort that human rights are deontological. They are, like persons, aims in themselves, whereas free trade has essentially an instrumentalist value that consists in enhancing social welfare.[14] As will be shown, the distinction between means and ends is far from simple.[15] This claim has particular weight as far as freedom of speech is concerned. Political philosophers have tended to highlight both the intrinsic and the instrumentalist value of free speech as a *moral* right. In-

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10 This may be because first generation rights (apart from the right to property) are considered irrelevant for international trade. For such a view, see Flory/ Ligneul, see note 2, 180; for an essay focusing on the relationship between freedom of expression and international trade, see T. Cottier/ S. Khorana, "Linkage between Freedom of Expression and Unfair Competition Rules in International Trade: The Hertel Case and Beyond", in: Cottier/ Pauwelyn/ Bürgi Bonanomi, see note 2, 245-272; the linkage between freedom of speech and free trade is also explored by E.U. Petersmann, "Theories of Justice, Human Rights and the Constitution of International Markets", *Loyola of Los Angeles Law Review* 37 (2003), 407 et seq. (443 et seq.)

11 Howse, see note 8.

12 S. Charnovitz, "The WTO and the Rights of the Individual", *Intereconomics* 36 (2001), 98 et seq. (108), available at <http://www.worldtradelaw.net>.

13 Petersmann is the most prominent exponent of this view; see his writings under note 3.

14 Alston, see note 4, 826: "Human rights are recognized for all on the basis of the inherent human dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are seen as objects rather than as holders of rights"; see also Garcia, see note 4, 62 et seq.; for a more nuanced view, see Charnovitz, see note 4, 115.

15 This is acknowledged by Alston, see note 4, 827 et seq.

terpreting free speech provisions as a *legal* right, constitutional courts and human rights monitoring bodies, in particular the European Court of Human Rights (ECtHR), have adopted the same approach.

The emphasis on an instrumentalist rationale is one reason which has led to an overlap – and sometimes to interference – between human rights and free trade regimes, mainly on the regional but also on the global level. Since the WTO forms part of a multilayered governance structure, the question of what role free speech plays, or ought to play within the global trading system cannot be analysed in isolation. The WTO's norms, functions and rulings need to be coordinated with those of other international regimes (situated on either the global or regional level) as well as with domestic legal orders. For this reason, the present contribution opens with a section analysing the characteristics of the multilayered governance structure within which the WTO operates, focusing on the interaction between the various layers and on the different strategies of mutual accommodation (II.). The following section will focus on the linkages between free trade and free speech from both an economic vantage point and from the perspective of free speech theorists. It will highlight the interaction between free speech and free trade, as well as both intrinsic and instrumentalist rationales for protecting freedom of expression (III.). Thereafter, the paper will adopt a comparative perspective and examine to what extent free speech and free trade are protected on the various layers of governance. This analysis will also help to identify the impact of the various theoretical rationales on positive law and to show the overlap between free trade and human rights regimes (IV.). Building on the findings of the first three parts, the paper will move on to examine how free speech concerns are relevant for and can be accommodated within the WTO (V.). Section VI. concludes by summarising the main findings.

II. Multilayered Governance

1. Characteristics

Theories of multilayered governance[16] are attempts to conceptualise the complex reality that traditional governmental functions (such as guaranteeing security and collective welfare, protecting fundamental rights

16 For a helpful introduction and overview, see M. Zürn/ H. Enderlein/ S. Walti (eds), *Handbook on Multi-level Governance*, 2010.

of citizens and regulating the economy) are no longer exercised predominantly on the domestic level. With the increasing international cooperation of states, regulatory powers have been transferred from the national to the regional and global level. The function of governing ceases to be confined within a single constitutional order and an overarching unified political authority, a *government*. Instead, *governance* is a more diffuse "overall process of regulating and ordering issues of public interest."[17] It implies the interaction of various layers, which together form what has been described as a "multilayered constitution",[18] a "multilevel system",[19] an "overall constitutional structure"[20] or a "five storey house", composed of a global, regional, national, sub-national and a municipal floor.[21] With respect to the "lower" national and subnational levels, the functions of the "higher" regional and global levels are two-fold: firstly, they compensate for the declining capacity of the nation state to address common concerns that defy territorial borders.[22] Secondly, the "higher" levels act as a check against "state failures".[23] The checking function has been an important rationale for the emer-

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17 A. Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", *LJIL* 19 (2006), 579 et seq. (580).

18 See N. Bamforth/ P. Leyland (eds), *Public Law in a Multi-Layered Constitution*, 2003; in a similar vein, see I. Pernice/ R. Kanitz, "Fundamental Rights and Multilevel Constitutionalism in Europe", in: Walter Hallstein-Institut (ed.), *WHI Paper 7/2004*.

19 See e.g. H.J. Blanke, "Der Unionsvertrag von Maastricht", *Die öffentliche Verwaltung* 46 (1993), 412 et seq. (422) (translated by the author); in a similar vein, see C. O'Cinneide, "Human Rights and Within Multi-layered Systems of Constitutional Governance: Rights Cosmopolitanism and Domestic Particularism in Tension", UC Working Papers in Law, *Criminology & Socio-Legal Studies*, Research Paper No. 12/2009, available at <http://papers.ssrn.com>; see also A. van Hoek/ T. Hol/ O. Jansen et al. (eds), *Multilevel Governance in Enforcement and Adjudication*, 2006.

20 T. Cottier/ M. Hertig, "The Prospects of 21st Century Constitutionalism", in: A. von Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB* 7 (2003), 261 et seq. (298).

21 T. Cottier, "Reforming the Swiss Federal Constitution: An International Lawyer's Perspective", in: M. Butler/ M. Pender/ J. Chalrey (eds), *The Making of Modern Switzerland 1948-1998*, 2000, 75–96; Cottier/ Hertig, see note 20, 299 et seq.

22 Peters, see note 17, has described this function in terms of "compensatory constitutionalism".

23 See Cottier/ Hertig, see note 20, 267.

gence of both international human rights and trade regimes, including more ambitious regimes of (economic) integration like the European Union (EU). Reflecting the traumatic experience that even democratically elected national governments could turn into a formidable threat to their own citizens, the insight prevailed after World War II that state power needed to be constrained not only from within (through domestic constitutions and judicial review) but also from without, by the international legal order. International human rights were thus proclaimed as a reaction to the "barbarous acts which have outraged the conscience of mankind"[24] and as an essential element in securing peace among nations. Preventing war was also an important rationale for the creation of the General Agreement on Tariffs and Trade (GATT, the first building block of the multilateral trading system on the global level), and economic integration on the European level. The welfare enhancing and civilising effects of trade, leading to greater interdependence and cooperation among nations,[25] were seen as an antidote to the protectionist policies preceding World War II.[26]

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24 See the Preamble of the Universal Declaration of Human Rights (UDHR) of 10 December 1948.

25 See C. de Montesquieu, "Book XX. of Laws in Relation to Commerce, Considered in its Nature and Distinctions of the Spirit of Laws", first published in French in 1758; "Commerce is a cure for the most destructive prejudices; for it is almost a general rule that wherever we find agreeable manners, there commerce flourishes; and that wherever there is commerce, there we meet with agreeable manners. (…) 2. Of the Spirit of Commerce. Peace is the natural effect of trade. Two nations who traffic with each other become reciprocally dependent; for if one has an interest in buying, the other has an interest in selling: and thus their union is founded on their mutual necessities.(…) The spirit of trade produces in the mind of a man a certain sense of exact justice, opposite, on the one hand, to robbery, and on the other to those moral virtues which forbid our always adhering rigidly to the rules of private interest, and suffer us to neglect this for the advantage of others." For a critical analysis of Montesquieu's arguments and a comparison with the writings of Kant, D. Lang, "Kant et Montesquieu: A propos des vertus pacificatrices du commerce et des relations entre les nations", in: R. Theis/ L.K. Sosoe (eds), *Les sources de la philosophie kantienne au XVIIe et XVIIIe siècles*, 2005, 252-262. The case that peace and trade are linked has also been made from a different philosophical vantage point by John Stuart Mill, who stressed that "[i]t is commerce which is rapidly rendering war obsolete, by strengthening and multiplying the personal interests which are in natural opposition to it. And it may be said without exaggeration that the great extent and rapid increase of international trade,

The image of superimposed layers of governance, and the emphasis on the checking function, evokes theories of federalism. The analogy between multilayered constitutional governance and a federal polity has limited explanatory power, however, as federalism is too simplistic a template to capture the complexity of the governance system in a globalised world.[27]

Firstly, federalism is fixed on a given territory, which implies that the "lower" levels of governance are subsumed within the "higher" level. By contrast, contemporary international regimes (such as the EU, the European Convention on Human Rights (ECHR) and the WTO) are functionally or sectorally defined and have different memberships.[28] This leads to "the possibility of overlap without subsumption".[29] For each state, different supra-national layers assert authority in a given area without calling into question the state's territorial jurisdiction in other fields.[30] Contemporary states are thus "embedded in multiple and overlapping layers of constitutional governance."[31] Secondly, federalism evokes the image of a relatively straightforward hierarchy among separate and uniform levels, whereas the relationship between the various layers of contemporary regimes is more complex. On the one hand, the global and regional levels are both heterogeneous, as they do not consist of a unified constitutional framework but of international regimes (or "sub-layers") with overlapping membership, operating under different institutional umbrellas, and pursuing different objectives. On the other hand, a hierarchy between the regional and the global level is generally absent, as they both form part of the international legal order. For instance, no clear vertical subordination exists between the ECHR and the WTO. This raises the question of the relationship and the interaction between the various layers of governance.

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in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions, and the character of the human race" (see J.S. Mill, "Chapter XVII: Of International Trade", in: id., *The Collected Works of John Stuart Mill, Volume III– Principles of Political Economy Part II*, 1848).

26 See e.g. Harrison, see note 2, 7 et seq.

27 See A. Peters, *Elemente einer Theorie der Verfassung Europas*, 2001, 189 et seq. with further references.

28 N. Walker, "The Idea of Constitutional Pluralism", *Modern Law Review* 65 (2002), 317 et seq. (346).

29 Walker, see note 28, 346.

30 Ibid.

31 Cinneide, see note 19, 3.

2. Relationship and Interaction between the Various Layers of Governance

Authors stressing the multilayered structure of contemporary governance have different visions of how the various layers and sub-layers relate. They fall, broadly speaking, into two camps: stressing the checking function of "higher" over "lower" levels of governance, one strand of thought conceives of their relationship in terms of hierarchy.[32] Some exponents of this view have argued, however, that the supremacy of "higher" layers is a principle and not a strict rule of conflict. Viewed as a system of *mutual* checks and balances, multilayered constitutionalism posits that "lower" levels retain the capacity to safeguard fundamental values of their respective legal order against encroachment by "higher" levels.[33] The possibility for "lower" levels to "revolt" against "higher" layers accounts for the reality that their interaction cannot be adequately described in terms of "top down" command but is based on dialogue and mutual consideration.[34]

Another strand of thought, adhering to network theories or theories of constitutional pluralism, conceives of the relationship between layers and sub-layers in terms of heterarchy instead of hierarchy.[35] As there is "no Archimedean point", no neutral or external perspective from which to determine the relationship between various layers,[36] the latter is assessed from the internal point of each layer or sub-layer, and is "inter-

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32 See e.g. Cottier/ Hertig, see note 20, 307 et seq.

33 Id., see note 20, 310 et seq.

34 Id., see note 20, 313 et seq.

35 From a perspective of constitutional pluralism, see e.g. Walker, see note 28, 337 (who describes the post-Westphalian order as a "multi-level order" (334)); for other authors defending the theory of constitutional pluralism, see e.g. M.P. Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in: N. Walker (ed.), *Sovereignty in Transition*, 2003, 501-537; for an analysis of different visions of constitutional pluralism, see M. Avbelj/ J. Komárek (eds), *Four Visions of Constitutional Pluralism*, EUI Working Paper LAW No. 2008/21; for the vision of a "loosely knit global constitutional network", see Peters, see note 17, 601 et seq. For other authors favouring network theories, see e.g. F. Ost/ M. van de Kerchove, *De la pyramide au réseau. Pour une théorie dialectique du droit*, 2002; K.H. Ladeur, "Towards a Legal Theory of Supranationality – The Viability of the Network Concept", *ELJ* 3 (1997), 33 et seq.

36 See Walker, see note 28, 338; id., "Sovereignty and Differentiated Integration in the European Union", *ELJ* 4 (1998) 356 et seq. (361 et seq.).

active rather than hierarchical."[37] Conflicting claims and visions are settled through dialogue "over time in a process of constant 'mutual accommodation'".[38]

Although they start from different premises, both strands of thought share some common ground: they stress the communicative interaction between the various layers of constitutional governance. The explanatory force of each model, however, varies in this author's view depending on the layers the relationship of which is to be analysed.

Whilst the "hierarchical" model is adequate to describe the relation between national and subnational layers of governance, the "network" model captures well the interaction between different regimes pertaining to the national, regional or international (sub)layers which are not institutionally linked in terms of membership. The cross-fertilisation and mutual borrowing among international human rights bodies,[39] for instance, or among different constitutional courts, is entirely voluntary and can be described in terms of "horizontal dialogue".[40] The same holds true when supreme courts from jurisdictions outside Europe cite judgments of the ECtHR, or, conversely, when the ECtHR corrobo-

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37 N. MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, 1999, 118.

38 A. Torres Pérez, *Conflict of Rights in the European Union*, 2009, 111.

39 See L. Hennebel, "Les références croisées entre les juridictions internationales des droits de l'homme", in: *Le dialogue des juges. Actes du colloque organisé le 28 avril 2006 à l'Université libre de Bruxelles*, 2007, 31–76.

40 For the distinction between different forms on judicial dialogue based on the presence or absence of subordination, see L. Burgorgue-Larsen, "De l'internationalisation du dialogue des juges. Missive doctrinale à l'attention de Bruno Genevois", in: *Le dialogue des juges: mélanges en l'honneur du Président Bruno Genevois*, 2009, 94-130 (98 et seq.); A. Rosas, "The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue", *European Journal of Legal Studies* 1 (2007), 1 et seq.; on the importance of judicial dialogue more generally, see e.g. A.M. Slaughter, *A New World Order*, 2004, 65 et seq.; id., "A Global Community of Courts", *Harv. Int'l L. J.* 44 (2003), 191 et seq.; C. McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights", *Oxford Journal of Legal Studies* 20 (2000), 499 et seq.; V. Jackson, "Comparative Constitutional Federalism and Transnational Judicial Discourse", *International Journal of Constitutional Law* 2 (2004), 91 et seq.

rates its findings with references to constitutional courts such as the Canadian Supreme Court[41] or the Supreme Court of Israel.[42]

It is more challenging to capture the relationship between the supranational (regional and global) and the national (sub-)layers which are connected in terms of membership (as is for instance the case for the WTO and the EU, or for the 47 Member States of the Council of Europe with respect to the ECHR). Both "pluralist" and "hierarchical" accounts have some drawbacks. Whilst adherents of the first model rightly point out that dispute settlement bodies on "higher" layers lack the "final word on the question of legal validity" of acts adopted on "lower layers",[43] which makes the relationship between international and domestic layers different from the hierarchical subordination between national and subnational courts, they minimise the extent to which "transnational frameworks are in practice often invoked to trump or overrule" particular rules and practices prevalent at the national level.[44] Attempting to find some middle ground between both theories, Rosas described the inter-layer relationship as "semi-vertical",[45] which reflects quite accurately the practice of states with regard to supra-national polities such as the EU, the ECHR and the WTO.[46] From the "hierarchical" vantage point, semi-verticality entails an understanding of supremacy of supranational layers over domestic ones as the main ordering principle, and the pre-eminence of national standards as an exception. From a normative point of view, this approach can among others be justified on functionalist grounds.[47] Su-

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41 ECtHR, App. No. 2346/02, *Pretty v. the United Kingdom,* [2002] 35 EHRR 1, paras 17 et seq., paras 66, 74.

42 ECtHR (GC), App. No. 6339/05 *Evans v. the United Kingdom,* ECHR 2007-I, paras 49 et seq., para. 80.

43 A. Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe", <http://ssrn.com/abstract=1913657>, 7.

44 Cinneide, see note 19, 12 (from which also the quote in the middle of the sentence is drawn).

45 See Rosas, see note 40, 9.

46 The profound impact of the ECHR on the Member States is highlighted in the study by H. Keller/ A. Stone Sweet, *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, 2008.

47 Cottier/ Hertig, see note 20, 307 et seq., stressing also the input legitimacy of "higher" levels of governance, based on various mechanisms of participation and consent of "lower" levels. For a Kantian perspective, which stresses that solutions adopted by domestic courts need to be generalisable,

premacy of "higher" levels is essential to achieve the common objectives pursued by cooperation on the regional and global level and enables "higher" levels to act as a check on "lower" levels.[48]

Thinking in terms of vertically ordered layers has prompted scholars to complement the principle of supremacy with another ordering principle well-known in federalist theories, the principle of subsidiarity. As a normative claim, subsidiarity is based on the premise that "lower" levels are closer to the citizens and posits that tasks should not be assigned to "higher" levels unless they cannot be adequately fulfilled on a lower level. Viewed descriptively, subsidiarity helps to explain the generally higher levels of integration achieved on "lower" than on "higher" levels of governance[49] and cautions against transposing solutions adopted within the more homogeneous domestic level to the regional level, or within the more consolidated regional to the global level. Apart form the allocation of powers, the principle of subsidiarity also plays an important role as regards the relationship between the judicial or quasi-judicial guardians of the various polities. In human rights law, the requirement to exhaust domestic remedies, and the ECtHR' s doctrine of judicial deference (known as the margin of appreciation doctrine)[50] are

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see M. Andenas/ E. Bjorge, "National Implementation of ECHR Rights: Kant's Categorical Imperative and the Convention", *University of Oslo Faculty of Law Legal Studies Research Paper Series* No. 2011-15 (2011).

48 See also P.L. Lindseth, "'Weak' Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union", *Oxford Journal of Legal Studies* 21 (2001), 145 et seq., stressing the autonomous regulatory interest of transnational governance in general, and of the EU, in particular, which is "to constrain, and in some sense to overcome, the propensity of Nation States to parochialism and self-interest" (148).

49 In the field of human rights, this point was made by Pedro Nikken, judge of the Inter-American Court of Human Rights. Holding "that it is easier to conclude more advanced treaties where fewer cultural and political differences exist among the States that negotiate them", he concludes that it is not surprising that the American Convention on Human Rights is more advanced "than the Covenant [i.e. the ICCPRs of 1966], which aspires to be an instrument that binds all of the governments of the planet." (concurring opinion in I.A. Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85 of 13 November 1985, Series A5).

50 On the margin of appreciation doctrine, see e.g. H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 1996; J. Schokkenbrock, "The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European

aimed at reducing "inter-layer irritation"[51] and at finding an adequate balance between the universalist and unifying ethos underlying international human rights and the particularist nature of national polities.

The "semi-verticality", and the ordering principles of supremacy and subsidiarity can also be incorporated within the "pluralist" or "network" model. Such an approach would be based on the idea that communication with the various knots or sites of the constitutional network is based on certain mutually respected rules and expectations. On the one hand, polities which are territorially or functionally part of another polity are expected to comply with the norms or rulings of the latter, but can in turn assume that the institutions (in particular the judicial ones) will not unduly expand their jurisdiction and encroach on their autonomy.[52]

The relationship between the various sub-layers of the regional and the global level is more complex. Unless they are connected in terms of membership (as is the case for the EU and the WTO), the "hierarchical" model offers little guidance on how to deal with inter-layer irritation resulting from the functional or sectoral overlap between different international regimes. By contrast with domestic constitutional orders, which provide for a unified institutional framework to balance and arbitrate between competing values, the same issue can be dealt with on the regional and global levels within different polities pursuing different objectives. For the purpose of this study, the relationship between global and regional human rights regimes and economic regimes (such as the EU or the WTO) are cases in point. Although the experience of the EU cannot be simply transposed to the WTO, it offers some valuable insights on how trade and human rights relate to each other.

3. The Example of the EU and the ECHR

The example of the EU has shown that the legitimacy of the ECtHR has generally been superior to that of the European Court of Justice

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Court of Human Rights", *HRLJ* 19 (1998), 30 et seq.; P. Mahoney, "Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin", *HRLJ* 11 (1990), 57 et seq.

51 Cinneide, see note 19, 1.

52 See Walker, see note 28, 329.

(ECJ) when it comes to the protection of human rights.[53] Until the EU accedes to the ECHR, as stipulated in the Lisbon Treaty,[54] the coordination between the two European transnational courts will continue to be based on mutual dialogue, and mainly on the ECJ's endeavour to align its case law to the Strasbourg jurisprudence.[55] Aware that the ECtHR's case law is a benchmark against which the legitimacy of EU law is measured, the ECJ frequently cites ECtHR's judgments and treats them with deference. Nevertheless, there has been a tendency to

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53 See J. Fudge, "Constitutionalizing Labour Rights in Europe", in: T. Campbell/ K.D. Ewing/ A. Tomins (eds), *The Legal Protection of Human Rights. Sceptical Essays*, 2010, 244-267, (264).

54 See article 6 para. 2 of the Treaty on European Union, as amended by the Lisbon Treaty, which holds that "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." Although the EU is not yet a member of the ECHR, the Strasbourg Court has affirmed its jurisdiction to examine whether Member States violate the Convention when implementing EU law. Holding that the Member States cannot free themselves from their obligations under the Convention by transferring powers to an international organization, the ECtHR has, however, taken into account the interest in international cooperation by limiting its standard of review to sanctioning manifest deficiencies of EU acts (see the famous judgment ECtHR App. No. 45036/98 *Bosphorus Hava Yollari Turizm v. Ireland,* ECHR 2005-VI; the Court seems to be willing to adopt this deferential standard of review with regard to international organisations that provide for a system of human rights protection which, from a substantive and procedural point of view, is equivalent to that under the Convention, a condition the Court deemed fulfilled by the EU).

55 The relationship between the EU and the ECHR is not a one way street; see e.g. ECtHR App. No. 28957/95 *Christine Goodwin v. the United Kingdom*, ECHR 2002-VI, in which the ECtHR referred to article 9 of the Charter of Fundamental Rights of the European Union ("Charter" or "EU Charter"), *Official Journal of the European Union* 2007/C 303/01, which guarantees the right to marry. The Court noted that the said provision deliberately departed from the wording of article 12 ECHR, as it omitted the reference to men and women. Thereafter, the ECtHR adopted a purposive interpretation of article 12 ECHR and found that the impossibility for a transsexual to marry due to the lack of legal recognition of his new sex following gender re-assignment breached the Convention. For an overview of further references to the EU Charter by the ECtHR, see F. Benoît-Rohmer, "Droits fondamentaux. L'Union européenne et les droits fondamentaux depuis l'entrée en vigueur du Traité de Lisbonne", *RTDE* 47 (2011), 145 et seq. (157 et seq.).

view the ECJ's rulings in the sphere of human rights with suspicion. The opinion is not uncommon that the judicial guardians of an initially economically inspired treaty lack the institutional competence and sensitivity to deal with human rights issues and will be prone to subordinating fundamental rights to economic interests. The Irish abortion saga is the most telling example in this respect. Ireland's virtually absolute protection of the life of the unborn child came under the scrutiny of both the ECtHR and the ECJ. Each Court approached the issue from a different perspective, reflecting the different functions of the ECHR and the EU. In *Open Door Well Woman*,[56] the ECtHR found that the absolute ban on informing Irish women about abortion and on British medical facilities carrying out terminations of pregnancies infringed freedom of expression, guaranteed in article 10 of the Convention. In *Grogan*,[57] by contrast, the ECJ approached the issue from the vantage point of freedom to provide services, one of the four fundamental economic freedoms enshrined in the EU Treaty.[58] Considering abortion as a medical service, the Court found that it also protected the potential recipients of the service (i.e. the pregnant women). By contrast with the Advocate General's opinion, it did not hold, however, that the freedom to receive a service implied a freestanding right to receive information. Instead, it side-stepped the issue in holding that the case at hand was beyond the reach of EU law because the information was disseminated by students, a source unconnected with the service provider (i.e. the British medical facilities). Both international rulings fuelled controversy within Ireland; however, the ECtHR's judgment, although finding a violation, was far less fiercely disputed than the ECJ's finding that it lacked competence to decide the issue.[59] Envisaging abortion through

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56 ECtHR App. No. 14234/88 *Open Door Counselling Ltd and Dublin Well Women Centre Ltd and others v. Ireland*, Series A 246 A 1992.

57 ECJ Case C-159/90 *SPUC v. Grogan* (1991) ECR I-4685.

58 Article 56 of the Treaty on the Functioning of the European Union (TFEU).

59 For commentaries and criticism of the *Grogan* case, see D. Rossa Phelan, "The Right to Life of the Unborn v. the Promotion of Trade in Court of Justice and the Normative Shaping of the European Union", *Modern Law Review* 55 (1992), 670 et seq.; id., *Revolt or Revolution. The Constitutional Boundaries of the European Community*, 1997; J. Coppel/ A. O'Neill, "The European Court of Justice: Taking Rights Seriously?", *CML Rev.* 29 (1992), 669 et seq.; D. Curtin, "Case C-159/90, Society for the Protection of the Unborn Child (Ireland) Ltd v Grogan and others", *CML Rev.* 29 (1992), 585 et seq.

an economic prism prompted charges that the ECJ did not take fundamental rights seriously and used them as a means to further economic interests.[60] The conflict was finally settled with an additional protocol to the Maastricht Treaty exempting Irish abortion policy from EU law.[61]

Interestingly, it was the Luxembourg Court's reasoning and methodology in *Grogan* rather than the outcome that triggered resistance. By contrast with the ECtHR, the ECJ lacks general jurisdiction to decide whether Member States' actions are consistent with human rights. It can only assess whether this is the case in the sphere of EU law.[62] Scrutinizing whether national law unduly inhibits the free movement of goods, persons, capital or services is, however, a core competence of the ECJ. The Court's mission as a guardian of the single market implies that the four freedoms form the starting point of the analysis, and that human rights (such as the right to life or freedom of expression) are considered as exceptions to the four market freedoms. This approach has been perceived as placing fundamental rights "on the defensive", relegating them to second place with respect to economic freedoms. It is, however, important to note that fundamental rights can be invoked at the level of the exceptions to the market freedoms as either a "shield" or as a "sword". In the first case, the Member State invokes the human right as a justification for the limitation of a market freedom, as Ireland did in relying on the right to life of the unborn child to prohibit information about abortion services outside Ireland. In the second case, the bearer of the fundamental market freedom argues that the state's action infringes both a free movement guarantee and a fundamental right. Accordingly, the students in *Grogan* based their argument not only on the free movement of services but also on freedom of expression.[63]

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60 See the references under note 59.

61 The Protocol is reproduced *verbatim* in the Lisbon Treaty, see Protocol 35 to the Treaty on European Union. According to this Protocol, "[n]othing in the Treaties (…) shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."

62 See article 51 para. 1 of the EU Charter.

63 For another well-known case, see ECJ Case C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* (2002) ECR I-6279. In this case, the ECJ found that the removal from the United Kingdom of a Filipino woman, married to a British citizen, for the sole reason that she had breached national immigration rules was a disproportionate restriction of the right to family life (article 8 ECHR). The Court held that the case was within the ambit of EU law, as Mr. Carpenter, who ran an advertising

The possibility of both synergies and conflicts between fundamental rights and market freedoms has given rise to fears that the ECJ would readily rely on fundamental rights so as to strengthen economic integration, whilst being reluctant to let human rights concerns trump economic interests. Cases in which the ECJ struck the balance between competing rights in favour of fundamental rights have thus received greater approval than those in which economic freedoms prevailed. The judgments *Omega*[64] and *Schmidberger*,[65] on the one hand, and *Viking*[66] and *Laval*,[67] on the other hand, illustrate this claim.

In *Omega,* the Court accepted that Germany's prohibition of a "playing at killing" game (named Laserdrom) which entailed simulated shooting at human figures was a legitimate restriction of free movement of goods and services, as it was aimed at protecting human dignity. The Court reached this conclusion although few other national constitu-

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agency, often travelled to other Member States for professional reasons, whilst his wife was caring for his children. Based on this reasoning, the ECJ found that Mrs Carpenter's removal would hinder Mr. Carpenter's freedom to provide services and that the restriction to this right had to be interpreted in the light of fundamental rights, including article 8 ECHR. The Court's ruling, which is based on a very tenuous link with an economic freedom, can in our view be read as the Court's genuine concern for the fundamental rights of a foreigner. Nevertheless, some commentators have referred to it as exemplifying that the Luxembourg Court does not protect fundamental rights for the sole sake of the individual but only to the extent that the latter is useful from an economic point of view (see e.g. J.P. Müller, "Koordination des Grundrechtschutzes in Europa – Einleitungsreferat", *RDS II* 9 (2005), 26 et seq.).

64 ECJ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* (2004) ECR I-9609. For an analysis, see e.g. J. Morijn, "Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution", *ELJ* 12 (2006), 15 et seq.

65 ECJ Case C–112/00 *Schmidberger v. Austria* (2003) ECR I–5659. For a commentary, see e.g. A. Biondi, "Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights", *European Human Rights Law Review* 9 (2004), 51 et seq.; Morijn, see note 64; C. Brown, "Case-note: Schmidberger", *CML Rev.* 40 (2003), 1499 et seq.

66 ECJ Case C-438/05 *Seaman's Union (FSU) v. Viking Line* (2007) ECR I-10779.

67 ECJ C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* (2007) ECR I-11767.

tions explicitly protected human dignity as a freestanding right and afforded it as stringent protection as the German Basic Law. The ECJ granted the Member States some leeway, since,

> "the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another."[68]

Recalling that fundamental rights form part of EU law, the Court held that their protection was a legitimate interest which could justify restrictions of the fundamental freedoms. The protection of human dignity was thus compatible with the EU legal order. The fact that states other than Germany did not enshrine human dignity as a freestanding human right and granted it less stringent protection was immaterial: the ECJ held that,

> "[i]t is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected."[69]

The ECJ confirmed this reasoning in a case handed down in 2010,[70] in which it mentioned moreover that the EU was to respect the national identity of the Member States.[71]

In *Schmidberger*, the ECJ borrowed from the famous margin of appreciation doctrine of the ECtHR and held explicitly that states were afforded discretion when relying on fundamental rights to justify restrictions to free movement guarantees. Although the Court was un-

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68 ECJ *Omega*, see note 64, para. 31.

69 Ibid., para. 37.

70 Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* of 22 December 2010 (nyr) in which the Court admitted that the Austrian law on the abolition of nobility was a sufficient public policy justification to limit the right to free movement by refusing to recognise the full name of a citizen from another Member State. The Court held that the Austrian law expressed the more general principle of equality before the law of all Austrian citizens, which was also a general principle recognised within the EU legal order (paras 88-89). Quoting *Omega,* the ECJ expressed its willingness to grant the national authorities a margin of discretion and confirmed that diverging conceptions among the Member States did not prevent a fundamental right from being successfully invoked as a public policy exception (paras 87 and 91).

71 ECJ *Ilonka Sayn-Wittgnstein*, see note 70, para. 92.

willing to subscribe to the view that fundamental rights enjoyed a preferred position *vis-à-vis* economic freedoms, it found that freedom of expression and assembly, trumped free movement concerns in the case at hand. Austria had thus not infringed free movement of goods in allowing peaceful demonstrations against environmental pollution to obstruct the traffic on the Brenner Pass.

The Court's approach was far less deferential in *Viking* and *Laval*. This time, the scales of the balance tipped in favour of economic freedoms. In both cases, coercive actions taken by trade unions in old Member States with a strong tradition of social rights (Sweden and Finland) with the aim of protecting their members against competition from inexpensive labour from new Member States (Latvia and Estonia) were deemed disproportionate. By contrast with *Schmidberger* and *Omega*, *Viking* and *Laval* met with strong scepticism and have been contrasted with the ECtHR more protective stance towards labour rights.[72]

The analysis of human rights concerns at the level of exceptions to economic freedoms, and the perception of the ECJ as a Court mainly concerned with economic integration, makes it vulnerable to charges of a neoliberal bias or of an instrumentalist use of human rights.[73] The fact that within the framework of EU law, the economic freedoms are the main focus of analysis, and human rights can only be accommodated via the exception clauses, gives rise to the suspicion of axiological priority between both sets of norms: economic rights are viewed as coming first, whereas human rights are relegated to second place.[74] Moreover, as the *Grogan* case illustrates, the economic language employed by the Court

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72 See e.g. Fudge, see note 53, 260 et seq.

73 See e.g. Coppel/ O'Neill, see note 59; in a similar vein, Alston, see note 4, 823, referring to L. Besselink, "Case Note", *CML Rev.* 38 (2001), 437 et seq. (454).

74 For a criticism of construing fundamental rights as exceptions to market freedoms, see Morijn, see note 64, 39 et seq.; Brown, see note 65; Müller, see note 63, 15; for a more general claim according to which in case of conflicts between rights, the right which is considered at the level of derogations is placed at a disadvantage, see E. Brems, "Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms", *HRQ* 27 (2005), 294 et seq. (305); O. De Schutter/ F. Tulkens, "Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution", in: E. Brems (ed.), *Conflicts Between Fundamental Rights*, 2008, 169-216, 190.

fails to attract support in sensitive matters.[75] Viewing abortion mainly

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[75] The economic language is more evident in the Advocate General's opinion. He first affirmed that abortion was a "service" in the sense of the EU Treaty and that the free movement of services provision protected not only the service provider but also the recipient. He then raised the question whether the information at issue fell within the ambit of the fundamental freedom. He answered in the affirmative, holding that: "In the judgment in GB-Inno-BM the Court emphasized, in connection with offering goods for sale, the interest of consumer information. It stated (in para. 8) that consumers' freedom to shop in another Member State is compromised if they are deprived of access in their own country to advertising available in the country where purchases are made. I can see no reason why the position should be otherwise with regard to information provided about a service: individuals' freedom to go to another country in order to receive a service supplied there may also be compromised if they are denied access in their own country to information concerning, in particular, the identity and location of the provider of the services and/or the services which he provides." (para. 18, internal footnotes omitted). "19. In my view, the answer given also holds good where the information comes from a person who is not himself the provider of the services and does not act on his behalf. The freedom recognized by the Court of a recipient of services to go to another Member State and the right comprised therein to access to (lawfully provided) information relating to the services and the provider of those services ensue from fundamental rules of the Treaty to which the most extensive possible effectiveness must be given. As a fundamental principle of the Treaty, the freedom to supply services must – subject to limitations arising out of imperative requirements or other justifying grounds, which I shall discuss later – be respected by all, just as it may be promoted by all, inter alia by means of the provision of information, whether or not for consideration, concerning services which the provider of information supplies himself or which are supplied by another person." Thereafter, the Advocate General turned to the question whether free movement of services applied to non-discriminatory restrictions. In support of his affirmative answer, he held that: "To allow measures which are non-discriminatory but detrimental to intra-Community trade in services to fall a priori outside the scope of Article 59 of the EEC Treaty would detract substantially from the effectiveness of the principle of the free movement of services, which in an economy in which the tertiary sector is continuing to expand will increase in importance. It would also give rise to an undesirable divergence between the Court's case-law on trade in goods and that on trade in services in situations in which only the service or the recipient of the service crosses the internal frontiers of the Community and which do not genuinely differ from situations in which goods or purchasers cross frontiers, and in situations in which services, for instance in the financial sector, are frequently presented as 'products'. (para. 20). 21. My conclusion is, therefore, that na-

in terms of a service has been seen as trivialising basic human rights concerns. Issues which would be considered by a constitutional or a human rights court, including women's rights to privacy and the right to receive information on health, received no mention in the ECJ's ruling. The Luxembourg Court thus neglected the expressive function of the law in *Grogan,* as it failed to explain to what extent EU law encapsulated more than mere economic concerns.[76] The ECJ's consequent reasoning in the Irish abortion case contrasts with more recent case law in the field of free movement of persons and European citizenship. Stressing the importance of EU-citizenship as the "fundamental status of nationals of the Member State",[77] the Court has progressively decoupled free movement from the pursuit of an economic activity in another Member State, interpreting residence and free movement rights as basic entitlements inherent in the citizenship status.[78] The incorporation of the EU Charter of Fundamental Rights in the EU legal order through the Lisbon Treaty may accelerate the departure from a predominantly economic focus of the European integration project,[79] leading to further rapprochement and fusion between the four basic economic freedoms (some of which are enshrined in the Charter[80]) and fundamental rights.

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tional rules which, albeit not discriminatory, may, overtly or covertly, actually or potentially, impede intra-Community trade in services fall in principle within the scope of Articles 59 and 60 of the EEC Treaty."

76 On the claim that the fundamental freedoms enshrine values other than merely economic ones, see J.H.H. Weiler/ N.J.S. Lockhart, "'Taking Rights Seriously' Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence", *CML Rev*. 32 (1995), 579 et seq. (597 et seq.) and G. de Burca, "Fundamental Human Rights and the Reach of EC Law", *Oxford Journal of Legal Studies* 13 (1993), 283 et seq. (298 et seq.).

77 ECJ Case C–184/99 *Rudy Grzelczyk v. CPAS* (2001) ECR I–6193.

78 For an analysis of this trend, see F. Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration", *ELJ* 17 (2010), 1 et seq.; M. Hertig Randall, "Der Schutz von Grundrechten und individuellen Freiheiten in der Europäischen Union aus schweizerischer Sicht", *Revue de Droit Suisse* Vol. I, 126 (2007), 487 et seq. (499 et seq.).

79 See in particular the recent Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)* of 8 March 2011 (nyr), including the opinion of Advocate General Sharpston of 30 September 2010.

80 See article 15 para. 2 of the Charter, which enshrines the freedom of every EU citizen "to seek employment, to work, to exercise the right of establishment and to provide services in any Member State." This provision

4. Insights for the WTO

A development similar to that outlined for the EU is very unlikely to occur within the WTO, the purpose of which is far more modest than that of European integration. Nevertheless, the interplay between the EU and the ECHR offers some insight as to the relationship between the international human rights regime and the multilateral trading system.[81] Firstly, owing to its economic mandate, the legitimacy of the WTO in the field of human rights is very likely to be less than that of international human rights bodies. Trade experts adjudicating human rights issues will be viewed with scepticism.[82] There will be concerns that they are structurally biased and "see every policy [including human rights] as a potential trade restriction."[83] When human rights claims are raised within the dispute settlement system of the WTO, the legitimacy of the rulings will also depend on Panels deferring to rulings of human rights bodies. Secondly, as human rights concerns within the WTO

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forms part of a broader guarantee of economic liberty, referred to below Section IV. 2. b.

81 On the benefits and limits of a comparative analysis between the EU and the WTO, see S. Zleptig, *Non-economic objectives in WTO Law: Justification provisions of GATT, GATS, SPS and TBT Agreements*, 2010, 7 et seq., which includes a comparative section on human rights at 199 et seq. For other comparative studies between the EU and the WTO, see F. Ortino, *Basic Legal Instruments for the Liberalisation of Trade. A Comparative Analysis of EC and WTO Law*, 2004, 2 et seq.; J.H.H. Weiler, "Cain and Abel – Convergence and Divergence in International Trade Law", in: id. (ed.), *The EU, the WTO and the NAFTA. Towards a Common Law of International Trade*, 2000, 1 et seq.; G. Búrca/ J. Scott (eds), *The EU and the WTO. Legal and Constitutional Aspects*, 2000.

82 See e.g. Kinley, see note 2, 75; Cleveland, see note 2, 258, holding that due to the WTO's institutional competence, "any balancing of trade and human rights concerns that is conducted by that body is likely to undervalue human rights norms"; G.B. Dinwoodie, "A New Copyright Order: Why National Courts Should Create Global Norms", *University of Pennsylvania Law Review* 149 (2000), 469 et seq. (508) (criticising the insufficiently inclusive perspectives of the WTO dispute settlement proceedings and the "trade-blinkered positions" which national governments also tend to adopt in the WTO).

83 M. Koskenniemi, "International Law: Between Fragmentation and Constitutionalism", 2006, 5, <http://www.ejls.eu/1/3UK.htm>; on the structural bias of international bodies, see id., *From Apology to Utopia. The Structure of International Legal Argument*, 2005, 600 et seq.

framework, like in EU law, are most easily accommodated at the level of the exception clauses, the perception of an economic bias is hard to refute. Not surprisingly, treating human rights as mere defences in trade disputes has already given rise to concerns.[84] It has been argued that this approach entails the idea of a "presumption of guilt", as "human rights norms might too closely be associated with restrictions to trade."[85] Thirdly, rulings ignoring human rights defences advanced by Member States or subjecting them to exact scrutiny risk fuelling substantial controversy. Fourthly, if a human right is invoked "as a sword", e.g. in support of the complainant state, purely economic analysis may prompt the charge of an instrumentalist use of human rights, as it fails to take into account the expressive function of the law. The adjudicative branch of the WTO would thus need to approach freedom of speech issues not only from an economic vantage point. It would also need to take into account the point of view of free speech theory prevalent in the rulings of constitutional and human rights courts. As will be shown in the following section, there is some convergence between these approaches, explaining the jurisdictional overlap between trade and human rights regimes.

III. Free Speech Functions and Values

1. Economic Perspective

An economic perspective helps to explain why free speech issues are a relevant concern for free trade regimes and have led to jurisdictional overlap within the EU, as the *Grogan* case has shown. Economists have stressed the impact of speech on the functioning of markets (a.), providing utilitarian rationales for both the constitutional protection and the

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84 See e.g. Harrison, see note 2, 215 et seq.; the High Commissioner for Human Rights' Report on GATS, see note 5, also points out the difference between a human rights approach and the treatment of human rights at the level of exceptions in international trade law, holding that "a human rights approach would place the promotion of human rights at the centre of the objectives of GATS rather than as permitted exceptions." It concludes, however, that "these links nonetheless provide an entry point for a human rights approach to liberalization and a means of ensuring that the essentially commercial objectives of GATS can be implemented with respect for human rights" (para. 63).

85 Harrison, see note 2, 215.

regulation of expression. As speech can be produced and sold, it is viewed from the economic vantage point as a service or a commodity. The "speech market", however, differs from the market of other commodities in important ways (b.). Its specificities need to be taken into account when assessing the need for constitutional protection and regulation (c.).

a. The Impact of Speech on the Functioning of Markets

Economists have highlighted the importance of speech in the functioning of markets since the 1960s.[86] If consumers lack adequate information, or have to spend excessive amounts of time or money searching for it, their purchasing decisions do not lead to the optimal allocation of resources. Insufficient information, both from the quantitative and qualitative point of view, has thus been recognised as giving rise to market failures. The school of information economics highlights the role of advertising (also termed "commercial speech") as an important source of consumer information. Advertising, however, owing to its one-sided nature, is an insufficient source of information and may, if false or misleading, exacerbate informational deficiencies. The theory of information asymmetry holds that producers and sellers are generally better informed about products or services than consumers, which adversely affects the functioning of markets. In extreme cases, it may fundamentally undermine the trust in the trading partners and cause the market to collapse.[87] The more difficult it is for consumers to check for themselves relevant product characteristics before purchase, the more pervasive informational asymmetries are. When it comes to production and process methods (including, for instance, the respect for environmental or labour standards), consumers are heavily dependent on the information provided by the seller or manufacturer, who may, however, have no economic incentive to make it available. Moreover, the geographical distance separating producers and consumers, and the differ-

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86 See the seminal article by G.J. Stigler, "The Economics of Information", *Journal of Political Economy* 69 (1961), 213 et seq.; the best known representatives of this school are Joseph E. Stiglitz, George Akerlof and Andrew Michael Spence. They were awarded the Nobel Prize in Economics in 2001. For an overview of the school of information economics, see e.g. J.P. Mackaay, *Economics of Information and Law*, 1980.

87 See the famous article by G.A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism", *Quarterly Journal of Economics* 84 (1970), 488 et seq.

ences between national product and production standards, make it even more difficult for consumers to assess the qualities of commodities, not to mention the growing complexity and diversity of products and services. Technological progress and economic globalisation thus further enhance the informational advantages of producers and sellers over consumers. For this reason, a well-functioning global economy depends not only on the free movement of goods and services across frontiers, but also on the free flow of information about their characteristics and production methods. As the American free speech specialist Lee C. Bollinger has argued, in a globalised economy, free speech violations occurring in one country also affect citizens in other states.[88] Political repression of the domestic media reporting health hazards of certain products, questioning the viability of the financial sector, or decrying corruption of the state apparatus impact on both the political and the economic sphere. Therefore, both the free marketplace of goods and services and the free marketplace of ideas ought to be of concern for the WTO.[89] Interestingly, highlighting the specificities of the speech market, some scholars have argued that economic approaches to regulation (e.g. public choice theory) provide a stronger reason for according constitutional protection to freedom of speech than to economic freedom (including the right to trade).[90]

b. The Specificity of the Speech Market

The starting point of economic approaches arguing for a higher level of protection of speech than economic activity[91] is that unlike most commodities, information is not a private but a public good. This property

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88 "Columbia President Says First Amendment Should be Global", 4 May 2010, The Epoch Times, <http://www.theepochtimes.com>.

89 Ibid.

90 The following section draws on M. Hertig Randall, "Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?", *Human Rights Law Review* 6 (2006), 53 et seq. (82 et seq.) and id., "La société civile face à la société commerciale: quelques réflexions sur la liberté d'expression dans un contexte commercial polities", in: F. Bohnet/P. Wessner (eds), *Droit des sociétés. Mélanges en l'honneur de Roland Ruedin*, 2006, 477 et seq. (482 et seq.).

91 See mainly D. Farber, "Commentary: Free Speech Without Romance: Public Choices and the First Amendment", *Harv. L. Rev.* 105 (1991), 554 et seq.

entails that information is generally under-produced.[92] Since it can be shared and disseminated at a low cost, it tends to benefit not only the paying customer but also third parties. The beneficiaries of information thus have an incentive to "free-ride". From this perspective, intellectual property rights (IPRs) are a means to counter free-riding and to encourage the production of information. Nevertheless, producers cannot translate all the social benefits flowing from the distribution of information into personal gain and, therefore, lack the motivation to produce as much information as would be socially optimal. For the same reason, they have less incentive to oppose censorship of information than to challenge governmental regulations on goods other than information. With regard to lobbying efforts from recipients of the information, the free-riding problem exacerbates the general ineffectiveness of consumer pressure groups as compared with other special interest groups. Government will thus be inclined to yield to demands for restrictions on information. In summary, information tends to be both under-produced by the market and over-regulated by the state. Elevating freedom of expression to a fundamental right can thus be understood, under public-choice theory, as an attempt to counteract these problems.

These general considerations do not apply to the same extent to all speech, as the public good features can be more or less pronounced depending on the type of expression at issue. At one end of the spectrum lies information, which, like that contained in the medical file of a patient, is of little use to anyone other than the recipient. Whilst such information has predominantly private goods characteristics, political speech lies at the other end of the spectrum. It is, in Farber's words, a "double" public good. Firstly, the information conveyed through political speech has the characteristics of a public good for the reasons described above. Secondly, political participation can be considered as an-

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92 The characteristics of public goods are their non-rivalry and non-excludability. The first property entails that the consumption of the good by one person does not preclude consumption or simultaneous use by others, and the second refers to the impossibility (or excessive difficulty) of excluding others from using the public good. By contrast with most consumer goods, which are private goods, clean air, for instance, is a public good: it is non-rivalous, since it is available to everybody, in as much as one person's use of clean air does not preclude others from breathing clean air simultaneously; it is non-excludable, as it would be virtually impossible to limit the use of clean air to those willing to pay for it, and to exclude people unwilling to pay for clean air (by shouldering the costs of anti-pollution policies) from its benefit.

other public good; indeed, as the influence of a single vote is marginal, individuals will generally benefit from a certain policy independently of whether they supported it or not. Since citizens can "free-ride" on the political engagement of others, they are also less inclined to seek information on public affairs and to oppose governmental restrictions on information.

Commercial speech lies on the spectrum somewhere between purely private and political speech. It has the characteristics of a "weak" public good. Although, unlike the information contained in a medical file, it is generally directed at the public at large, it resembles a private good in as much as advertising increases the speaker's turnover. Most of the benefits of the information thus accrue to the producer. The direct profit motive means that the market for advertising is entirely dependent on the market for the commercialised product or service. In that sense, advertising has been described as a complementary product to the main commodity, entirely financed through sales revenues. It is the wholly ancillary nature of commercial speech,[93] and its direct profit motive, which distinguishes it from other types of information with more pronounced public good characteristics. Although filmmakers and authors may also pursue an economic interest, unlike commercial speech, their work does not have the advantage of being financed through the profits of a main commodity. This explains why they are much more dependent on state subsidies than advertising.

The commercial speaker's direct profit motive offers an incentive to producers and sellers to provide consumers with some, but not all, the relevant information. Although any advertisement contains some incompressible element of information, and therefore has some utility to consumers, it fails to provide information not directed to further sales, let alone unfavourable facts.[94] Owing to the inherent bias of advertising, the functioning of markets relies on other information sources, such as

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93 See N. Kaldor, "The Economic Aspects of Advertising", *Review of Economic Studies* 17 (1950), 1 et seq.

94 Economists hold that the incentives to disseminate negative information about competitors' products via comparative advertising are limited, see e.g. R. Pitofsky, "Beyond Nader: Consumer Protection and the Regulation of Advertising", *Harv. L. Rev.* 90 (1977), 661 et seq.; R. Posner, "Free Speech in an Economic Perspective", *Suffolk University Law Review* 20 (1986), 2 et seq. (40).

the media,[95] scientific reports, consumer organisations and other NGOs. As it lacks the direct profit motive characteristic of commercial speech, such "non commercial information" will be under-produced as compared with advertising. Moreover, producers of non-commercial information will be less inclined to oppose speech-restrictive measures than commercial speakers. Producers and sellers, by contrast, will generally have a strong incentive to refute and seek suppression of statements detrimental to their commercial interests. Moreover, their speech is less likely to be chilled through governmental regulation than non-commercial expression. Put differently, on the speech market, commercial speech has a competitive advantage over non-commercial counter-speech. This imbalance needs to be taken into account when expression is constitutionally protected and regulated.

c. Implications for the Protection and Regulation of Speech

Several regulatory strategies are aimed at addressing deficiencies of the speech market caused by the public good characteristics of information and at combating "informational failures" of the marketplace of goods and services. Disclosure requirements and subsidies to consumer organisations are aimed at increasing the creation and dissemination of under-produced information. As already mentioned, entrenching freedom of speech in constitutions can be viewed from an economic perspective as a strategy to counter the danger of overregulation, resulting in the suppression of socially beneficial speech. Under the utilitarian framework typical of economic analysis, constitutional protection of freedom of speech does not entail free speech absolutism but is aimed at ensuring that free speech interests receive sufficient weight on the scales when balanced against competing interests.[96] Based on a cost-benefit-analysis characteristic of utilitarian approaches, the suppression of speech is justified if the harm the expression does is likely to outweigh

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95 The dependency of the media on commercial advertising entails the risk that the media are reluctant to publish speech critical of market players or their products, see e.g. E.C. Baker, *Advertising and a Democratic Press*, 1994, in particular Chapter 2; L. Soley, *Censorship, Inc,: The Corporate Threat to Free Speech in the United States*, 2002.

96 According to this vision, rights are particularly important interests which can be outweighed but count for more than other interests in utilitarian calculations. See J. Waldron, "Introduction", in: id., *Theories of Rights*, 1984, 15 which contains an outline of competing theories of rights.

its potential benefits.[97] Considering the difficulties in assessing the harms and benefits of speech, error costs need to be included in the analysis. Owing to information asymmetries between producers and consumers, these costs are likely to be higher for non-commercial sources like consumer magazines. Unlike manufacturers and sellers, they generally have less information about product characteristics and manufacturing processes and will find it more difficult than producers to counter charges of making false or misleading statements. Due to the bigger error costs, the risk of the suppression of socially valuable speech is thus higher for non-commercial statements. The fact that non-commercial speech is more likely to be chilled than commercial speech reinforces this conclusion. Put differently, allowing some false or misleading statements is the price to be paid for avoiding self-censorship of truthful speech. The error costs and the chilling effect of speech regulation underscore the complexity of assessing whether the suppression of speech in a given case is justified. Both factors argue for caution. When faced with non-commercial statements, there are good reasons to tip the balance in favour of free speech.

2. Free Speech Theory

The previous section has shown that the functioning of markets depends on sufficient information, both from commercial and non-commercial sources. Whilst market transparency calls for regulation of expression, the specificities of the speech market justify according free speech constitutional protection, which tilts the scales in favour of free speech concerns. Protecting free speech based on welfarist considerations is an unusual way to approach freedom of expression. Human rights advocates are bound to retort that fundamental rights are valuable *per se* and not for the sake of economic efficiency. Free speech theory, however, shows a more complex picture, and illustrates the more general problem that little consensus exists about the foundations of human rights. Behind the simple statement that human rights are entitlements which every human being holds by virtue of the sole fact of being human lurks the problem of the indeterminate nature of these rights.[98] As regards free speech, political philosophers have advanced a

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97 See e.g. Posner, see note 94.

98 On the indeterminate nature of human rights, see e.g. J. Griffin, *On Human Rights*, 2008, 9 et seq.; M.K. Addo, *The Legal Nature of International*

range of competing theories highlighting different rationales for the protection of the right to free expression.[99] Protecting dissent,[100] furthering tolerance,[101] facilitating the peaceful evolution of society,[102] and checking the abuse of power[103] have been considered important free speech functions.

The following section will not consider all of them. It will briefly sketch the three most prominent rationales for the protection of freedom of expression, which are arguments based on autonomy (a.), democracy (b.) and truth (c.). The purpose of this overview is twofold: firstly, it is aimed at showing that free speech theorists have defended freedom of expression both as a means and as an end.[104] The opposition between economic approaches and philosophical arguments is thus less pronounced than often assumed. Secondly, the analysis will show the extent to which existing justifications for free speech lead to results similar to those of the economic approach sketched above, and are relevant for the functioning of markets.

a. The Argument from Autonomy

From a human rights perspective, the argument from autonomy is the most obvious justification of freedom of expression. It is directly linked to the foundational value of human rights, to human dignity, i.e. the intrinsic worth of every member of the human family.[105] In the Western tradition, dignity is grounded on autonomy, meaning the ability of persons endowed with reason[106] to form their own conception of a

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Human Rights, 2010, 19-81; for an overview of various foundations of human rights, see J.J. Shestack, "The Philosophic Foundations of Human Rights", *HRQ* 20 (1998), 201 et seq.

99 For an analysis of free speech theory, see mainly F. Schauer, *Free Speech: A Philosophical Inquiry*, 1982; E. Barendt, *Freedom of Speech*, 2005.

100 S. Shiffrin, *Dissent, Injustice and the Meaning of America*, 1999.

101 L.C. Bollinger, *The Tolerant Society*, 1986.

102 See T.I. Emerson, "Toward a General Theory of the First Amendment", *Yale L. J.* 72 (1962-1963), 877 et seq., who also relies on other free speech values.

103 V. Blasi, "The Checking Value in First Amendment Theory", *American Bar Foundation Research Journal* 72 (1977), 521 et seq.

104 This expression is inspired by the famous concurring opinion of Justice Brandeis in *Whitney v. California,* see below note 149.

105 Cf. the Preamble of the UDHR.

106 See article 1 of the UDHR.

worthwhile life and to pursue it.[107] Respecting people's dignity thus entails treating them as normative agents, i.e. as "self-deciders", or in Rousseauist and Kantian terms, as "self-legislators."[108] This vision of autonomy does not necessarily call for the protection of a general right to liberty, but for the freedom to define one's conception of a worthwhile life and to pursue it, within the limits of the same freedom granted to all. Accordingly, international human rights instruments do not protect a general right to liberty. They focus on specific rights considered particularly relevant for moral agency and, as history has shown, are at a high risk of being infringed.[109] Both conditions are fulfilled for free speech. Censorship of unpopular ideas has marked the history of humankind and given rise to vindications of freedom of expression as a right constitutive of normative agency. Forming and pursuing one's conception of a worthwhile life requires the capacity for critical reflection, which is inconceivable without language, deliberation and exchange with others. In that vein, Kant argued that the Enlightenment, defined as "man's emergence from his self-incurred immaturity",[110] required one to make public use of one's reason. Persons acting as "self-deciders", moreover, need sufficient information about available options. In that sense, freedom of expression has been described as a condition for the exercise or enjoyment of other human rights. Information about contraceptives or abortion facilities, for instance, enables women to exercise their right to privacy and is connected to their right to health. Taking another example, information about contents and production methods of food may be necessary for the exercise of freedom of religion, since many religious beliefs require respect for dietary practices. As these examples show, even if one takes a narrow view of autonomy and limits it to those choices most relevant to forming and pursuing a conception of a good life (which would not extend to all consumption choices), the free flow of information about products and services is in many instances a condition of normative agency.[111]

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107 Griffin, see note 98, 152 et seq.

108 See Griffin, see note 98, 157.

109 See e.g. A. Dershowitz, *Rights from Wrongs*, 2005.

110 I. Kant, "An Answer to the Question: 'What is Enlightenment'", 1874.

111 For a narrow view of autonomy, see Griffin, see note 98, 239 et seq., who defines the scope of freedom of expression as "freedom to state, discuss, and debate anything relevant to our functioning as normative agents." For broader views, see e.g. R. Dworkin, *Freedom's Law. The Moral Reading of the American Constitution*, 3rd edition, 1999, 200; M. Redish, "Self-

b. The Argument from Democracy

The argument from democracy is closely linked to the argument from autonomy, stressing people's status as "self-legislators" and "self-governors", e.g. their right to participate, directly or indirectly in public affairs and in the elaboration of rules they are subject to. Nevertheless, it is generally considered an instrumentalist defence of free speech, as it views freedom of expression as a means to guarantee democratic self-government, considered a public, and not just a private interest.

The argument from democracy places debates and the flow of information on matters of public concern at the heart of freedom of expression. It calls for strong protection of the media and other institutions of civil society (such as associations and NGOs) which inform the citizenry, check and criticise those in power and shape public opinion on matters relevant to collective self-determination. Moreover, under the argument of democracy, the protection of minority views is crucial for several reasons. Firstly, it gives minorities the sense of co-authorship and inclusion. When outvoted, the chance of having had the opportunity to voice one's concerns and to retain the ability to do so with a view to changing existing laws and policies is essential. Secondly, vigorous protection of non-conforming, dissident opinions is crucial for the fairness of the political process. It prevents current majorities from blocking the channels of communication and from insulating themselves against criticism. Highlighting the high risk of wrongly suppressing political speech because of the self-interest and partisan bias of power-holders, and the danger of chilling political speech, free speech theorists' concern with democracy also explains their willingness to protect not only non-conformist, but also some false speech, such as defamatory statements about politicians. Whilst the autonomy-based defence does not justify the pre-eminence of freedom of expression when it clashes with other human rights, such as reputational and privacy rights, under the argument from democracy, the public interest in securing uninhibited debate on public matters tilts the scales in favour of free speech.

At first sight, the argument from democracy may seem to have little relevance to speech related to the commercial marketplace. However, although distinct, the commercial and the political spheres increasingly overlap. Consumers regard many purchasing decisions not merely as

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Realization, Democracy and Freedom of Expression: A Reply to Professor Baker", *University of Pennsylvania Law Review* 130 (1982), 678 et seq.

economic acts aimed at satisfying subjective preferences, but view consumption itself as an act of political or moral significance.[112] Various factors have contributed to the politicisation of consumption decisions. For instance, privatisation of formerly public functions has blurred the traditional line between the public and the private sphere[113] and has weakened citizens' ability to both influence and control the exercise of these powers through traditional democratic channels. Under these circumstances, indirect influence through consumption decisions fulfils a compensatory role. Similarly, technical progress and enhanced product complexity have acted as an incentive to "vote with one's dollars" when democratic participation and deliberation are marginalised:[114] increased product complexity and constant technological change have called for more flexible ways of regulation than traditional legislative procedures, fuelling a trend to confer regulatory powers upon private standard-setting bodies or governmental agencies composed to a large extent of experts. Whilst insulation from the ordinary political processes is advantageous in terms of efficiency,[115] it raises difficulties in terms of input legitimacy.[116]

Globalisation compounds these difficulties. As product regulation frequently has spill-over effects on other jurisdictions, diverging national norms act as a barrier to trade, which needs to be addressed on a global level, most prominently within the WTO. Similar to the experience within the EU, the judicial branch of the WTO has played an important role in disciplining national protectionism. At the same time, it favours deregulation, often referred to as "negative integration", giving rise to the need for flanking measures. Such measures of "positive inte-

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112 See e.g. D.A. Kysar, "Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice", *Harv. L. Rev.* 118 (2004), 525 et seq. For a more general analysis of the evolution of consumption, see R. Mason, *The Economics of Conspicuous Consumption: Theory and Thought Since 1700*, 1998.

113 A.C. Aman, "Information, Privacy, and Technology: Citizens, Clients, or Consumers?", in: J. Beatson/ Y. Cripps (eds), *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams*, 2001, 325-348 (332).

114 See Kysar, see note 112, 525 et seq.; A.C. Aman, *The Democracy Deficit: Taming Globalization Through Law Reform*, 2004, 134.

115 See e.g. G. Majone, *Regulating Europe*, 1996.

116 See J.H.H. Weiler, "Epilogue: 'Comitology' As Revolution – Infranationalism, Constitutionalism and Democracy", in: C. Joerges/ E. Vos (eds), *EU Committees: Social Regulation, Law and Politics*, 1999, 339–350.

gration" concern, for instance, the definition and enforcement of minimal labour and environmental standards and the regulation of genetically modified organisms.[117] However, these issues often turned out to be virtually intractable. In this context, citizens use their purchasing power as both a stick and a carrot for economic actors to satisfy certain minimal standards. Typically, many of these standards are not limited to consumer preferences regarding product quality and price but also extend to the way the product is made. These "preferences for processes"[118] frequently reflect visions of justice and fairness traditionally debated in democratic fora. The virulent criticism addressed to big corporations for failing to respect minimal labour and environmental standards is a prominent example of how the roles of citizens and consumers have increasingly been blurred.

Globalisation has also been a context favourable to the rise of big corporations, the financial assets of which may exceed those of small or developing countries and enables these corporations to exert greater influence on the political process.[119] In this context, corporate power needs to be checked no less than state power.[120] Unfair business practices, mismanagement, disregard for environmental and labour standards, the marketing of unsafe products, and the excessive risks taken by financial institutions are clear examples of conduct which ought to be prevented and checked through free speech. Oversight is particularly important for corporations deemed too big to fail, as their difficulties have a strong impact on the financial system, the labour market, social security systems and ultimately on the taxpayer. The social, economic and environmental impact of corporations often calls for political action, making speech on corporate issues clearly a matter of public con-

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117 It comes as no surprise that the question of how a fair balance can be achieved between the interest in international trade and competing interests, pertaining for instance to environmental issues, labour standards, and human rights, has given rise to much controversy. For an overview of these "trade and ... " issues or the "linkage debate", see e.g. the articles published under the heading "Symposium: The Boundaries of the WTO", *AJIL* 96 (2002), 1 et seq.

118 See Kysar, see note 112, 525.

119 See e.g. D. Jackson, "Note: The Corporate Defamation Plaintiff in the Era of Slapps: Revisiting New York Times v. Sullivan", *William & Mary Bill of Rights Journal* 9 (2001), 491 et seq. (492).

120 In favour of greater corporate oversight and accountability, see F. Rigaux, "Introduction générale", *RUDH* No. 13 (special number) (1993), 3 et seq. (15).

cern. These developments are not to be understood as amounting to the claim that consumer decisions are equivalent to citizens' participation in democratic decision-making. As Aman highlights, consumer choice tends to be reactionary, whilst the role of the citizen is more creative, aimed at defining policies which, depending on the view of democracy adopted, implement the common good or accommodate citizens' conflicting interests. Nevertheless, the trends described above imply that consumer choice is frequently the only, albeit imperfect, substitute for citizens' participation. The political dimension of many consumption decisions and the indirect control exercised by corporate power through the consumers thus cannot be denied.

The Canadian Supreme Court eloquently highlighted the blurring of the commercial and the political sphere in a case involving "counter-advertising", e.g. the criticism of a product or a service by a dissatisfied customer (in the case at hand, of an insurance company). The Supreme Court held that "counter-advertising" was not merely a form of speech derived from commercial expression, but "assists in circulating information and protecting the interests of society just as much as does advertising or certain forms of political expression. This type of communication may be of considerable social importance, *even beyond the merely commercial sphere.*"[121] In the same vein, the Court characterised "counter-advertising" as "a form of the expression of opinion that has an important effect on the social and economic life of a society. *It is a right not only of consumers, but of citizens.*"[122]

In conclusion, due to the overlap and interdependence between the political and the commercial sphere, the argument from democracy justifies the protection of expression which from an economic vantage point is considered as contributing to market transparency and the efficient allocation of resources. The same holds true for the third classic defence in favour of freedom of expression, the argument from truth.

c. The Argument from Truth

It is not surprising that the truth-seeking function of freedom of thought and expression has been stressed by a utilitarian scholar. In his famous defence in favour of free speech, John Stuart Mill emphasised

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121 Emphasis added.

122 Emphasis added.

the societal value of freedom of expression.[123] As human beings are partial and fallible, uninhibited debate, reflecting all sides of an argument, is the only means to gain knowledge and for society to progress. Silencing an opinion was thus for Mill not only a private injury to the speaker, but detrimental to the listeners, and to the whole "human race."[124]

As regards the scope of the argument from truth, Mill considered "freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological"[125] as covered by the free speech principle. Although the argument from truth is particularly relevant in the domains mentioned, no reason exists to exclude the commercial sphere. Highlighting the conformist pressures of society, Mill vindicated free speech in particular for unpopular and minority views. Due to the structural imbalance between commercial and non-commercial expression, his defence requires strong protection of non-commercial speakers voicing criticism of commercial practices.

3. Synthesis

This section has outlined the function and values underlying freedom of expression from an economic perspective and from the perspective of classic free speech theory. It has shown that there is common ground between both approaches. Firstly, instrumentalist reasoning, which is typical of economic analysis, is not wholly foreign to classic free speech theory. Under the argument from truth, speech is protected mainly as means; the argument from democracy is not only clearly connected to personal autonomy and dignity, but also considers democracy a collective interest furthered by free speech. Moreover, both rationales protect freedom of speech not only for the speaker's sake but take into account the interest of the listeners, or more broadly, the interests of the public at large in receiving ideas and information necessary to take part in public decision making or the collective quest for truth. Secondly, the economic analysis highlights the strong dependency of markets on adequate information, stemming both from commercial and non-

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123 J.S. Mill, *On Liberty*, 1859, mainly Chapter II: *Of the Liberty of Thought and Discussion*, available on the website of the Online Library of Liberty, <http://oll.libertyfund.org>.

124 Ibid.

125 Ibid., Chapter I.

commercial speakers, including for instance the media, NGOs and consumer organisations. The structural imbalance of the information market in favour of commercial speech justifies stronger protection of non-commercial than of commercial expression. The same conclusion can be reached under the argument from democracy and the argument from truth, which both insist on the need to protect dissenting and minority views. The scope of both arguments can be construed broadly enough so as to encompass speech relevant for the commercial marketplace. The same holds true for the autonomy-based defence, which covers, under a narrow reading, at least market-related information relevant for the exercise of other human rights or necessary to shape one's conception of a worthwhile life.

These insights reveal a more complex picture than views drawing clear lines between the instrumentalist approach relevant to trade and economic analysis and the dignitarian defence of human rights. They also show that courts operating either within a human rights or an economic framework may reach similar outcomes. These arguments will become more evident in the following section, which will analyse the role and function of freedom of speech and free trade on the various constitutional layers and sub-layers.

IV. Free Speech and Free Trade within the Multilayered Constitution

Whilst the previous section explored freedom of expression as a *moral* right, the present one focuses on both free speech and free trade as *legal* rights. Such analysis prepares the ground for the integration of freedom of speech concerns within the WTO. Seen as one part of a multilayered constitution, the multilateral trading system cannot be addressed in isolation. Concerns for the coherence of the constitutional structure as a whole make it necessary to explore the functions and values pursued within regimes situated on the same or on different levels of governance.

1. The National Level

In light of the number and diversity of national legal orders, only general observations can be made about the constitutional protection of freedom of speech and the "right to trade" (more frequently termed

"economic freedom" or "economic liberty"), understood as a comprehensive right of both natural and legal persons to choose and pursue an economic activity. The main point is that as regards the recognition of the right, a broader consensus exists with respect to freedom of expression than concerning a right to trade. Whilst many, if not most, constitutions enshrine free speech,[126] economic freedom enjoys less support. Focusing on some prominent WTO members, the Constitution of China, for instance, guarantees freedom of expression[127] but only protects the right and duty to work.[128] Based on the title and wording of the constitutional provision, it is designed to protect a social and not a liberty right. In a similar vein, the Constitution of Japan refers to the "right and obligation to work."[129] It explicitly confers to every person only the right to "*choose* his occupation",[130] and solely "*to the extent that it does not interfere with the public welfare.*"[131] The Canadian Charter of Rights and Freedoms does not explicitly protect economic liberty beyond a guarantee similar to the interstate commerce clause enshrined in the US Constitution or the free movement rights within the EU legal order.[132] In Brazil,[133] India[134] and South Africa,[135] the constitutions provide for economic rights, which are worded mainly as rights of individuals to choose and engage in an economic activity. As regards the level of protection, the South African Constitution explicitly distinguishes between the right to *choose* a trade, occupation or profession freely and the right to *practice* the said activities, holding that "[t]he

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126 See the comparative study with further reference by A. Stone, "The Comparative Constitutional Law of Freedom of Expression", *University of Melbourne Legal Studies Research Paper* No. 476 (2010), available at <http://papers.ssrn.com>. The author holds that "Rights of freedom of expression can be found in constitutions drawn from all continents: throughout western Europe as well as in the constitutions of the new democracies of Eastern Europe, in constitutions in Asia, South America, Africa and Australasia" (at 1).

127 Article 41 of the Constitution of China.

128 Article 42, ibid.

129 Article 27 of the Constitution of Japan. As regards freedom of expression, it is guaranteed in article 21 of this Constitution.

130 Article 22, ibid., emphasis added.

131 Ibid., emphasis added.

132 Article 6 para. 2 of the Charter.

133 Article 5 XIII of the Constitution of Brazil.

134 Article 19 para. 1 lit. g of the Constitution of India.

135 Article 22 of the Constitution of South Africa.

practice of a trade, occupation or profession may be regulated by law."[136] Turning to the Council of Europe, most, but not all[137] constitutions explicitly[138] protect more or less broadly construed economic liberty rights.[139] With regard to the scope of the right, some constitutional texts refer only to the right to work, which is interpreted (also) as a liberty right, and sometimes as a broader right of economic liberty.[140] Among the European legal orders, the Swiss Constitution stands out as being among the oldest constitutional texts to enshrine a very comprehensive right of economic freedom, protecting the choice, access and exercise of an economic activity by both individuals and corporations, which includes the right to trade within Switzerland and with third countries.[141] This right was enshrined in the Swiss Constitution of 1874

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136 Ibid.

137 See the Human Rights Act 1998 in the United Kingdom, and the Constitution of Bosnia and Herzegovina, which only enshrines free movement guarantees, see article 1 para. 4 of the Constitution of 1 December 1995.

138 In some constitutional orders, economic liberty has been recognised as an implied right; see e.g. the case law of the French Conseil Constitutionnel, Decision No. 81-132 of 16 January 1982, in which it was inferred from the general right to liberty, protected in article 4 of the Declaration of Rights of Men and Citizens of 1789, that entrepreneurial freedom ("liberté d'entreprendre") could not be subject to arbitrary of abusive restrictions.

139 For a comparative analysis of the right to pursue an economic activity, see H. Schiwer, *Der Schutz der "Unternehmerischen Freiheit" nach Art. 16 der Charta der Grundrechte der Europäischen Union – Eine Darstellung der tatsächlichen Reichweite und Intensität der grundrechtlichen Gewährleistung aus rechtsvergleichender Perspektive*, 2008; for a succinct overview, see D. Schreiter, *Wirtschaftsgrundrechte von Unternehmen in der Europäischen Grundrechtecharta unter besonderer Berücksichtigung des sachlichen Anwendungsbereichs der verbürgten Garantien*, 2009, 102 et seq.

140 Similar to the right to work, the right to occupational freedom has been broadly interpreted in some jurisdictions as protecting entrepreneurial freedom; this is for instance the case in Germany, see e.g. Schreiter, see note 139, 104.

141 Article 27 of the Swiss Constitution. On economic liberty within the Swiss constitutional order, see e.g. J.P. Müller/ M. Schefer, *Grundrechte in der Schweiz,* 4th edition, 2008, 1042 et seq.; A. Auer/ G. Malinverni/ M. Hottelier, *Droit constitutionnel Suisse,* Vol. 2, 2nd edition, 2006, 415 et seq.; K.A. Vallender/ P. Hettich/ J. Lehne, *Wirtschaftsfreiheit und begrenzte Staatsverantwortung: Grundzüge des Wirtschaftsverfassungs- und Wirtschaftsverwaltungsrechts,* 4th edition, 2006; D. Hofmann, *La liberté économique suisse face au droit européen*, 2005.

essentially for instrumental reasons. Similar to the US interstate commerce clause, it was mainly designed to further the economic integration of the newly created federal state by overcoming barriers to trade among the constituent states. Apart from the creation of a single market, the constitutional protection of economic freedom is based on the assumption that a free market economy is more conducive to general welfare than state interventionism. In addition to the welfarist justification, economic freedom is also considered as an essential safeguard of individual liberty and self-development. Like other human rights, historical experience underpins this vision of economic liberty. The excessive influence of guilds was not only detrimental to general welfare but also to individual self-development and equality.[142] The diverse functions of economic freedom vary depending on the content and the bearer and the components of the right in question. The human rights dimension is clearly more relevant for individual actors and the right to choose and access an economic activity; with respect to corporate actors and the free pursuit of an economic activity, the instrumental justifications are paramount.[143]

As regards the level of protection, some constitutions explicitly contain broad limitation clauses or qualifications aimed at preventing a neoliberal interpretation of economic liberty rights.[144] Although the

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142 The historical legacy of communism also explains why most Central and Eastern European constitutions protect economic liberty; for an enumeration of the various constitutional provisions, see M. Ruffet, "Ad Art. 15 GRCh", in: C. Callies/ M. Ruffet (eds), *Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta, Kommentar,* 3rd edition, 2007, 2598, footnote 2.

143 See e.g. J.P. Müller, "Allgemeine Bemerkungen zu den Grundrechten", in: D. Thürer/ J.F. Aubert and J.P. Müller (eds), *Verfassungsrecht der Schweiz*, 2001, 626 no. 9

144 See for instance article 11 para. 6 of the Constitution of Luxembourg (subjecting the right "to any restrictions that may be imposed by the legislature"); article 41 of the Constitution of Italy, holding that freedom of enterprise "may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity" (para. 2) and that "[t]he law determines appropriate planning and controls so that public and private economic activities may be directed and coordinated towards social ends." (para. 3); article 45 para. 3.2. of the Constitution of Ireland, according to which "[t]he State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation"; article 59 of the Constitution of Azerbaijan (protecting the right to

admissible restrictions and the conceptions of the relationship between the state and the economy vary across the European legal orders,[145] the necessity to limit economic freedoms and to reconcile them with other policy goals, including environmental and social policy, is common ground.[146]

As is well known, the heritage of the United States is different. The Supreme Court's neoliberal approach during the *Lochner* era[147] has discredited economic liberty as an individual right to an extent which European scholars find hard to understand.[148] The dialogue of the deaf as regards the status of free trade within the WTO is partly due to differing historical legacies.

Compared with economic freedom, free speech as a human right and the underlying free speech values enjoy broader support on both sides of the Atlantic. European courts and the United States Supreme Court, for instance, emphasise the importance of freedom of speech both as an end in itself and as a means for securing democracy and social progress (i.e. truth).[149]

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carry out a business activity "according to existing legislation"), and article 48 para. 2 of the Constitution of Turkey, holding that "[t]he state shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in conditions of security and stability."

145 See M.P. Maduro, "Reforming the Market or the State?: Article 30 and the European Constitution: Economic Freedom and Political Rights", *ELJ* 3 (1997), 55 et seq. (65 et seq.) (noting that ordo-liberal constitutional concepts are not embedded in the constitutional tradition of the Member States).

146 See e.g. for a comparative analysis of economic freedom and its limitations in Spain, France and Switzerland, A. Capitani, *"Les libertés de l'entrepreneur". Recherches sur la protection constitutionnelle des droits et libertés à caractère économique. Aspects de droit comparé espagnol, français et suisse*, 2008, 155 et seq., concluding that although economic liberties "are from a formal point of view not hierarchically inferior, their level of protection is reduced" (at 191, no. 406, translated by the author).

147 See the famous judgment *Lochner v. New York*, 98 U.S. 45 (1905).

148 In Europe, the legacy of *Lochnerism* tends to be referred to as a general argument against judicial review. See e.g. for the Scandinavian countries, R. Helgadóttir, *The Influence of American Theories on Judicial Review in Nordic Constitutional Law*, 2006.

149 See e.g. the famous concurring opinion of Justice Brandeis in *Whitney v. California*, 274 U.S. 357 (1927), holding that: "Those who won our inde-

However, substantial differences exist with respect to the level of protection afforded to freedom of expression and the method of adjudication.[150] Whilst European courts generally engage in balancing free speech against competing values and rights, adopting a methodology not foreign to economic analysis,[151] the United States Supreme Court favours a rules-oriented approach based on distinctions between various categories of speech and the purpose of the governmental measure. When the speech at issue is not considered as "low value" speech and enjoys full constitutional protection, there is virtually no room for restriction based on the content of the expression.[152] Hate speech regulations, for instance, which are widespread in Europe, are thus constitutionally proscribed in the United States.[153] To take another example:

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pendence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; (…)". For a famous European free speech case, see the seminal *Lüth* judgment of the German Constitutional Court, BVerfGE 7, 198 (for an English translation, see <http://www.utexas.edu>. The Court held that: "The basic right to freedom of expression, the most immediate aspect of the human personality in society, is one of the most precious rights of man (Declaration of the Rights of Man and Citizen (1789) Art. 11). It is absolutely essential to a free and democratic state, for it alone permits that constant spiritual interaction, the conflict of opinion, which is its vital element (…). In a certain sense it is the basis of freedom itself, 'the matrix, the indispensable condition of nearly every other form of freedom' (Cardozo)."

150 For a study on the United States Supreme Court's free speech methodology from a European perspective, see I. Hare, "Method and Objectivity in Free Speech Adjudication: Lessons from America", *ICLQ* 54 (2005), 49 et seq. For comparative studies including jurisdictions other than Europe and the United States, see e.g. Stone, see note 126; M.H. Good, "Freedom of Expression in Comparative Perspective: Japan's Quiet Revolution", *HRQ* 7 (1985), 429 et seq.; R.J. Krotoszynski, *The First Amendment in Cross-cultural Perspective: A Comparative Legal Analysis of Freedom of Speech*, 2006.

151 See above Section III. 1. c.

152 See note 150.

153 For a comparative study of hate speech and other forms of controversial speech, see the contributions in I. Hare/ J. Weinstein (eds), *Extreme Speech and Democracy*, 2009; M. Rosenfeld, "Hate Speech in Constitutional Juris-

whilst the German conception of human dignity justifies the prohibition of "playing at killing" games, as evidenced by the *Omega* case,[154] the American attachment to free speech leaves virtually no room to regulate the sale of violent video games to minors.[155]

Again, history accounts for some of these differences: in Europe, the experience of the Holocaust has led to vigorous protection of human dignity, whilst in the United States, the legacy of the McCarthy era has highlighted the proneness of government to stifle unorthodox views. Moreover, the mistrust of government is greater in the United States,[156] favouring a predominantly negative understanding of rights. In the field of free speech, this approach is encapsulated in the metaphor of the free marketplace of ideas[157] which government must not interfere with. In Europe, courts more frequently hold that the state has not only the duty to abstain but also to protect fundamental rights against infringement by private parties and to promote free speech values, such as media pluralism.[158] In the light of these differences between Europe and the United States, it is not surprising to find even more discrepancies, both as regards interpretation and effective implementation of freedom

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prudence: A Comparative Analysis", *Cardozo Law Review* 24 (2003), 1523 et seq.

154 See above Section II. 3.

155 See *Brown et al. v. Entertainment Merchants Association et al.* U.S. No. 08-1448, decided on 27 June 2011.

156 See D. Feldman, "Content Neutrality", in: I. Loveland (ed.), *Importing the First Amendment. Freedom of Expression in American, English and European Law*, 1998, 139-171; E. Barendt, "Importing United States Free Speech Jurisprudence?", in: T. Campbell/ W. Sadurski (eds), *Freedom of Communication*, 1994, 57-76 (64).

157 The metaphor has its origins in the famous dissenting opinion of Justice Holmes in *Abrams v. United States*, 50 U.S. 616 (1919), which refers to the "free trade in ideas".

158 See for instance the following Decisions of the French Conseil Constitutionnel, which recognized pluralism as a constitutional value derived from freedom of speech (Decision No. 84-181 DC of 10 October 1984, in which the Conseil Constitutionnel rejects the metaphor of uninhibited free trade in ideas, holding that pluralism needs to be protected against both public and private power and cannot be left to the market alone; see also Decision No. 86-217 DC of 18 September 1986 and Decision No. 89-271 DC of 11 January 1990).

of expression,[159] if further jurisdictions are taken into account. A well-known example is the controversy surrounding the thorny issue of defamation of religion, which has divided states in the Human Rights Council[160] and at the 2009 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban II), held in Geneva.

Turning to the economic sphere, courts have also taken differing views on advertising. In some jurisdictions, including Japan,[161] the Netherlands,[162] Switzerland, Germany and France, commercial speech does not fall within the ambit of freedom of expression. By contrast, the United States Supreme Court,[163] and, following its example, the Cana-

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159 As regards effective implementation of freedom of expression, see e.g. the cases decided by the African Commission on Human Rights listed below, see note 174, which highlight the grave deficiencies in certain countries.

160 The first resolution on this subject was adopted under the auspices of the United Nations Commission on Human Rights following the initiative of Pakistan in 1999. Ever since, a similar resolution has been adopted every year, within the Commission and its successor, the Human Rights Council. For the most recent ones, see Resolution 10/22, "Combating defamation of religions" of 26 March 2009, Doc. A/HRC/RES/10/22; and Resolution 13/16, "Combating defamation of religions" of 25 March 2010, Doc. A/HRC/RES/13/16; the vote on both resolutions shows that the Council is strongly divided on this issue. The first was adopted with 23 against 11 votes with 13 abstentions, the second with 20 against 17 votes with 8 abstentions. For an analysis of the various resolutions adopted on this subject, see S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System", *European Human Rights Law Review* 9 (2009), 353 et seq. There are, however, signs of a rapprochement between the two camps, as the concept of defamation of religions was abandoned in the latest resolution, see Resolution 16/13, "Freedom of religion or belief" of 24 March 2011, Doc. A/HRC/RES/16/13, adopted by consensus.

161 See Krotoszynski, see note 150, 214 et seq.; but see S. Matsui, "Freedom of Expression in Japan", *Osaka University Law Review* 38 (1990), 13 et seq. (28 et seq.) (holding that the constitutional protection of commercial speech is controversial).

162 Article 7 para. 4 of the Dutch Constitution explicitly exempts commercial advertising from the scope of freedom of the press and freedom of expression.

163 See the seminal case *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

dian Supreme Court,[164] have extended the scope of the free speech guarantee to commercial expression and accord it a considerable level of protection.[165] Nevertheless, both courts clearly admit broader limitations of commercial than of political speech, a trend confirmed in other jurisdictions.

2. The Regional Level

a. Human Rights Regimes

Regional human rights regimes do not guarantee a self-standing, comprehensive right of economic liberty. By contrast, all four general human rights treaties concluded on the regional level – the European Convention on Human Rights of 1950,[166] the American Convention on Human Rights of 1969,[167] the African (Banjul) Charter on Human and Peoples' Rights of 1981[168] and the Arab Charter on Human Rights of 2004[169] – protect freedom of speech. The case law within the European, the American and the African human rights regimes draws both on the

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164 See the seminal case *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 S.C.R. 232.

165 Cf., for instance, the following cases on tobacco advertising handed down by the United States Supreme Court, the Canadian Supreme Court, and the ECJ: *Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001); *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; ECJ, Case C-380/03 *Germany v. European Parliament and Council* ("Tobacco Advertising II") (2006) ECR I-11573. For comparative studies on commercial speech, see e.g. J. Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe*, 2008; V. Skouris, *Advertising and Constitutional Rights in Europe*, 1994; B.E.H. Johnson/ K.H. Youmsee, "Commercial Speech and Free Expression: The United States and Europe Compared", *Journal of International Media and Entertainment Law* 2 (2009), 159 et seq.; A. Hatje, "Werbung und Grundrechtsschutz in rechtsvergleichender Sicht", in: J. Schwarze (ed.), *Werbung und Werbeverbote im Lichte des europäischen Gemeinschaftsrechts*, 1999, 37 et seq.; see also R.A. Shiner, *Freedom of Commercial Expression*, 2003; K.K. Gower, "Looking Northward: Canada's Approach to Commercial Expression", *Communication Law and Policy* 10 (2005), 29 et seq.

166 Article10 ECHR.

167 Article 13 American Convention.

168 Article 9 African Charter.

169 Article 32 Arab Charter.

arguments from autonomy and democracy. It highlights that freedom of expression is not only protected for the sake of the individual but also for the sake of the interest of the community as a whole. In the words of the ECtHR, "[f]reedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment",[170] or, as the Inter-American Court of Human Rights put it, free speech is "a cornerstone in the mere existence of a democratic society" and "a condition for the community to be fully informed when making their choices."[171] It is both "a right that belongs to each individual" and "a collective right to receive any information whatsoever."[172] According to the African Commission on Human Rights, freedom of expression is "vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country."[173] As a consequence, the supervisory organs of all three regional human rights regimes accord political speech a high level of protection: restrictions targeting the media, NGOs, political parties and politicians are subject to strict scrutiny;[174] in the same vein, politicians' reputation

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170 See e.g. App. No. 25181/94 *Hertel v. Switzerland,* ECHR 1998-VI, para. 46, quoting the famous judgment App. No. 5493/72 *Handyside v. the United Kingdom*, Series A24 (1976), para. 49.

171 I.A. Court H.R., *Compulsory Membership,* see note 49, para. 70.

172 Ibid., para. 30.

173 ACom.HPR, Comm. nos. 105/93, 128/94, 130/94 and 152/96 *Media Rights Agenda and Others v. Nigeria* (1998), para. 54.

174 For a comparison of the ECtHR's and the Inter-American Court's case law on freedom of expression, see E.A. Bertoni, "The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards", *European Human Rights Law Review* 3 (2009), 332 et seq.; all the decisions on freedom of expression rendered by the African Commission concern political expression, see ACom.HPR, Comm. nos. 105/93, 128/94, 130/94 and 152/96 *Media Rights Agenda and Others v. Nigeria* (1998) (seizure of 50,000 copies of a magazine critical of the government); ACom.HPR, Comm. no. 225/98 *Huri-Laws v. Nigeria* (Persecution of a human rights organization's employees and raids of its offices); ACom.HPR, Comm. no. 212/98 (1999), *Amnesty International v. Zambia* (politically motivated deportations of politicians and of a businessman); ACom.HPR, Comm. nos. 48/90, 50/91, 52/91, 89/93 *Amnesty International and Others v. Sudan* (1999) (detention of people belonging to opposition parties or trade unions); ACom.HPR, Comm. nos. 147/95 and 149/96, *Dawda Jawara v. The Gambia* (2000) (arrests, detentions, expulsions and intimidation of journalists); ACom.HPR, Comm. no. 250/2002

and privacy enjoy a lesser degree of protection than that of private figures.[175] The argument from truth holds a less prominent place than the argument from democracy but also finds expression in the case law of the European and the Inter-American Court of Human Rights. It is implicit in a broad vision of political speech and the reference to the *progress* of a democratic society.[176] The similarity between the rulings of the regional human rights bodies is not a coincidence. As the Inter-American Court's extensive references to the Strasbourg case law show, cross-fertilisation has favoured convergence.[177] It is not surprising that the oldest regional human rights regime – the European Convention – has been more important as a source of inspiration to its regional counterparts than the other way round. The consolidation of the American and African body of free speech cases may, however, lead to a two-way dialogue. The fact that the "younger" American Convention and its free speech guarantee were designed to provide more generous protection than article 10 of the older European human rights instrument, and may give rise to more progressive case law, could be conductive to such a development.[178]

Liesbeth Zegveld and Messie Ephrem v. Eritrea (2003) (detention of 15 senior officials belonging to the same political party who had been openly critical of Government policies).

175 For the European human rights regime, see the famous judgments ECtHR, App. No. 9815/82, *Lingens v. Austria*, Series A03-B (1986), 8 EHRR 407; ECtHR, App. No. 11798/85 *Castells v. Spain*, Series A236 (1992), 14 EHRR 445; for the American system, see e.g. Inter-American Court, *Herrera Ulloa v. Costa Rica*, judgment of 31 August 2004, Series C107; *Ricardo Canese v. Paraguay*, judgment of 31 August 2004; *Jorge Fontevecchia and Hector D'Amico v. Argentina*, judgment of 29 November 2011 and for the African system, see ACom.HPR, Comm. nos. 105/93, 128/94, 130/94 and 152/96 *Media Rights Agenda and Others v. Nigeria* (1998) para. 74: "People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether."

176 See the quote accompanying note 170 and ECtHR, App. No. 13470/87 *Otto-Preminger-Institut v. Austria*, Series A295-A, para. 49 (1994), holding that speech gratuitously offensive to religious feelings of others does "not contribute to any form of public debate capable of furthering *progress* in human affairs" (emphasis added).

177 For a detailed analysis, see Bertoni, see note 174.

178 See Bertoni, see note 174, 352; such development can already be observed on the European level, as the ECtHR sometimes refers to the more recent

So far, however, the Strasbourg Court has to our knowledge been the only one called upon to decide free speech cases directly related to the economic marketplace. Information about the remuneration of the chairman of a big corporation in an ongoing labour dispute,[179] speech criticising commercial seal hunting methods,[180] the limited opening times of veterinary practices,[181] the complications and lack of care after cosmetic surgery carried out by a renowned physician,[182] a TV spot exhorting the public to consume less meat for the sake of animal protection,[183] and claims made by a scientist alleging the health hazard of micro waved food,[184] were all considered as speech on matters of public concern and afforded a high level of protection. In the case mentioned last, *Hertel v. Switzerland*, the Court held that "what is at stake is not a given individual's purely 'commercial' statements, but his participation in a debate affecting the general interest, for example, over public health." It concluded that it had to "carefully examine whether the measures in issue were proportionate to the aim pursued"[185] and found that the fact that the scientist's opinion was a "minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas."[186] In the context of defamation proceedings instigated by a transnational corporation against Greenpeace activists, the Court referred to the "general interest in promoting the free circulation of information and ideas about the activities of commercial entities" and the risk of such expres-

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EU Charter of Fundamental Rights so as to adopt a purposive interpretation of the Convention (see Benoît-Rohmer, see note 55).

179 ECtHR (GC), App. No. 29183 *Fressoz and Roire v. France* (1999) 31 EHRR 28.

180 ECtHR, App. No. 21980/93 *Bladet Tromso and Stensaas v. Norway* (1999) 29 EHRR 125.

181 ECtHR, App. No. 8734/79 *Barthold v. Germany*, Series A90 (1985).

182 ECtHR, App. No. 26132/95 *Bergens Tidende v. Norway* (2001) 31 EHRR 15.

183 ECtHR, App. No. 24699/94 *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, ECHR 2001-VI; ECtHR (GC), App. No. 32772/02 *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2).

184 *Hertel,* see note 170.

185 *Hertel*, ibid., para. 47.

186 *Hertel*, ibid., para. 50.

sion being chilled.[187] It also held "that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts, and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies."[188]

The Court's willingness to accord speech on matters of public concern a high level of protection has caused it to venture into commercial territory, leading to an overlap with the WTO regime, specifically, with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). In a series of cases concerning domestic copyright legislation, the ECtHR analysed copyright legislation in the light of freedom of expression.[189] As mentioned above, from an economic point of view, IPRs seek to address market failures of the "information market" caused by the public goods feature of information. Their instrumental value, which consists in favouring the production of information and innovation, is thus related to both free speech functions and the economic marketplace. Whilst IPRs are designed to further free speech values, the exclusive rights they create can at the same time act as a barrier to the dissemination of information. Faced with a conflict between IPRs and freedom of expression, the ECtHR found that injunctions based on the Austrian Copyright Act prohibiting the media from disseminating photographs of politicians or individuals involved in matters of public concern infringed free speech.[190]

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187 ECtHR, App. No. 68416/01 *Steel and Morris v. the United Kingdom*, ECHR 2005-II, para. 95.

188 *Steel and Morris*, para. 94, referring to ECtHR, App. No. 17101/90 *Fayed v. the United Kingdom*, Series A294-B, para. 75.

189 L.R. Helfer, "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights", *Harv. Int'l L. J.* 49 (2008), 1 et seq. (46).

190 See ECtHR, App. No. 35841/02, *Oesterreichischer Rundfunk v. Austria* (2006), which concerned the dissemination of images showing the head of a neo-Nazi organisation during his release on parole. The Court stressed that the subject matter was of public concern and that the news "related to a sphere in which restrictions on freedom of expression are to be strictly construed." The Court thus had to "exercise caution when the measures taken by the national authorities are such as to dissuade the media from taking part in the discussion of matters of public interest" (para. 66); App. No. 34315/96, *Krone Verlags GmbH & Co KG v. Austria* (2003), 57 EHRR 1059, concerning a politician criticised for not having earned all his income lawfully, and App. No. 10520/02, *Verlagsgruppe News GmbH v.*

The ECtHR also moved into the economic sphere by extending the reach of freedom of expression to commercial speech, including commercial advertising and statements made by competitors sanctioned pursuant to unfair competition law.[191] The Court, however, distinguishes commercial expression from speech on matters of public concern and grants the Member States a wide margin of appreciation. In one of the first commercial speech cases, *Markt intern,* the Court held, for instance, that a "margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate."[192]

Due to this deferential standard of review, the Court generally finds no violation in commercial speech cases.[193]

Stretching the reach of the Convention even wider, the Court found in *Autronic*[194] that a corporation specialised in home electronics which was refused permission to receive a Soviet television programme via a Soviet satellite so as to demonstrate the performance of private dish antennas at a trade fair was expression protected under article 10 ECHR. Neither the applicant's status as a legal corporation, nor the fact that the content of the speech was of no interest to the corporation itself or to the public, were relevant in the Court's view. In this case, article 10 ECHR was thus in substance given the scope and purpose of economic freedom, since the protected interests at stake were exclusively commercial.

Austria (No. 2) (2006), concerning pending investigations on the suspicion of tax evasion against a "business magnate" (para. 36), e.g. the owner and publisher of a widely-read weekly.

191 For an overview and analysis of the ECtHR's commercial speech doctrine, see Hertig Randall, see note 90.

192 ECtHR, App. No. 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, Series A165 (1989) 12 EHRR 161, para. 33.

193 See Hertig Randall, see note 90.

194 ECtHR, App. No. 12726/87 *Autronic AG v. Switzerland*, Series A178 (1990) 12 ECHR 485.

Autronic illustrates the ECtHR's tendency to interpret the Convention generously.[195] In addition to freedom of expression, the Court admits that corporations are holders of other rights,[196] including, for instance, the right to privacy (article 8 ECHR) and fair trial guarantees (article 6 ECHR), and that they have standing to file an application.[197] Accordingly, the Court has held that not only individual premises (mainly a person's home) but also corporate premises are protected under article 8 ECHR.[198] As regards the right to property, the Court has taken economic interests into account in protecting also intellectual property, including trademarks of multinational corporations.[199] The ECtHR's approach is difficult to explain based on a vision of human rights protecting human dignity.[200] Instrumentalist considerations, in-

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195 For a recent contribution on the ECtHR's interpretive methodology, see G. Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer", *EJIL* 21 (2010), 507 et seq.

196 For studies on the role of corporate actors under the ECHR, see e.g. M. Emberland, *Human Rights of Companies. Exploring the Structure of ECHR Protection*, 2006; V. Martenet, "Les sociétés commerciales devant la Cour européenne des droits de l'homme", in: Bohnet/ Wessner, see note 90, 503-521. For a critical stance, see A. Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights", *Human Rights Law Review* 7 (2007), 511 et seq.

197 Article 34 para. 1 ECHR grants standing not only to "any person" but also to a "non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention." The Court considers corporations as non-governmental organisations and admits that they have standing. See X.B. Ruedin/ P.E. Ruedin, "Les personnes morales dans la procédure de requête individuelle devant la Cour européenne des droits de l'Homme", in: Bohnet/ Wessner, see note 90, 27-48.

198 ECtHR, App. No. 37971/97, *Société Colas Est and others v. France*, ECHR 2002-III. For a commentary, see M. Emberland, "Protection against Unwarranted Searches and Seizures of Corporate Premises under art. 8 of the European Convention on Human Rights: *the Colas Est SA v France Approach*", *Mich. J. Int'l L.* 25 (2003), 77 et seq.

199 ECtHR (GC), App. No. 73049/01 *Anheuser-Busch Inc. v. Portugal* (2007) 45 EHRR 36, para. 72. For an analysis, see Helfer, see note 189, describing the case as "especially striking" (at 3) and that it sits "uneasily with a treaty whose principal objective is to protect the civil and political liberties of individuals" (at 4).

200 See M. Hertig Randall, "Personnes morales et titularité des droits fondamentaux", in: R. Trigo Trindade/ H. Peter/ C. Bovet (eds), *Economie, En-*

cluding the objective to limit state power, to safeguard the rule of law,[201] to create minimal standards across Europe, or, from a sceptic's viewpoint, to entrench capitalism,[202] seem more relevant justification for the extensive reach of the Convention.[203] The Court's interpretation of fundamental rights takes into account that the drafters conceived them as both an aim and a means. As reflected in the Preamble of the ECHR and the Statute of the Council of Europe, fundamental rights are also protected as a means to safeguard democracy and to prevent totalitarianism, and to create common values conducive to European integration.[204] The Court's interpretation of the Convention as a "constitutional instrument of a European public order"[205] reflects this vision.

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vironnement, Ethique, De la responsabilité sociale et sociétale, Liber Amicorum Anne Petitpierre-Sauvain, 2009, 181-191.

201 See Emberland, see note 196, Chapter 4.

202 D. Nicol, *The Constitutional Protection of Capitalism,* 2010; id., "Business Rights as Human Rights", in: Campbell/ Wing/ Tomkins, see note 53, 229-243.

203 The Inter-American Court of Human Rights also favours a generous interpretation of Convention rights. Although standing is limited to natural persons, the Court's case law protects economic interests (for instance those of investors) via a broad interpretation of the right to property. See L. Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law", *EJIL* 32 (2010), 585 et seq. (598 et seq.).

204 See the Preamble of the ECHR, which states that: "Considering that the *aim* of the Council of Europe is the achievement of *greater unity* between its Members and that one of the *methods* by which the aim is to be pursued is the *maintenance and further realization of Human Rights and Fundamental Freedoms*" (emphasis added). See also the Preamble and article 1 lit. a. and b of the Statute of the Council of Europe, which holds that: "a. The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms."

205 ECtHR, App. No. 15318/89 *Loizidou v. Turkey*, Series A310, para. 75 (1995); on the ECHR as a European public order, see J.A. Frowein, "The European Convention on Human Rights as the Public Order of Europe", in: *Collected Courses of the Academy of European Law*, Vol. I.2, 1992, 267-358.

"The Convention thus seeks to advance human rights as instrumental to the cause of a Europe united by shared values. It is part of a regime on human rights, but at the same time is linked in a sense to the regime on European integration of the European Union (EU)."[206]

b. Free Trade Regimes (The European Union)

Whilst the Strasbourg court's case law has broadly construed Convention rights, including freedom of expression, and has ventured into the commercial sphere, the judicial guardian of the EU legal order, the ECJ, has moved, as discussed above,[207] from the economic into the human rights sphere. To sketch this evolution with a special focus on freedom of expression, it is useful to distinguish between judicial control of EU acts and measures of the Member States.

The genesis of human rights protection against EU acts is a particularly interesting example of interaction between various layers and sublayers of governance.[208] Having posited the principle of supremacy of EU law over domestic law, the ECJ faced resistance from national courts, some of which were unwilling to abide by EU measures deemed incompatible with fundamental rights protected in domestic constitutions.[209] Partly in response to these challenges, the ECJ incorporated fundamental rights into the EU legal order as general principles of law. Whilst asserting the autonomy and supremacy of EU law, including that of EU fundamental rights,[210] the Court aimed at achieving inter-

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206 S. Ratner, "Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law", *AJIL* 102 (2008), 475 et seq. (496).

207 Above Section II. 3.

208 On fundamental rights in the EU legal order, see e.g. P. Alston/ M. Bustelo (eds), *The EU and Human Rights*, 1999; D. Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007.

209 The best known cases are those handed down by the German Constitutional Court, see BVerfGE 37, 271 ("Solange I"); BVerfGE 73, 339 ("Solange II"); BVerfGE 89, 155 ("Maastricht Judgment"); BVerfGE 102, 147 ("Banana Judgment"); BVerfGE 123, 267 ("Lisbon Judgment").

210 See mainly ECJ, Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) ECR 1161, paras 3 and 4: The ECJ stressed that the "law stemming from the Treaty, an independent source of law cannot because of its very nature be overridden by rules of national law", including "fundamental rights as formulated by the constitution" of the Member States. Its validity had to be assessed in the light of EU law, of which fundamental rights formed an integral part.

layer coherence and had recourse to domestic constitutional law as well as the ECHR as sources of inspiration.[211]

The unwritten Bill of Rights fashioned through the ECJ's case law has meanwhile been codified. Adopted in 2000 as a political instrument, the EU Charter of Fundamental Rights, proclaimed on 7 December 2000, became legally binding in 2009.[212] It protects both freedom of expression and economic freedom in two separate provisions. Article 15 enshrines the freedom to choose an occupation and the right to engage in work, and article 16 sets out the freedom to conduct a business. Whilst there is an overlap between the two provisions, and little agreement on their respective scope,[213] the adoption of two distinct provisions takes into account the differing constitutional traditions of the Member States. Reflecting a more limited consensus, the freedom to conduct a business is, according to the wording of article 16, "recognised" "in accordance with Community law and *national laws and practices.*"[214] No such qualification exists in article 15, which enjoys broader support as a human right.

Before the Charter became part of the EU legal order, the ECJ had already reviewed EU measures in the light of fundamental rights. It examined, for instance, far-reaching bans on advertising and sponsoring for tobacco products in the light of freedom of expression.[215] Referring to the case law of the ECtHR's commercial speech cases, it adopted a

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211 Article 6 para. 3 of the Treaty on European Union codifies the ECJ's case law: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

212 This date corresponds to the entry into force of the Lisbon Treaty, which incorporates the Charter and confers it the same status as the EU-Treaties (see article 6 of the EU-Treaty). To this effect, the Charter was slightly amended and proclaimed again in December 2007.

213 See J. von Bernsdorff, "Article 16", in: J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union*, 3rd edition, 2011, 296 et seq., No. 10; H.D. Jarass, *Charta der Grundrechte der Europäischen Union. Kommentar*, 2010, 167, 4; Schreiter, see note 139, 111 et seq.

214 Emphasis added.

215 ECJ, "Tobacco Advertising II", see note 165; for a free speech case outside the commercial sphere, see Case C-274/99 *P. Connolly v. Commission* (2001) ECR I-1611, concerning the dismissal of an employee of the European Commission for having published a book highly critical of the EU policies he worked on.

deferential standard of review and upheld the directive in question. The tobacco directive case illustrates two more general trends in the ECJ's case law on fundamental rights: firstly, the tendency to construe EU fundamental rights in the light of the ECHR, and secondly the Court's willingness to grant the EU legislative branch a wide margin of discretion.[216]

Reflecting the Court's understanding of itself as the judicial guardian of the single market based on free movement of persons, goods, services and capital, the Luxembourg judges have engaged in closer scrutiny of national measures restricting trade between Member States. Having conferred upon the four freedoms the status of directly applicable individual rights, the Court reviewed a considerable number of cases which are relevant for freedom of expression. Placing the emphasis on market access,[217] which depends on the availability of information to consumers,[218] the ECJ has scrutinised advertising or marketing restrictions that have a detrimental impact on foreign goods or services in the light of

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216 See the well-known Case 160/88 *Fedesa v. Council* (1988) ECR 6399, in which the ECJ upheld the ban on hormones in beef, by contrast with the Appellate Body, see WTO, Appellate Body Report, *EC Measures concerning Meat and Meat Products (EC – Hormones),* Doc. WT/DS26/AB/R, adopted 13 February 1998); the deferential standard of review is also underlined by commentators with respect to economic freedoms enshrined in arts 15 and 16 of the Charter, see e.g. Bernsdorff, see note 213, 290, No. 18.

217 In the famous Case C-267 and 268/91 *Keck and Mithouard* (1993) ECR I-6097, the ECJ excluded selling arrangements, which include some forms of advertising, from the scope of free movement of goods. The Court has, however, interpreted this exception narrowly and does not apply it to advertising restrictions that affect foreign products more adversely than domestic products. This is generally the case, as foreign producers depend more on advertising for market access than domestic ones. For the evolution of the case law, see e.g. Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v. Roostwijk GmbH* (2004) ECR I-3025, para. 37 et seq.

218 The ECJ stressed the importance of consumer information for the functioning of markets, for instance in Case C-362/88 *GB-INNO v. Confederation du Commerce Luxembourgeois* (1990) ECR I-667, holding that free movement of goods could not be interpreted as "meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection" (para. 18). Based on this view, the Court found the prohibition on mentioning the initial price and the duration of the sales in advertising to be contrary to EU law.

the free movement guarantees.[219] Despite the focus on free movement, the Court has shown willingness to uphold domestic measures aimed at protecting human health, including bans on alcohol advertising.[220] In more recent cases, it not only relied on free movement of goods but considered, in line with the *Grogan*, *Omega* and *Schmidberger* cases,[221] that restrictions of fundamental freedoms had to be interpreted in the light of fundamental rights, including article 10 ECHR. Due to the deferential standard of review applicable to commercial speech, however, the reference to the Convention did not result in a higher level of protection than that flowing from free movement guarantees alone.[222]

Outside the commercial speech cases, freedom of expression had more teeth. In *ERT*, for instance, the Court relied on article 10 ECHR, as well as on freedom to provide services, to find a domestic broadcasting monopoly in breach of EU law.[223] The Court also assessed domestic

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219 For studies on restrictions of free speech in the EU legal order, see D. Buschle, *Kommunikationsfreiheit in den Grundrechten und Grundfreiheiten des EG-Vertrages,* 2004; on commercial speech, see Schwarze, see note 165; G. Perau, *Werbeverbote im Gemeinschaftsrecht*, 1997; for a study focusing on advertising restrictions and free movement of goods and services, see R. Greaves, "Advertising Restrictions and the Free Movement of Goods and Services", *European Law Review* 23 (1998), 305 et seq.

220 See e.g. ECJ, Joined Cases C-1/190 and 176/90 *Aragonesa de Publicidad Exterior and Publivía* (1991) ECR I-4151 concerning the ban on advertising of beverages with a high alcohol content at specified places; the ECJ found the ban to be compatible with free movement of goods; Case *C–405/98 KO v. Gourmet International Products* (2001) ECR I-1795, concerning the prohibition of advertising of alcoholic beverages in magazines; ECJ, C-262/02 *Commission v. France* (GC) (2004) ECR I-6569 and ECJ, C-429/02, *Bacardi France S.A. v. Télévision française 1 SA (TF1) and Others* (GC) (2004) ECR 1-6613, both finding a French ban on indirect television advertising for alcoholic beverages during the retransmission of binational sporting events taking place in other Member States compatible with free movement of services.

221 See above Section II. 3.

222 See e.g. Karner, see note 217, concerning the prohibition on mentioning in advertisements that the goods for sale originate from an insolvent estate if the goods in question have ceased to be part of it. Although the ECJ examined the advertising restriction in question in the light of freedom of expression, it referred to the ECtHR's case law on commercial speech and held that Member States enjoyed considerable discretion (see para. 51).

223 ECJ, Case C-260/89 *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* (1991) ECR I-2925; this case contrasted

measures in the light of freedom of expression in *Familiapress.*[224] The case concerned a ban on the distribution of a German magazine in Austria on the grounds that it contained prize competitions contrary to national unfair competition law provisions. In the proceedings, the Austrian Government argued that the domestic legislation was aimed at protecting press diversity, as the local press was unable to use equally costly marketing strategies. The Court agreed with the Austrian Government, and held, referring to the case law of the ECtHR, that,

> "[m]aintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods" since it "helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order."[225]

At the same time, the Court referred to its *ERT* judgment and found that the overriding requirements invoked to derogate from free movement of goods had to be interpreted in the light of fundamental rights, including freedom of expression. As the domestic measure interfered with press freedom, the domestic court which had referred the matter to the ECJ was asked to balance the individual right to free speech and free movement of goods against press pluralism, a value also derived from freedom of expression. Interestingly, the Court thus left the issue to the Austrian court to decide but indicated a series of factors which needed to be taken into account, such as the competitive relationship of various press products, the impact of marketing strategy on consumers and the market shares of individual publishers and press groups on the Austrian market.

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with the Court's earlier *Cinéthèque* ruling, in which it held that it lacked the competence to examine the domestic measure (resulting in a ban on the plaintiff's videocassettes) in the light of fundamental rights, see ECJ, Joined Cases 60 and 61/84 *Cinéthèque SA v. Fédération Nationale des Cinémas Français* (1985) ECR 2605.

224 ECJ, Case C-368/95 *Vereinigte Familiapress Zeitungsverlag- und vertriebs GmbH v. Heinrich Bauer Verlag* (1997) ECR I-3689.

225 *Familiapress*, see note 224, para. 18. The ECJ referred to the famous judgment of the ECtHR, App. No. 914/88; 15041/89; 15717/89 *Informationsverein Lentia and Others v. Austria,* Series A 276 (1993). On media pluralism within the Council of Europe, see e.g. E. Komorek, "Is Media Pluralism a Human Right? The European Court of Human Rights, the Council of Europe and the Issue of Media Pluralism", *European Human Rights Law Review* 3 (2009), 395 et seq.

3. The Global Level

On the global level, freedom of expression forms part of the International Bill of Rights, this is the Universal Declaration of Human Rights of 1948 (UDHR), and the two International Covenants of 1966. It is anchored in article 19 UDHR, as well as article 19 of the International Covenant on Civil and Political Rights (ICCPR) (a.). It is also inherent in certain rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) (b.). Similar to the regional human rights treaties, neither Covenant protects a free-standing right to trade. The question whether and to what extent the right in question forms part of customary international law thus only needs to be explored for the right to free speech, the consensus underpinning economic liberty being too slim (c.).

a. The ICCPR

The ICCPR has to date been ratified by 167 states. Its supervisory body, the Human Rights Committee, has stressed that "[t]he right to freedom of expression is of paramount importance in any democratic society."[226] Like its regional counterparts, it thus considers political expression as core speech. Interestingly, the Human Rights Committee also adopted a protective stance towards commercial speech. In its communication *John Ballantyne et al. v. Canada*,[227] it not only considered advertising as protected expression, but also rejected the view that different categories of speech "can be subject to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others."[228] This finding is nevertheless limited for two main reasons. Firstly, *John Ballantyne et al. v. Canada* did not concern a typical commercial speech case, involving, for instance, regulation of false or misleading advertising or bans motivated by health reasons. The communication was filed by an English-speaking shopkeeper who challenged the language law of Quebec prohibiting commercial shop signs in a language other than French. The right of an individual to express

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226 HRC, Communication No. 628/1995 *Tae-Hoon Park v. Republic of Korea* (1998), para. 10.3; Communication No. 1173/2003 *Benhadj v. Algeria* (2007), para. 8.10.

227 HRC, Communications Nos. 359/1989 and 385/1989 *Ballantyne, Davidson and McIntyre v. Canada* (1991).

228 Ibid., para. 11.3.

oneself in the language of his or her choice does not raise fundamentally different issues depending on the content and purpose of the speech at issue. Secondly, the Human Rights Committee's new general comment on freedom of expression[229] and its drafting history show that the status of commercial speech is controversial. Whilst listing political discourse, commentary on one's own and on public affairs, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse among the forms of protected speech[230] did not stir up controversy, there was no consensus on commercial speech. For this reason, commercial speech was first put inside brackets which were removed in later drafts and replaced with the formula that commercial speech *may* also be included within the scope of article 19.[231] At the same time, the reference to *John Ballantyne et al. v. Canada* was deleted in order to show that commercial expression was not on the same footing as other categories of speech.[232]

As regards the functions and values of freedom of expression, the general comment refers, in addition to the argument from democracy, also to the argument from autonomy.[233] It also holds that free speech is a "necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights."[234] Whilst the essential role of the media is acknowledged, the precise obligations states have to secure pluralism have been controversial, as reflected in the relatively weak wording that states "*should* take particular care to encourage an independent and diverse media."[235]

International obligations not to inhibit the flow of information can also be derived from the ICESCR. This fact is of practical relevance for states that have not ratified the ICCPR, as is the case for China.

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229 HRC, "General Comment No. 34: Article 19: Freedoms of Opinion and Expression", 21 July 2011, Doc. CPR/C/GC/34, which replaces the very cursory General Comment No. 10 of 1983 on article 19.

230 Ibid., para. 11.

231 General Comment No. 34, see note 229, para. 11.

232 See the information available at <http://www.ishr.ch/treaty-bodies> and <http://intlawgrrls.blogspot.com>.

233 Para. 1.

234 Para. 2 bis.

235 Para. 13, see for a similarly cautious wording also para. 15.

b. The ICESCR

Illustrating the indivisibility and interdependence of human rights, and the overlap between various sub-layers of the international human rights regimes, the Committee on Economic, Social and Cultural Rights (CESCR) has adopted a broad vision of the rights enshrined in the Covenant. With regard to article 12 ICESCR, the Committee holds, for instance, that "the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including […] access to information. These and other rights and freedoms address integral components of the right to health."[236] The right to health thus "contains both freedoms and entitlements",[237] including components of freedom of expression, e.g. the right to seek, receive and impart information and ideas concerning health issues.[238] Based on this view, states that censor or suppress "health-related education and information, including on sexual and reproductive health"[239] violate their duty to respect the right to health.[240] From the vantage point of free speech theory, the Committee's view can be read as emphasising the argument from autonomy, which calls for a strong level of protection of expression considered as a condition for the exercise of other human rights.[241]

c. Customary International Law

For states which have not ratified the Covenant or have made reservations to article 19 ICCPR, the question arises whether or to what extent freedom of expression has the status of customary international law. Scholars are divided on this issue. Some consider that all the rights enshrined in the UDHR (which includes freedom of expression) have gained the status of customary law.[242] Others adopt a narrower view,[243]

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236 General Comment No. 14: The Right to the Highest attainable Standard of Health, Art. 12 of the Covenant, 11 August 2000, Doc. E/C.12/2000/4, para. 3.

237 Ibid., para. 8.

238 Ibid., para. 12.

239 Ibid., para. 11.

240 Ibid., paras 34 et seq.

241 See above Section III. 2. a.

242 See e.g. H. Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law", *Ga. J. Int'l & Comp. L.* 25 (1995-1996), 287 et seq.; L.B. Sohn, "The Human Rights Law of the Char-

proposing or referring to more or less extensive rights catalogues that generally do not encompass free speech.[244] In support of the first view, one may stress that the UDHR forms the basis of Universal Periodic Review within the Human Rights Council. The practice of all the 193 State Parties to the United Nations is thus regularly examined in the light of the Universal Declaration. Against such an extensive vision of customary international law, it has been argued that it devalues this source of law.[245] However, the claim that freedom of expression forms part of customary international law is supported by two further arguments: firstly, the existence of this right is underpinned by a broad consensus, as freedom of speech is protected within most domestic constitutions, all regional human rights instruments, and in the ICCPR with

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ter", *Tex. Int'l L. J.* 12 (1977), 129 et seq. (133); M.S. McDougal/ H. Lasswell/ L.C. Chen, *Human Rights and World Public Order*, 1980, 272; Habbard/ Guiraud, see note 4; J.P. Humphrey, "The International Bill of Rights: Scope and Implementation", *William and Mary Law Review* 17 (1976), 527 et seq. (529).

243 See e.g. B. Simma/ P. Alston, "The Sources of Human Rights Law: Custom, Jus Cogens and General Principle", *Austr. Yb. Int'l L.* 12 (1992), 82 et seq. (91); W. Kälin/ J. Künzli, *Universeller Menschenrechtsschutz*, 2nd edition, 2008; among authors writing about the interface of human rights and international economic law, see Alston, see note 4, 829; Howse/ Mutua, see note 2, 10; A. McBeth, *International Economic Actors and Human Rights*, 2010, 30.

244 According to the Restatement (third) of Foreign Relations Law of the United States (1986), para. 702, "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." The Human Rights Committee has suggested a more extensive catalogue, see HRC, General Comment No. 24: Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, Doc. CCPR/C/21/Rev.1/Add.6, para. 8. For an author holding that free speech is part of customary international law, see M. Panizzon, "GATS and the Regulation of International Trade in Services", in: M. Panizzon/ N. Pohl/ P. Sauvé (eds), *GATS and the Regulation of International Trade in Services,* 534-560, 554; C.B. Graber, *Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung*, 2003, 119.

245 See Simma/ Alston, see note 243.

nearly universal membership. Secondly, within the Charter-based human rights mechanisms, a thematic mandate "on the Promotion and Protection of the Right to Freedom of Opinion and Expression" was instituted in 1993.[246] This indicates that the members of the UN consider freedom of expression to be protected within general international law.

Affirming that freedom of expression forms part of customary international law, however, carries the risk of glossing over the differences among various domestic and international regimes as regards the status of various categories of speech.[247] Based on the Human Rights Committee's view, which considers both reservations to and derogations from freedom of opinion to be non-permissible, the right to hold an opinion ought to be considered as forming part of customary public international law.[248] It is submitted that state measures engaging in repression or censorship of political speech also infringe freedom of speech *qua* customary international law.[249] Although freedom of political expression is far from being effectively realised on the domestic level, the case law of many constitutional courts, all three regional human rights courts and the Human Rights Committee reflects a consensus on the particular importance of political speech, broadly defined.[250] Such a line

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246 See Commission on Human Rights Resolution 1993/45 and Human Rights Council Resolutions 7/36 and 16/4. For the genesis of this resolution and the claim that it is based on the assumption that freedom of expression forms part of public international law independently of human rights treaties, see B. Rudolf, *Die thematischen Berichterstatter und Arbeitsgruppen der UN-Menschenrechtskommission*, 2000, 335 et seq.

247 Some of the main issues on which state practices diverge are mentioned above Section IV. 1.

248 See also HRC, General Comment No. 24, see note 244, para. 8, which considers freedom of thought, conscience and religion as forming part of customary international law.

249 If repression and censorship are systematic and thus form part of state policy, such practices can be considered as a "consistent pattern of gross violations" of freedom of expression in the sense of the Restatement (third) of Foreign Relations Law of the United States, see note 244.

250 With regard to human rights norms, it has been argued that the *opinio iuris* carries more weight than state practice (see e.g. T. Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law", *AJIL* 90 (1996), 238 et seq. (239-240)). Without this reasoning, the widely acknowledged claim that the prohibition of torture forms part of customary international law (or even *ius cogens*) would be impossible to maintain in the light of the widespread practice of torture.

of reasoning would also be compatible with views claiming that public international law has evolved towards admitting a "right to democracy".[251] Independently of the existence of such a right, it can be argued that transparency is essential to check any form of government. This argument is important for the purpose of this survey considering that WTO members are almost equally split between "free" and "not free" states.[252]

4. Synthesis

The previous sections examined the status and function of freedom of expression and economic freedom within the multilayered constitution. This cursory analysis offers several insights. Firstly, whilst freedom of expression is protected as a freestanding right on every layer of governance, the same does not hold true for economic freedom. Human rights regimes, similarly to some domestic constitutions, do not enshrine a comprehensive guarantee of economic liberty. Considerable diversity exists even among the Member States of the EU. Despite the entrenchment of the four market freedoms on the EU level, the domestic constitutional orders protect economic liberty to various degrees. Secondly, and not surprisingly, there are also differences with regard to the interpretation and application of free speech. However, there is wide consensus that political expression, understood in broad terms, is core speech and deserves a high level of protection. Pursuant to the case law

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251 See the seminal contribution by T. Franck, "The Emerging Right to Democratic Governance", *AJIL* 86 (1992), 46 et seq. For a cautionary note from an Asian perspective, see S. Varayudej, "A Right to Democracy in International Law: Its Implications for Asia", *Annual Survey of International & Comparative Law* 12 (2006), 1 et seq. The Human Rights Committee stresses the importance of freedom of expression for the right to political participation enshrined in article 25 ICCPR (see General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), 12 July 1996, Doc. CCPR/C/21/Rev.1/Add.7, para. 12). Combined with the other components of this right, article 25 "will result in a functioning electoral democracy" (Varayudej, see note 251, 9).

252 See the study by S.A. Aaronson/ J.M. Zimmermann, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking*, 2008. The authors base their study on the classification of states done by Freedomhouse. For a summary of their study, see Konstantinov, see note 2, 321 et seq.

of the ECtHR, political speech extends to "market relevant expression", such as speech critical of business practices or stressing the health hazard of certain products. By contrast to political expression, courts tend to adopt a deferential standard of review when examining restrictions on commercial expression (narrowly defined as advertising or speech targeting a competitor). Moreover, disagreement exists as to whether commercial speech falls within the ambit of freedom of expression. Thirdly, the practice of the courts on the various constitutional layers does not confirm visions of strict separation between various regimes and categories of rights. Human rights courts and constitutional courts tend to protect freedom of speech not exclusively on grounds of autonomy, e.g. as a right belonging to every human being by virtue of being human, but also take into account instrumentalist justifications. This trend is very pronounced in the case law of the ECtHR.

Similar to the broad interpretation of other Convention rights, the Strasbourg court has construed freedom of expression as protecting purely economically motivated corporate speech. Conversely, within the EU, the ECJ has been gradually moving from a utilitarian vision of the economic freedoms (in particular free movement of persons) to interpreting these rights as protecting human beings rather than economic actors. As a consequence of these trends, there are substantial overlap, rapprochement and interaction between the "ethical" and the "economic" Europe.[253] Both mutual influence and expansionism can also be observed in the relationships between various human rights courts. On the regional level, the case law of the ECtHR on freedom of expression has served as a source of inspiration to the other regional courts, without the relationship being a one-way street. On the global level, the CESCR has construed socioeconomic rights broadly. It has, for instance, interpreted the right to health also as a liberty right which comprises several components of freedom of expression. The trend towards cross-fertilisation, mutual borrowing and expansionism has so far been less pronounced within the WTO. Nevertheless, the view that the WTO is not a self-contained regime operating in clinical isolation from public international law,[254] and the Appellate Body's trend towards a

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253 The expression is borrowed from M. Delmas-Marty, "Commerce mondial et protection des droits de l'homme", in: *Commerce mondial et protection des droits de l'homme: les droits de l'homme à l'épreuve de la globalisation des échanges économiques*, 2001, 1-17 (9).

254 See e.g. A. Lindroos/ M. Mehling, "Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO", *EJIL* 16 (2005), 857 et seq.

less formalistic interpretation of the WTO treaties,[255] opens up space to integrate human rights concerns (including freedom of speech issues) within the multilateral trading system.

V. Integrating Freedom of Speech within the WTO

Before addressing the interface between freedom of expression and world trade law, it is useful to point out a few characteristics of the multilateral trading system which are relevant for the inter-linkage between human rights and free trade rules. The emphasis will be on the distinguishing features of the free trade regime as compared with human rights regimes. Firstly, although it has been argued that international trade law is aimed at protecting individual liberty of producers and consumers, the WTO remains an essentially member-driven organisation. By contrast with human rights regimes and the EU, individuals never have standing to enforce their rights or interests. The Dispute Settlement Understanding[256] (DSU) remains a mechanism to resolve inter-state disputes. Secondly, like the four market freedoms, WTO law has the function of securing market access for domestic economic actors against protectionist policies adopted by other states, whilst human rights law is primarily designed to protect citizens against their own state. Considered together, these facts make it hard to sustain the view that the WTO is conceived as protecting free trade as a human right, independently of whether free trade (mainly by corporate actors) is regarded as a human right. The WTO law remains anchored in the paradigm of reciprocity typical of inter-state relations,[257] which is ex-

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255 See I. Van Damme, "Treaty Interpretation by the WTO Appellate Body", *EJIL* 21 (2010), 605 et seq.

256 Understanding on Rules and Procedures Governing the Settlement of Disputes.

257 See J. Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?" *EJIL* 14 (2003), 907 et seq.; see also S. Charnovitz, "WTO Dispute Settlement as a Model for International Governance", in: A. Kiss/ D. Shelton/ K. Ishibashi (eds), *Economic Globalization and Compliance with International Environmental Agreements*, 2003, 245-253 (252); for a contrary view, see C. Carmody, "WTO Obligations as Collective", *EJIL* 17 (2006), 419 et seq.; see also Harrison, see note 2, 60 who mentions that "many trade lawyers would dispute this characterization of trade law and human rights law obligations" without taking sides himself.

plicitly rejected within human rights regimes. Although most human rights treaties provide not only for individual but also for inter-state complaints, the supervisory organs of the ECHR, and later of other human rights bodies, have stressed that a state complaining about human rights violations by another state before the competent treaty body does not defend its own interests but those of the community of states as a whole.[258] The so-called objective nature of human rights norms, and the absence of reciprocity, also means that a state cannot refuse to abide by its human rights obligations on the grounds that other states fail to honour their commitments. Within the WTO, by contrast, compensation and retaliation are available to a complainant state so as to induce the defendant state to comply with a Panel or Appellate Body ruling. Reciprocity is thus alive and well within the multilateral trading system. It is this very feature, combined with the compulsory nature of the DSU, which tends to confer pre-eminence to WTO law with respect to other international regimes. These characteristics of the WTO regime give rise to "sanctions envy"[259] and the resulting calls for linking trade law with norms from regimes whose enforcement mechanisms are much weaker. Whilst human rights enjoy perceived normative superior-

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258 See the famous admissibility decision of the European Commission of Human Rights in *Austria v. Italy* (known as the *Pfunders* case), App. No. 788/60, Yearbook of the European Convention on Human Rights, 1961, Vol. IV, 138-140, which described the specific nature and purpose of the Convention as follows: "The purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law. […] it follows that the obligations undertaken […] are essentially of an objective character, being designed to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves; […] [I]t follows that a High Contracting Party, when it refers an alleged breach of the Convention to the Commission […], is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe." For a detailed analysis of the specific nature of human rights treaties, with references to other human rights regimes, see Addo, see note 98, 468 et seq.

259 Charnovitz, see note 257, 252.

ity[260] over international trade law, the "hard enforced" WTO regime benefits from "de facto" pre-eminence over "soft-enforced" human rights regimes.[261] In other words, enforcement, which "has always been seen as the weak link in the international legal system, and it is surely the weak link of international human rights law",[262] is less of a problem for the WTO.

Compared with the judicial branch of the WTO, the legislative and the executive branch fares less well in terms of effectiveness. By contrast with the EU, the multilateral trading system lacks an independent institution representing the interests of the community of the Member States and law-making powers typical of supranationalism. This also limits the avenues along which to integrate human rights within the multilateral trading regime. Under the current institutional framework, the mechanisms available to accommodate human rights issues, including freedom of expression, are mainly treaty amendments, the adoption of waivers, accession discussions, the non-extension of privileges, Trade Policy Reviews (TPR) and dispute settlement.[263] As others have shown, the practical relevance of these avenues is quite limited. Human rights concerns, for instance, have so far not played an important role in accession negotiations or during TPR.[264] For this reason, most contributions on human rights and the WTO focus on dispute settlement, which is considered the most promising among the existing avenues. The advantage of this mechanism remains relative. So far, states have been reluctant to rely on human rights directly within the dispute settlement

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260 Of the regional human rights courts, both the Strasbourg Court and the Inter-American Court have made claims coming close to asserting the superiority of human rights law *vis-à-vis* other norms of international law. See the *Bosphorus* ruling of the ECtHR, see note 54 and E. De Wet, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order", *LJIL* 19 (2011), 611 et seq.; the Inter-American Court has supported this finding based on the objective nature of the ACHR, which it contrasted with the reciprocal nature of an investment treaty (see Lixinski, see note 203, 590 et seq. (598 et seq.)).

261 See H. Hestermayer, *Human Rights and the WTO. The Case of Patents and Access to Medicine*, 2007, 206 et seq. (from which the terminology is borrowed); see also Konstantinov, see note 2, 330.

262 L. Henkin, "Human Rights and 'State Sovereignty'", *Ga. J. Int'l & Comp. L.* 25 (1996), 31 et seq. (41).

263 See Konstantinov, see note 2, 325.

264 Id., see note 2, 325 et seq.

procedure.[265] More generally, the fact that only governments have standing "acts as a key political filter", limiting both the number of cases and the arguments brought before the dispute settlement bodies.[266] The preference for a negotiated settlement,[267] and political reasons, may explain governments' reluctance to base their claims not only on WTO law but also on human rights law. Bargaining, and reaching a negotiated compromise over basic entitlements of human beings, appears much more problematic than a settlement over purely commercial interests.

Due to the paucity of precedents, the following sections are partly speculative, attempting to anticipate cases in which free speech concerns may be at issue. The analysis will first focus on the GATT and the General Agreement on Trade in Services (GATS) (1.) and then on the TRIPS Agreement (2.). It will be limited to cases where free speech is directly linked to the dispute at issue. Thus the compatibility of trade sanctions targeting human rights violations that are not directly trade-related will not be examined.[268]

1. GATT and GATS

To gain a clearer understanding of how freedom of expression may interact with the norms of trade liberalisation in the field of goods (GATT) and services (GATS), it is useful to adopt a comparative perspective. Drawing on the insights from the inter-linkage between freedom of expression and economic rights and freedoms on other layers of governance, in particular within the EU, the present analysis will distinguish between "defensive" and "offensive" uses of freedom of expression.[269] The first group encompasses cases in which the complaining state invokes free speech as "a sword" to reinforce its claim that the defending state has breached GATT or GATS rules. The second con-

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265 Id., see note 2, 331.

266 See Helfer, see note 189, 44; On the "political filters" with respect to WTO litigations, see A.O. Sykes, "Public versus Private Enforcement of International Economic Law: Standing and Remedy", *Journal of Legal Studies* 34 (2005), 631 et seq.

267 See Helfer, see note 189, 44, footnote 224.

268 On this issue, see e.g. Cleveland, see note 2 and Stirling, see note 2.

269 The terminology is borrowed from Coppel/ O'Neill, see note 59.

sists of cases in which the defending state relies on freedom of expression as "a shield", at the level of exceptions to free trade rules.

a. "Defensive" Use of Free Speech

What are the cases in which conflicts between freedom of expression and commitments are likely to occur under the GATT and the GATS? This question needs answering before possible avenues for reconciling free speech and WTO law are analysed. As discussed above, within the EU legal order, the ECJ was faced with a clear clash between market freedoms and free speech in the *Schmidberger* case. It has been argued that a similar scenario may also occur within the WTO legal order, as "politically motivated private demonstrations blocking freedom of transit"[270] may contravene Article V GATT. Although theoretically feasible, the state-centred nature of the dispute settlement mechanism makes it unlikely that a government would bring a claim against another state for allowing a peaceful demonstration to interrupt a specific transit route for a few hours. A state may have a bigger incentive to file a complaint in a scenario where private actors systematically and intentionally block the traffic of foreign goods in protest against "unfair" competition.

The ECJ was called to rule on similar facts in *Commission v. France*.[271] This case concerned the French Government's lack of action to secure free movement of Spanish agricultural products against blockages and acts of vandalism from French farmers over a period of more than ten years. Scrutinising this case in the light of free movement implied, however, that the ECJ admitted that the four economic freedoms imposed on the Member States not only the duty to refrain from taking protectionist measures but also the duty to protect free movement rights against interference from private parties. This activist ruling did not remain without comments on the European level. It is far from certain that a Panel or the Appellate Body, which operate in a more diverse setting than the ECJ, would, or should, confer an equally broad scope to the states' obligations under GATT.

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270 E.U. Petersmann, "The 'Human Rights Approach' Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?", *Journal of International Economic Law* 7 (2004), 605 et seq. (609).

271 ECJ Case 265/95 *Commission v. France* (1997) ECR I-6959.

A more likely avenue for freedom of expression to enter the ambit of GATT and GATS would be with disputes involving "cultural products",[272] which were at issue, for instance, in the famous *Canada–Periodicals* case.[273] By contrast with *Familiapress* and similar cases decided by the ECJ, the Canadian Government did not rely on freedom of expression to justify the measures taken to protect the Canadian press against competition from U.S. products. More generally, measures taken by states to preserve the diversity of the local media, cinematography, literature and arts have so far rarely been analysed as free speech issues within the WTO.[274] Discussions[275] have mainly centred on linking WTO law with cultural rights protected under the ICESCR[276] and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression.[277] The reluctance to frame the "trade and culture" debate as a free speech issue may partly be due to diverging interpretations of the scope and content of freedom of expression. As already mentioned,[278] the American vision of an unfettered free marketplace of ideas, coupled with a purely negative vision of fundamental rights contrasts, for instance, with the "European" vision considering media and press pluralism as a free speech value which the state needs to protect against the standardising forces of the market. As also discussed earlier,[279] the lack of consensus is reflected on the global level, too. As the drafting process of the new General Comment on article 19

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272 For a study on "cultural products" within the WTO, see e.g. J. Morijn, *Reframing human rights and trade: potential and limits of a human rights perspective of WTO law on cultural and educational goods and services*, 2010; T. Voon, *Cultural Products and the World Trade Organization*, 2007; Graber, see note 244.

273 WTO Appellate Body Report, *Canada – Certain Measures Concerning Periodicals (Canada – Periodicals)*, Doc. WT/DS31/AB/R adopted 30 July 1997.

274 For an exception, see Graber, see note 244, 102 et seq.

275 For an overview of the discussion, see Voon, see note 272, 149 et seq.

276 See article 27 para. 1 Universal Declaration: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

277 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, adopted 20 October 2005, entered into force 18 March 2007.

278 See above Section IV. 1.

279 See above Section IV. 3. a.

ICCPR has shown, the extent to which freedom of speech imposes on governments the duty to safeguard press pluralism is controversial.

Does the lack of a global consensus mean that states should be precluded from invoking freedom of expression as a defence against a complaint filed by another WTO member? An answer in the affirmative would in the author's view not take sufficiently into account the subsidiarity of "higher" with respect to "lower" layers of governance. The experience on the European level shows that the ECtHR's margin of appreciation doctrine is an important tool to accommodate national diversity. In the same vein, the ECJ's *Omega* jurisprudence allows states to justify restrictions of economic freedoms based on human rights defences, even absent a shared vision of the right in question.[280] Within the WTO, the public morals exception (Article XX (a) GATT and Article XIV (a) GATS)[281] is the most promising avenue to integrate human rights conceptions which are not shared by all members within the multilateral trading system.[282] This approach can build on WTO jurispru-

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280 See above Section II. 3.

281 For studies of the public morals exception, see M. Wu, "Free Trade and the Protection of Public Morals: An analysis of the Newly Emerging Public Morals Clause Doctrine", *Yale J. Int'l L.* 33 (2008), 215 et seq.; N.F. Diebold, "The Morals and Order Exceptions in WTO: Balancing the Toothless Tiger and the Undermining Mole", *Journal of International Economic Law* 11 (2007), 43 et seq.; S. Charnovitz, "The Moral Exception in Trade Policy", *Va. J. Int'l L.* 38 (1998), 689 et seq.; C.T. Feddersen, "Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and 'Conventional' Rules of Interpretation'", *Minn. J. of Global Trade* 7 (1998), 75 et seq.

282 This approach is supported amongst others by Harrison, see note 2, 200 et seq.; Voon, see note 272, 156 et seq.; see also the Report of the United Nations High Commissioner for Human Rights, "Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights", Doc. HR/PUB05/05 (2005), 5; Howse/ Mutua, see note 2; M.J. Trebilcock/ R. Howse, "Trade Policy and Labor Standards", *Minn. J. Global Trade* 14 (2005), 261 et seq. (290); S. Zleptic, *Non-economic objectives in WTO law : justification provisions of GATT, GATS, SPS, and TBT Agreements*, 2010, 202 et seq.; S.J. Powell, "Place of Human Rights Law in World Trade Organization Rules", *Fla. J. Int'l L.* 16 (2004), 219 et seq. (223); Cleveland, see note 2, 157.

dence. In *U.S.–Gambling*,[283] the Panel held with respect to the terms "public morals" and "public order" that,

> "the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further, the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate. (…) More particularly, Members should be given some scope to define and apply for themselves the concepts of 'public morals' and 'public order' in their respective territories, according to their own systems and scales of values."[284]

The emphasis on the variability of public morals, and the willingness to grant members "some scope" to define and apply this concept, support the view that the Panel rejected a universalist vision of public morality. Varying in time, public morals are, as the Appellate Body held with respect to other exception clauses, "by definition, evolutionary."[285] The fact that human rights law was in its infancy when GATT was drafted thus does not prevent contemporary human rights norms from informing the ordinary meaning of Article XX (a) according to the rules of interpretation of article 31 para. 1 Vienna Convention on the Law of Treaties (VCLT).[286] Human rights moreover fit the Panel's defi-

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283 WTO, Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (U.S.–Gambling)*, Doc. WT/DS285/R, Appellate Body Report adopted 20 April 2005.

284 Ibid., para. 6.461, internal footnotes omitted.

285 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, Doc. WT/DS58/AB/R, adopted 6 November 1998, para. 130, internal quotations omitted; on the evolutionary nature of the public moral exception, see Voon, see note 272, 156, and of the exception clauses more generally, Zleptic, see note 282, 203.

286 See also High Commissioner for Human Rights, see note 282, 5: "(…) But arguing for the exclusion of the norms and standards of international human rights on the basis of the ordinary meaning of the terms would be very difficult to sustain. For, '[i]n the modern world, the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept.'" (quoting R. Howse, "Back to court after Shrimp/Turtle? Almost but not quite yet: India's short lived challenge to labor and environmental exceptions in the European Union's generalized system of preferences", *Am. U.*

nition of public morals in *U.S.–Gambling* as denoting "standards of right and wrong conduct maintained by or on behalf of a community or nation."[287] As Zleptic put it,

> "[i]f pornography, gambling, alcohol drinks or matters of religious concern are considered as core elements of the public morals exception, it is difficult to argue why human rights considerations should not fall within the same category. They can also be considered as constitutive of 'public order', defined as the 'preservation of the fundamental interests of a society, as reflected in public policy and law'" ,[288] and relating,
>
> "inter alia, to standards of law, security and morality."[289]

Whilst *U.S.–Gambling* does not support a universalist reading of "public morals", it does not seem to endorse an entirely particularist vision, either.[290] However, it offers no guidance as to the "thickness" of consensus necessary for the public morals exception to apply.[291] Defining the degree of convergence required is a difficult undertaking. At least if a certain conception of a human right finds support both within several jurisdictions of the national level and on the regional level, the consensus requirement ought to be considered as being met. This is the case with respect to the free speech value of pluralism, which is not only espoused by several European constitutional courts but also by the ECtHR and the ECJ. The UNESCO Convention, which refers in its title to "cultural expression",[292] points to even broader support.

Taking regional human rights instruments into account would, in the case of Europe, fit well with the ECtHR's description of the European Convention as a "constitutional instrument of a European public order."[293] This solution strikes a balance between the risks entailed by both universalism and particularism. It takes the principle of subsidiar-

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Int'l L. Rev. 18 (2003), 1333 et seq. (1368); see also Trebilcock/ Howse, see note 282, stressing the "evolution of human rights as a core element in public morality in many postwar societies and at the international level."

287 Panel Report, *U.S.–Gambling*, see note 283, para. 6.465.

288 Panel Report, *U.S.–Gambling*, ibid., para. 6.467.

289 Ibid.

290 The Report refers to the practice of other jurisdictions before admitting the applicability of the public morals exception, see Panel Report, *U.S.-Gambling,* see note 283, paras 6.471- 6.474; see also Wu, see note 281, 233.

291 See Wu, see note 281, 231 et seq.

292 See above note 277.

293 See above Section IV. 2. a. and *Loizidou v. Turkey*, see note 205.

ity seriously without compromising the checking function of "higher" over "lower" layers of governance[294] by preventing the "public morals exception" from being rendered ineffective in accommodating diverging domestic values, whilst taking seriously the concern that states may use unfettered discretion to adopt protectionist measures under the cover of "public morals". Robert Wai's assertion that "the multilateral nature of the international human rights regime partially protects against protectionist motives"[295] is pertinent also with respect to regional human rights instruments. Invoking free speech values as defences in disputes concerning "cultural products" would thus not be incompatible with the object and purpose of the WTO. More affirmatively, with respect to the media, pluralism enhances the diversity of information and public debate on matters of public concern, which include, as mentioned earlier,[296] both political and economic matters. Diverse media is also an important safeguard against abuses in the political and the commercial sphere. The importance of transparency for the functioning of markets makes it supportive of the objectives pursued by the WTO.

b. "Offensive" Use of Free Speech

As was shown above, synergies and overlaps between freedom of expression and free trade occur in the field of commercial speech, e.g. commercial advertising. This raises the question whether the WTO adjudicative branch ought to examine advertising restrictions not only in the light of GATT or GATS rules, but also in the light of freedom of expression. Referring to the *Hertel* case,[297] Petersmann, for instance, raises the question why human rights courts confer more extensive protection to commercial speech than trade courts.[298] This assertion, however, is based on a concept of commercial speech which is different from that used by constitutional and human rights courts.[299] The latter adopt a narrow vision of commercial expression and limit it to cases where the speaker has a direct profit motive, as is the case in commer-

294 On the role of subsidiarity and the checking function within a multilayered constitution, see above Section II. 1. and 2.

295 Wai, see note 2, 54.

296 See above Section III. 2. b.

297 See above Section IV. 2. a.

298 Petersmann, see note 270, 610.

299 See C.B. Graber, "The *Hertel* Case and the Distinction between Commercial and Non-Commercial Speech", in: Cottier/ Pauwelyn/ Bürgi Bonanomi, see note 2, 273-278.

cial advertising and speech by competitors falling within the ambit of unfair competition law. This was also the vision of the ECtHR in the *Hertel* case.[300] As mentioned above, the Strasbourg court distinguished the expression at issue in *Hertel* from standard commercial speech and treated it as political speech, understood in a broad sense. If commercial speech is understood in a narrow sense, there is little ground to argue that human rights courts treat this category of speech more favourably than trade courts. The analysis of freedom of expression on the different layers of governance has shown that both the ECtHR and the ECJ subject commercial speech to a lower level of scrutiny than political speech.[301] Although the Luxembourg court has interpreted derogations from free movement provisions in the light of freedom of expression, this has not resulted in a higher level of protection against advertising restrictions than that flowing from free movement of goods or free movement of services.[302] On the global level, the Human Rights Committee's work on drafting the new general comment on freedom of expression illustrates that there is little consensus on whether or not commercial speech is a form of protected expression under article 19 ICCPR.[303] In the light of this diversity, in the author's view it is inadvisable for Panels or the Appellate Body to frame advertising restrictions as free speech issues. Doing so is likely to trigger criticism, including the charge that human rights are used as a strategic tool to reinforce market access. This approach would be particularly controversial with respect to advertising restrictions based on health grounds. Bans on advertising alcoholic beverages or cigarettes apply in many jurisdictions. Viewing them as limitations of free speech entails the risk of according commercial speech an excessively high level of protection, generating conflicts with other human rights, in particular with the right to health.[304] Pursuant to the ICESCR, the duty to protect and fulfil the right to health requires states to take positive measures. In the light of the Framework Convention on Tobacco Control (FCTC), these include

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300 See above Section IV. 2. a.

301 See above Section IV. 2. a. and b.

302 See above Section IV. 2. b.

303 See above Section IV. 3. a.

304 Within the health community, concerns have been voiced that advertising restrictions may be sanctioned by WTO dispute settlement bodies, without them being framed as free speech issues. See e.g. E. Gould, "Trade Treaties and Alcohol Advertising Policy", *Journal of Public Health Policy* 26 (2005), 359 et seq.

restrictions on advertising.[305] Under these circumstances, the approach taken in the *Thailand Cigarettes* case[306] and in *U.S.–Gambling*[307] with respect to commercial speech is appropriate.

In the first case, Thailand's total ban on both direct and indirect advertising in all media, which applied indiscriminately to domestic and imported cigarettes, was found compatible with GATT.[308] The Panel considered the argument that the broad scope of the ban *de facto* disadvantaged imported products *vis-à-vis* domestic cigarettes and may thus amount to discrimination proscribed by Article III:4 GATT. It held, however, that even if this view were accepted, the national measure could be justified on public health grounds. Since advertising carries the risk of stimulating the demand for cigarettes, a total ban was deemed necessary in the sense of Article XX(b) GATT.[309]

In *U.S.-Gambling,* the Panel did not clearly distinguish between the supply of gambling services and the promotion thereof. Referring to the practice of other jurisdictions, including the case law of the ECJ,[310] it considered the public morals exception applicable.[311]

A human rights approach taking into account freedom of expression would have greater appeal with respect to information bans about a health-related service or product, as was the case in *Grogan.* Even if such measures were to come within the reach of WTO law, assessing them in the light of human rights would be a daunting task. The WTO judiciary would need to venture into highly sensitive areas, which may

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305 On the relationship between WTO law and the FCTC, see A.L. Taylor, "Trade, Human Rights, and the WHO Framework Convention on Tobacco Control: Just What the Doctor Ordered?", in: Cottier/ Pauwelyn/ Bürgi Bonanomi, see note 2, 322-333, and W. Meng, "Conflicting Rules in the WHO FCTC and their Impact. Commentary on Allyn L. Taylor", in: ibid., see note 2, 334-339; the fact that trade liberalisation has led to an increase in the number of smokers in developing countries is highlighted in the joint study of the WTO and the WHO on the WTO Agreements and public health, 2002, 71 et seq., available at <http://www.wto.org>.

306 Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand – Cigarettes)*, Doc. DS10/R - 37S/200, adopted 7 November 1990.

307 Appellate Body Report, *U.S.–Gambling*, see note 283.

308 The Panel found other measures which applied only to imported cigarettes to be GATT inconsistent.

309 Panel Report, *Thailand – Cigarettes,* see note 306, 78.

310 Panel Report, *U.S.–Gambling*, see note 283, para. 6.473, footnote 913.

311 Panel Report, *U.S.–Gambling*, see note 283, paras 6.471-6.474.

undermine the legitimacy of a dispute settlement system conceived mainly for economic matters. Cases like *Grogan* moreover require weighing and balancing of competing fundamental rights. Apart from freedom of expression, the right to privacy and to health of the pregnant women, and the right to life of the foetus, are at issue. Finding an appropriate balance is a delicate task for which a dispute settlement body composed of trade experts is ill equipped. A finding of a violation risks prompting the charge of a "strategic" use of human rights. This problem would be compounded if a human rights body reached a different solution in a subsequent case. As *Grogan* shows, the opposite scenario is also conceivable. A Panel or the Appellate Body called upon to decide such matters is likely to be aware of its limitations and leave the defending state more discretion than a human rights body would. In *Grogan*, whilst the ECJ declined jurisdiction, the Advocate General engaged in the balancing process and considered the information ban compatible with the fundamental freedoms and fundamental rights protected in the EU legal order. As mentioned, the ECtHR reached the opposite result. Such diverging rulings are detrimental to the coherence of the international legal order and weaken both human rights and the legitimacy of the multilateral trading system. In cases similar to *Grogan*, it would be preferable for WTO dispute settlement bodies to analyse the issue from the vantage point of free trade rules. The reports could state the limited grounds of the ruling and mention that their findings do not imply compatibility with human rights law.

An offensive use of freedom of expression would, however, be justified in two constellations. Firstly, a state should not be able to successfully invoke an exception clause to justify a measure that was clearly found to be incompatible with freedom of expression by a regional or international human rights treaty body.[312] Under a reading of the public

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312 For a similar approach, see Wu, see note 281, 246, who requires, however, that the international treaty be ratified by the majority of WTO members. He posits this requirement, however, for "outward-looking measures", e.g. cases in which a WTO member invokes the public morals exception to enforce certain standards outside its own jurisdiction. He considers "inward-looking" measures (which are at issue when a WTO member invokes public morals as a defence) as being less problematic and subjects them to less stringent conditions. As the right to freedom of expression is enshrined both in the ICCPR (a treaty which binds the majority of WTO members) and in regional human rights instruments, preventing a WTO member from justifying a WTO-inconsistent measure which also violates freedom of expression does not hold that member to a standard foreign to other

morals exception which includes human rights, it makes sense to admit that the scope of the exception clause is at the same time limited by human rights, and cannot be invoked to justify a measure found in breach of freedom of expression by the competent human rights body. This approach also means that Panels or the Appellate Body would not accept domestic measures that infringe freedom of expression and are taken under the guise of preserving cultural diversity. The concern that such measures may be used to stifle freedom of expression is also reflected in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression. Its article 2 para. 1 holds that,

> "Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof."

Accepting that the public morals exception is itself limited by human rights law would have the merit of counteracting the fragmentation of international law. At the same time, it would also address fragmentation within states and create incentives for different governmental ministries to adopt a coherent approach. Trade ministries should not disregard human rights obligations freely entered into by their governments in the WTO forum. The fact that the scope of the public morals clause may vary depending on the international obligations entered into by each state, ought not be a decisive argument against the proposed approach, as variability is a characteristic feature of the public morals exception.

Secondly, the scope of the exception clauses ought also to be limited by *ius cogens* norms and rules of customary international law, which is of importance for states which are not bound to respect freedom of expression by virtue of a universal or a regional human rights convention. *Ius cogens* prevails over treaty law based on its hierarchical superior-

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WTO members, although diverging interpretations of the same right are possible. Since the right of individual or state communications is optional under the ICCPR, taking into account regional human rights instruments makes it easier to satisfy the requirement that a domestic measure is in clear breach of freedom of expression.

ity.[313] Customary international law can be taken into account both via the "weak form of normative integration"[314] of article 31 (1) VCLT, and via the "more constricting and binding principle of integration found in Article 31 (3)(c) VCLT",[315] as "relevant rules of international law applicable in the relations between the parties." Whilst freedom of expression is generally not considered part of *ius cogens*, it may benefit from the protective ambit of imperative norms of international law. Practices like torture, forced disappearances and summary executions of journalists, which are widespread in certain states,[316] infringe both freedom of expression and *ius cogens* norms. As Panizzon has argued, they may impair the work of journalists and make broadcasters reluctant to send reporters to a country where their life and integrity is at risk. Grave human rights abuses may thus prevent foreign media from making use of the market access commitments made by the receiving country under GATS and are therefore trade-relevant.[317]

As argued above,[318] free speech enjoys independent protection in the form of customary international law against state policies engaging in repression or censorship of political speech, broadly defined. With respect to the practice of some states (the most prominent example being China) of subjecting the media, including the Internet, to stringent content control, scholars have rightly argued that the WTO dispute settlement bodies should not accept a defence based on the public morals

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313 Arts 53 and 64 VCLT.

314 T. Broude, "Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration", *Loyola University Chicago International Law Review* 6 (2008), 173 et seq. (200). Whether treaties ratified by both parties to the dispute, or only those ratified by all WTO members, are to be considered as rules "applicable in the relations between the parties" in the sense of article 31 (3)(c) VCLT is controversial. As is well known, the Panel in *EC- Biotech* favoured the second interpretation (see WTO, Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, Doc. WT/DS291,292,293/R, adopted 21 November 2006; for a discussion of this ruling and other interpretations of article 31 (3)(c) VCLT, see e.g. Voon, see note 272, 137 et seq.; Harrison, see note 2, 200 et seq.

315 Broude, see note 314, 199.

316 See e.g. the free speech cases decided by the African Commission on Human Rights, see note 174.

317 Panizzon, see note 244, 541.

318 Above Section IV. 3. c.

exception. Doing so "would amount to granting a license to violate some core international human rights standards, the most important one of which being the right to freedom of expression."[319]

So far, both WTO members and its judiciary have shied away from raising free speech claims within the dispute settlement system, as the well-known *China–Publications*[320] case shows. The United States had initiated the complaint arguing that China violated obligations it had entered into in the Accession Protocol by limiting imports and distribution of cultural products to state-owned enterprises. As a consequence, foreign corporations were unable to import and distribute publications like books, magazines and newspapers in print and online, as well as sound recordings, films and DVDs. China argued that the restrictions on trading rights are necessary to safeguard public morals. This defence needs to be seen in the context of the pervasive system of

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319 H.S. Gao, "The Mighty Pen, the Almighty Dollar, and the Holy Hammer and Sickle", *Asian Journal of WTO & International Health Law and Policy* 2 (2007), 328 et seq.; for doubts that the public morals or the public order exception would cover blatant censorship, see also M. Panizzon, "How close will GATS get to Human Rights?", NCCR Working Paper No. 2006/14, 28, available at <http://papers.ssrn.com>; T. Wu, "The World Trade Law of Censorship and Internet Filtering", *Chi. J. Int'l L.* 7 (2006), 263 et seq. (284), holding that the applicability of the public order exception is "a hard question when the content blocked may be more of a threat either to the Party or to a favoured local company."

320 WTO, Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications)*, Doc. WT/DS363/AB/R, adopted 19 January 2010. For commentaries, see J. Pauwelyn, "Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report in China-Audiovisuals", *Melbourne Journal of International Law* 11 (2008), 1 et seq.; X. Wu, "Case Note: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Doc. WT/DS363/ABR)", *Chinese Journal of International Law* 9 (2010), 415 et seq.; J. Shi/ W. Chen, "The 'Specificity' of Cultural Products v. the 'Generality' of Trade Obligations: Reflecting on China – Publications and Audiovisual Products", *Journal of World Trade* 45 (2011), 159 et seq.; J. Ya Qin, "Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence – A Commentary on the China – Publications Case", *Chinese Journal of International Law* 10 (2011), 271 et seq.

content control applied in China.[321] Deemed politically sensitive, information and cultural products can only be imported and distributed by a limited number of selected state-owned entities which are also entrusted with content control. The statutory grounds for refusing dissemination of a cultural product are manifold and couched in broad and vague terms. They clearly go beyond the legitimate interests provided for in human rights agreements, such as public order, national security and public morals. China's rules and regulations also prohibit publications which "defy the basic principles of the Constitution, injure the national glory and interests, (…) infringe upon customs and habits of the nationalities, propagate evil cults or superstition, or disturb public order or destroys social stability."[322] These criteria are concretised through internal instructions from the Communist Party's Central Propaganda Department. These secret guidelines and directives ensure a maximum level of flexibility to adjust the censorship criteria to the political circumstances of the day. As a consequence, the criteria applied by the state-owned enterprises are opaque and the review process itself lacks transparency and respect for due process.[323]

Even though the systematic censorship applied to all imports and distribution of cultural products is anathema to the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers",[324] the United States did not challenge the review process or the broad censorship criteria but accepted the claim made by China that content review pursued the aim of protecting public morals. Its argument was limited to questioning the necessity of the measure. The United States argued that excluding private enterprises from the import and distribution of cultural products was not necessary, since a less trade-disruptive measure was available: instead of entrusting the state-owned enterprises with content review, the Chinese Government could carry out censorship by a centralised agency. The Panel and the Appellate Body endorsed the United States' arguments, showing no inclination to engage with the politically sensitive nature of censorship. The Panel held that the protection of public morals is a crucial value. It considered that members are able to determine the appropriate level of pro-

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321 For a description of the censorship regime, see Qin, see note 320, 274 et seq.; see also B. Liebman, "Watchdog or Demagogue? The Media in the Chinese Legal System", *Colum. L. R.* 105 (2005), 1 et seq. (23-28).

322 Qin, see note 320, 76, internal quotation marks omitted.

323 Qin, ibid., 284.

324 Article 19 para. 2 ICCPR.

tection, and that China had opted for a high level.[325] As neither the United States, nor a third party, had challenged the content control as such, the Panel did not question *whether* but only *how* the review was to be carried out. It concluded that a centralised review system was a reasonable alternative available to China.

Although the party submissions, and both the Panel and the Appellate Body report, preferred to steer clear of human rights arguments, the question arises whether the ruling *de facto* favoured freedom of expression. Put differently, what are the human rights implications of *China–Publications*? Does the ruling point to synergies between the "right to trade" and the right to free speech, enabling WTO law to act as a handmaiden for human rights law? This is far from certain. Commentators have highlighted that China's duty to reform the content review process could have both positive and negative implications for freedom of expression.

On the one hand, it has been argued that the centralisation of content review in a newly created governmental agency may, in the long term, jeopardise the opacity of the whole procedure, as private importers would sooner or later challenge the lack of transparency and due process of content control and ask for the reasons why certain products did not pass the censors' scrutiny. The new review scheme may as a result be challenged in a new WTO complaint on the grounds that it is inconsistent with the transparency or due process obligations under the covered agreements (Article X GATT or Article III and VI GATS).[326] Making the review process transparent would, however, run counter to the Communist Party's desire for maximum flexibility. Publicising the prohibited products may moreover fuel the public's interest and increase the risk of illegal circulation.[327]

On the other hand, centralised review may result in more stringent control of cultural products. Under the current system, the in-house reviewers of the state-owned enterprises are given considerable leeway in interpreting and applying the vague censorship criteria. The decentralised nature of the review enables censors to opt for a more liberal approach than that favoured by conservative members of the Party. Moreover, the state-owned enterprises' financial incentive in trading acts as a safeguard against an excessively rigid application of the censorship criteria. By contrast, employees of a centralised government

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325 Panel Report, *China – Publications,* see note 320, paras 7.816-7.819.

326 See Qin, see note 320, 285-286.

327 Qin, ibid., 285.

agency responsible exclusively for content review would be insensitive to the economic impact of banning material from being imported and distributed. "Accountable to the central censorship agency only, the reviewers would be motivated to screen imports as rigorously and strictly as possible so as to justify their bureaucratic existence."[328] Lastly, the Chinese Government may choose to combine centralised review with the legal duty of all private importers to engage in self-censorship. This solution, already applied to Google, carries the risk of having a considerable chilling effect on freedom of expression, as private corporations may prefer to remain on the safe side and censor material which is not clearly caught by the censorship criteria[329].

In conclusion, the impact of *China–Publications*[330] on freedom of expression is difficult to assess. Although it is understandable that WTO members and the dispute settlement bodies preferred to avoid a politically charged issue like censorship, this is regrettable from a human rights perspective. Uncritically endorsing China's censorship scheme as conceived to protect the important interest of public morals may even have the detrimental effect of legitimising clear violations of freedom of expression. This would not be the case had the parties and the WTO judiciary been willing to construe the public morals exception in the light of human rights law. Had they gone down this road, it would have been necessary to engage clearly with policy arguments[331] and to show that freedom of expression was not only protected for the sake of "the right to trade" of foreign importers. As argued in the context of the EU, such narrow instrumentalist reasoning fails to take into account the expressive nature of human rights law. The claim could have been made that the WTO's objective of pursuing "sustainable development" entailed the respect for freedom,[332] including freedom of expression, as an essential right for both individual self-development

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328 Qin, ibid., 287, holding that this phenomenon has already been noticed with regard to Internet censorship, allegedly carried out by 30,000 employees.

329 Qin, see note 320, 287.

330 See note 320.

331 For a criticism of the panel and the Appellate Body's reluctance to engage with policy arguments in *China – Publications,* see Qin, see note 320, 316, 321 (who does not however include freedom of expression among them).

332 See Amartya Sen's famous understanding of development as freedom. See e.g. A. Sen, *Development as Freedom*, 1999; for an interpretation of sustainable development as including human rights, see also Howse/ Mutua, see note 2, 12.

and democracy. Moreover, the close connection between free speech and transparency, which is explicitly mentioned as an objective in GATS, could have been underscored. Lastly, the checking value of freedom of speech, both in the political and the economic sphere, could have been stressed. The free flow of information is, as argued above,[333] a necessary safeguard against abuses of political and economic power. Without robust and independent media willing to expose harmful commercial practices, the trust in trade liberalisation, and the functioning of the WTO, will be impaired in the long term.

2. TRIPS

a. "Defensive" Uses

Like for GATT and GATS, accommodating freedom of speech concerns within the TRIPS Agreement raises the question of possible conflicts between both sets of norms. Similarly to the two other covered agreements, the *Hertel* case was again invoked in the sphere of the TRIPS Agreement in order to highlight the need to apply WTO law consistently with the right to freedom of expression. Whilst it is true that rules of unfair competition law (in casu article 10 *bis* of the Paris Convention and thus the TRIPS Agreement) can have the effect of stifling freedom of expression, it seems unlikely that the judicial organs of the WTO would construe the relevant unfair competition rules so broadly as to extend to non commercial speech. Indeed, the Swiss Unfair Competition Act at issue in *Hertel* stands out for its singularly broad scope. Generally, unfair competition rules suppose some competitive relationship between the parties and the speaker's intention to further his or a third party's position on the market at the expense of a competitor.[334] Thus, they generally cover all statements (including those made by a scientist or the press) likely to impact on consumers' purchasing decisions.

The potential for conflict between freedom of expression and TRIPS is greater in the field of copyright and trademark law. As mentioned

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333 Section III. 2. b.

334 See R. Baur, *UWG und Wirtschaftsberichterstattung – Vorschläge zur Reduktion des Haftungsrisikos*, 1995, 61 et seq., comparing Switzerland with Germany, France and Italy.

earlier,[335] the ECtHR has already shown willingness to subject copyright rules to scrutiny and to find a violation in cases where they inhibited speech on matters of public concern. Domestic courts have also rendered judgments on conflicts between IPRs and freedom of expression. As Helfer highlights, balancing one set of rights against the other is a "sensitive and policy-laden function",[336] including not only rights-based reasoning but also "utilitarian and social welfare arguments."[337] It is thus not surprising that national courts reach different outcomes on issues including, for instance, copyright limitations to permit quotation, news reporting, or the use of copyrighted work, such as songs, in satire and parody, for the purpose of social criticism or simple entertainment.[338] As famous brands are a common target of scorn and ridicule, there is also considerable scope for conflict between trademarks and freedom of expression.[339]

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335 See above Section IV. 2. a. and note 190.

336 Helfer, see note 189, 49.

337 Ibid.

338 See P. Bernt Hugenholtz, "Copyright and Freedom of Expression in Europe", in: R.C. Dreyfuss/ D. Leenheer Zimmerman/ H. First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, 2001, 343 et seq. (362), showing the potential for conflict between intellectual property rights and article 10 ECHR. For other studies analysing the tension between freedom of expression and intellectual property rights, see e.g. C. Geiger, "'Constitutionalising' Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union", *International Review of Intellectual Property & Competition Law* 37 (2006), 371 et seq.; id., "Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?", *International Review of Intellectual Property & Competition Law* 35 (2004), 268 et seq.; S.J. Horowitz, "A Free Speech Theory of Copyright", *Stanford Technology Law Review* 2 (2009).

339 For studies on trademark parodies and the conflict between freedom of expression and trademarks, see e.g. M. Hertig Randall, "Regard d'une constitutionnaliste sur la parodie des marques", in: P.V. Kunz/ D. Herren/ T. Cottier/ R. Matteotti (eds), *Wirtschaftsrecht in Theorie und Praxis. Festschrift für Roland von Büren*, 2009, 415-452, including references to American, German, French, Swiss and South African case law; for a comparative study in German and American law, see J. Grünberger, *Schutz geschäftlicher Kennzeichen gegen Parodie im deutschen und im amerikanischen Recht*, 1991; for an overview of French case law, see D. Voorhoof, "La liberté d'expression est-elle un argument légitime en faveur du non-respect du droit d'auteur?", in: A. Strowel/ F. Tulkens et al. (eds),

It is important to note that trademark and copyright law generally provide for exceptions so as to accommodate free speech concerns and other competing interests. However, the exception clauses and many other copyright and trademark provisions are highly indeterminate.[340] Conflicts may thus arise from differing interpretations. Assessing, for instance, whether limitations to copyright are confined to "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder" as required by article 13 of the TRIPS Agreement clearly entails the application of many open-textured terms. In the field of trademarks, article 17 of the TRIPS Agreement is also indeterminate.[341] Moreover, terms including the use of a trademark "in the course of trade" and "likelihood of confusion"[342] can be interpreted more or less broadly. The same holds true when the protection of well-known trademarks applies to uses "in relation to" goods or services which "would indicate a connection" with the owner of the registered trademark.[343] Based on an over-generous construction, any use of a mark which is not purely disinterested (such as a trademark parody disseminated in a magazine) may be considered as occurring "in the course of trade", including a category of expression much broader than commercial speech; "connection" with the rights owner or "likelihood of confusion" could be read as encompassing cases which involve the simple association evoked with a distinctive commercial sign. States would thus be required to adopt stringent protection against trademark dilution which would lead to a risk of stifling social criticism in the form of trademark parodies.[344]

Noting the potential for conflict between IPRs and the right to free speech, several authors have argued that dispute settlement bodies

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Droit d'auteur et liberté d'expression, 2006, 39 et seq.; for a study of German law, see B. Schneider, *Die Markenparodie in Deutschland*, 2010.

340 See N.W. Netanel, "Asserting Copyright's Democratic Principles in the Global Arena", *Vanderbilt Law Review* 51 (1998), 217 et seq. (309).

341 "Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties."

342 Article 16 para. 1 TRIPS Agreement.

343 Article 16 para. 3 TRIPS Agreement.

344 For potential conflicts with freedom of expression stemming from a maximalist reading of TRIPS, see L.P. Ramsey, "Free Speech and International Obligations to Protect Trademarks", *Yale J. Int'l L.* 25 (2010), 405 et seq. (427 et seq.).

ought to refrain from a "maximalist" interpretation of the TRIPS Agreement and construe its provisions in the light of freedom of expression.[345] Essentially two means are available to achieve consistency of IPRs with free speech values: firstly, the scope of copyright and trademark provisions can be construed narrowly so as to exclude, for instance, political or artistic speech from the ambit of the TRIPS Agreement; secondly, like in the field of the GATT and the GATS, states can be accorded sufficient leeway to create breathing space for robust exchange of ideas through a generous interpretation of the exception clauses.[346] This approach would offer the advantage of multi-level consistency,[347] enabling states to respect their international obligations under both TRIPS and human rights agreements, as well as the right of freedom of expression protected on the domestic level. It would be compatible with the purpose and object of the TRIPS Agreement, too. In its general provisions, the latter enables states to take measures necessary for the protection of other public policy goals.[348] It also recognises the instrumental value of IPRs and holds that their protection and enforcement "should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."[349] Considering the importance of free speech for collective interests, including democracy and the functioning of the economic system, domestic measures aimed at protecting free speech values can be viewed as contributing to "social and economic welfare" and to striking a reasonable balance between the IPR holders rights and obligations. Moreover, TRIPS grants members some leeway as regards the implementation of their obligations and acknowledges the special need for flexibility for least developed countries.[350]

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345 See Ramsey, see note 344; Netanel, see note 340; a deferential approach is also recommended by the following authors, who do not, however, rely predominantly on freedom of speech in support of their view: L.R. Helfer, "Adjudicating Copyright Claims under the TRIPs Agreement: The Case for a European Human Rights Analogy", *Harv. Int'l L. J.* 39 (1998), 357 et seq.; Dinwoodie, see note 82, 512 et seq.

346 See Ramsey, see note 344, 445 et seq.

347 See C. Breining-Kaufmann, "The Matrix of Human Rights and Trade Law", in: Cottier/ Pauwelyn/ Bürgi Bonanomi, see note 2, 95-138 (118).

348 Article 8 TRIPS Agreement.

349 Article 7 TRIPS Agreement.

350 Preamble and article 1 para. 1 TRIPS Agreement.

b. "Offensive" Uses

Whilst there are good reasons to interpret the TRIPS Agreement as leaving states sufficient discretion to adopt speech-protective laws, another question is whether TRIPS ought to be construed as *requiring* states to do so. If that were the case, the failure, for instance, of a state to exempt non-commercial uses from trademark law could constitute a breach of both TRIPS and human rights law. As Ramsay has argued, this approach would raise several difficulties.[351] Firstly, it would be hard to reconcile with the wording of TRIPS, which is termed as leaving states the *option* to pursue other policy goals.[352] Secondly, as IPRs are both an "engine of free expression"[353] and, if construed too broadly, an impediment to the free flow of information, the line between "speech enhancing" and "speech impeding" uses of IPRs is difficult to draw.[354] Moreover, the appropriate balance may vary depending on the social, political and economic context.[355] Granting states the ability to experiment and to "act as laboratories in the development of international rules"[356] would be in line with the idea of subsidiarity inherent in multilayered constitutionalism. It would also take seriously concerns that the WTO may not be the most appropriate forum to strike the subtle balance between IPRs and free speech concerns.[357] The fact that international human rights law so far offers little guidance on this issue exacerbates this difficulty.[358] Of the regional human rights regimes, only the ECtHR has to the author's knowledge so far addressed conflicts between IPRs and freedom of expression. Even those rulings are sparse and barely address the vast array of possible conflicts between both bodies of law. This raises the risk that subsequent rulings by human rights bodies will contradict activist rulings of the WTO adjudicative branch. Because of the perceived axiological superiority of human rights law over trade law, such contradictory rulings would be detrimental to the legitimacy of the multilateral trading system. The fact that

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351 Ramsey, see note 344, 456 et seq.

352 See Netanel, see note 340, 281.

353 This expression is borrowed from US SC, *Harper & Row Publishers Inc.*, 471 U.S. 539 (1985), 558.

354 See Netanel, see note 340, 230.

355 See id., see note 340, 277, 296; Dinwoodie, see note 82, 513 et seq.

356 Dinwoodie, see note 82.

357 See Ramsey, see note 344, 455; Dinwoodie, see note 82, 508.

358 See Ramsey, see note 344, 451.

the WTO and its dispute settlement system are still in their early years magnifies this risk.[359]

Does it follow that "freedom imperialism"[360] via TRIPS is never justified? Put differently, is there some room for "offensive uses" of freedom of speech within the WTO in the field of intellectual property? The *China–IPR* case[361] would have offered an opportunity to address this question. Filed by the United States on the same day as *China–Publications*,[362] the complaint also concerned China's comprehensive censorship scheme, as works which had not successfully passed the review process were denied the protection of copyright. The broad and vague criteria, as exposed in the unappealed Panel report, extend to publications which "impair the prestige and interests of the State", "propagate cults and superstition", "undermine social stability", "jeopardize social ethics or fine national cultural traditions" and extend to "other contents banned by laws, administrative regulations and provisions of the State."[363] As observed in the context of the *China–Publications* case,[364] these criteria (not to mention the internal party guidelines)[365] give the reviewers almost unfettered discretion to refuse IPR protection to core political speech, which enjoys a high level of protection within all three regional human rights instruments as well as on the universal level. Moreover, good reasons exist to consider the denial of copyright protection as a measure limiting freedom of expression. On the one hand, the measure forms part of a broad scheme of content review. On the other hand, the refusal to grant copyright protection to non-conformist views denies authors revenues from their work. This makes them more dependent on the government and weak-

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359 See Helfer, see note 345, who argues that an initially deferential approach was an important factor for the legitimacy of the European human rights regime and favours the same approach within the WTO.

360 Netanel, see note 340, 280, 282.

361 WTO Appellate Body Report, *China – Measures Affecting the Protecting and Enforcement of Intellectual Property Rights (China – IPR),* Doc. WT/DS362/R, adopted 20 March 2009. For an analysis from the vantage point of freedom of expression, see T. Broude, "It's Easily Done: The *China-Intellectual Property Rights Enforcement* Dispute and the Freedom of Expression", available at <http://ssrn.com>.

362 See note 320.

363 See Panel Report, *China – IPR*, see note 361, paras 7.77–7.79; for a comprehensive list, see Broude, see note 361, 13.

364 See note 320.

365 See above Section V. 1. b.

ens, as a result, the emergence of a civil society as a counterweight to the state.[366] In other words, the system of content review undermines the speech protective function of both IPRs and human rights law. Despite this, the United States failed to invoke freedom of expression or other human rights norms,[367] and the Panel chose the course of judicial minimalism. It "wishe[d] to emphasize that the United States claim did not challenge China's right to conduct content review" and that "[t]he Panel's findings do not affect China's right to conduct content review."[368] The Panel contented itself with finding that the denial of copyright was incompatible with the TRIPS Agreement. In response to China's defence based on article 17 of the Berne Convention for the Protection of Literary and Artistic Work of 1971 as incorporated by article 9 para. 1 TRIPS, the Panel opted for a narrow interpretation of the public order clause without, however, taking freedom of expression into account. Article 17 of the Berne Convention, entitled "Censorship", reads as follows,

> "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."

The Panel found that the reference to "circulation, presentation, or exhibition" does not cover all forms of exploitation of a work and thus does not justify the denial of all copyright.[369] It chose to look upon censorship and IPRs as two distinct issues, noting that,

> "copyright and government censorship address different rights and interests. Copyright protects private rights, as reflected in the fourth recital of the preamble of the TRIPS Agreement, whilst government censorship addresses public interests."[370]

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366 See Netanel, see note 340, 227.

367 See article 15 para. 1 lit. (c) ICESCR, enshrining the right to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

368 Panel Report, *China – IPR,* see note 361, para. 7.144.

369 Ibid., para. 7.127.

370 Ibid., para. 7.135.

Like for *China–Publications*,[371] the question arises whether the Panel ruling has a positive effect on freedom of expression, despite the strategy of "issue avoidance". Again, this is far from certain. Firstly, the infringed WTO provisions only require China to grant copyright protection to foreign authors. Denial of copyright thus remains possible with regard to Chinese works, enabling the state to exert control over domestic authors and to hinder the democratising effect of an emerging civil society. As regards foreign materials, this sanction will not be available any more pursuant to the Panel's ruling. As several commentators have noted, rigorous enforcement of copyright may in the Chinese context paradoxically be detrimental to the free flow of information.[372] Under a system of comprehensive censorship, enforcing copyright is in effect a powerful weapon in the hands of the censors with which to clamp down on the unofficial channels circulating unauthorised works. Thus, the consequence of *China–IPR* may well be not more speech, but more enforced silence.[373] Put differently, a ruling which is mindful of copyright's free speech enhancing and democratising function cannot be confined to the holding that article 17 of the Berne Convention precludes the denial of copyright to censored work, but needs to engage with the substantive criteria and the transparency of the review process. Under such an approach, article 17 of the Berne Convention would need to be construed in the light of customary human rights law and the object and purpose of TRIPS. Freedom of expression, and the welfare enhancing purpose of copyright, would limit the scope of the seemingly self-judging nature of the public order clause. In conclusion, whilst *China-IPR* at first sight seems to be a case in which freedom of expression and the multilateral trading system are mutually supportive,

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371 See note 320.

372 Broude, see note 361, 15; the fact that deficient of enforcement favours the dissemination of information and ideas under conditions of censorship is also stressed by B.R. Byrne, "Regulating the Film Industry in China: A New Approach", in: *The IP and Entertainment Law Ledger*, 2010, <http://ledger.nyu-ipels.org>, section III; adopting a democratic vision of copyright, Netanel, see note 340, 252 et seq. also cautions against strong copyright protection and enforcement in non-democratic states.

373 This sentence is inspired by the famous passage of Justice Brandeis in *Whitney v. California*, see note 149: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

the disengagement from the human rights context makes it at best a "partial", maybe even a "pyrrhic victory for freedom of speech."[374]

VI. Conclusion

The present study has explored the interface between freedom of expression and free trade in the context of the multilateral trading system. Before analysing the potential for conflicts and synergies between free speech and WTO law, it examined the theoretical and institutional inter-linkages between freedom of expression and free trade. Both are intricate and manifold.

At the theoretical level, considerable overlap exists between economic approaches analysing the role and function of freedom of expression and free speech justifications advanced by political philosophers and constitutionalists. From an economic vantage point, freedom of expression is, like the individual right to trade, essential for the functioning of markets. Importantly, this approach not only focuses on commercial speech (e.g. mainly commercial advertising) but also requires protection of any market-relevant information, which includes speech from the media and civil society. Owing to the lack of direct profit motive and its pronounced public goods characteristics, speech from independent sources, like political speech, is more easily chilled than commercial speech. Economic approaches focusing on the regulation of speech account for this difference and support a higher level of protection for speech on matters of public concern than for commercial speech. Starting from different premises, free speech theorists generally arrive at the same conclusion. As was shown, under the three most common free speech justifications, freedom of expression is protected for the sake of autonomy, as a means to further democracy or the discovery of truth. All three rationales justify, in addition to a broad array of expression, also the protection of market-relevant information. Whilst the argument from autonomy corresponds to the deontological vision of human rights, the arguments from truth and democracy are, like economic free speech justifications, instrumental in nature. A pluralist account of freedom of expression thus provides for a richer understanding of the relationship between free speech and free trade than visions contrasting the deontological human right to free speech with the instrumental individual right to trade.

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374 Broude, see note 361, 12.

Considerable overlap exists also at the institutional level. A comparative analysis focusing on the role of freedom of expression and free trade on the domestic, regional and global layers of governance does not confirm strict separation between instrumentalist visions of free trade and deontological justifications of freedom of speech. Constitutional courts and human rights monitoring bodies stress both the intrinsic and the instrumentalist value of free speech. Whilst freedom of expression is protected as a free-standing right on every layer of governance, less consensus exists with regard to a comprehensive right of economic liberty. A more or less broadly defined right to pursue an economic activity is well established in Europe and within the EU, both for its intrinsic and its instrumental value. This vision is not shared by the United States and finds little support on the regional and the global level. As regards freedom of expression, the consensus among the various layers of governance varies depending on the type of speech at issue. The question whether freedom of expression extends, for instance, to commercial speech is controversial. By contrast, a broad consensus exists that political expression is core speech entitled to a high level of protection. Based on this finding, this article has argued that policies of state censorship and repression of political speech violate freedom of expression as a norm forming part of customary international law.

Apart from casting light on the status and level of protection of free speech and free trade within the multilayered constitution, the comparative analysis has stressed the lively interaction between the various layers of governance. It has also stressed the trend towards expansion of and overlap between international regimes. Based on a broad vision of political speech, the ECtHR, for instance, accords a high level of protection to market-relevant expression from independent sources, and thus effectively contributes to safeguarding transparency of the economic system. Conversely, the ECJ has extended its reach to human rights and systematically interprets them in the light of the ECtHR's case law. Whilst the protection of human rights against infringements from EU acts was seen as essential for the legitimacy of European governance, applying fundamental rights *vis-à-vis* the Member States has been less straightforward. More precisely, judgments in which the ECJ accepted states' reliance on a human right (including freedom of expression) as a justification for measures restricting market freedoms have stirred up little controversy. To the contrary, a deferential approach accommodating conceptions of human rights even if they are not shared by all Member States has been an important tool to implement the principle of subsidiarity inherent in multilayered governance. It also helps

to counteract the common perception that an economically minded court is necessarily inclined to privilege economic interests and to relegate human rights to second place. By contrast with "defensive" recourse to human rights, "offensive" uses have tended to confirm fears of an economic bias. This has mainly been the case when a fundamental right limits the state's leeway to justify a domestic measure in sensitive areas, such as abortion, and when the court's reasoning is couched predominantly in economic terms.

The state-centred nature of the dispute settlement system, and the greater heterogeneity of WTO members, have not been very conducive to integrating human rights (including freedom of expression) within the multilateral trading system. Nevertheless, the European experience offers some insights for the WTO legal order. The perception of an economic bias poses no lesser threat to the legitimacy of Panels and the Appellate Body than it does to the ECJ.

As regards free speech, a potential for conflict exists in the field of TRIPS. An expansionist interpretation of TRIPS, coupled with a narrow construction of the exception clauses, risks encroaching on the regulatory autonomy of WTO members to accommodate speech enhancing policies (such as exceptions in favour of non-commercial speech, including satire and parody). An interpretation of the exception clauses in the light of free speech values, and a deferential standard of review, would avoid this danger. In the field of the GATT and the GATS, the public morals exception can be used to accommodate conceptions of freedom of expression even if they do not reflect a universalist standard. This is the case for example for cultural and press diversity, which tends to be viewed as a free speech value on both the domestic and regional level in Europe. As is widely known, this vision has not prevailed in the United States.

Limiting the reach of WTO law for the sake of freedom of expression should not be viewed as a "concession" granted to human rights concerns. Press diversity and sufficient breathing space for non commercial speech, are necessary to check both economic and political power. They are a prerequisite for market transparency, and, ultimately, for trust in free trade and a globalised economy.

The interdependence of the political and the economic sphere raises an important argument admitting also "offensive" uses of freedom of speech within the WTO. Drawing on the experience in the EU, and taking into account the greater diversity and more limited purpose of the global multilateral trading system than that of the European integration project, the present study has pointed out the risks of using free-

dom of speech as a sword. The WTO judiciary ought not to engage in the delicate interpretation and balancing inherent in fundamental rights jurisprudence. When a regional or international human rights body finds a state policy to be in breach of freedom of speech, the government should, however, not be able to justify the same policy based on the public morals defence within the forum of the WTO. Moreover, human rights protected by customary international law should also limit the scope of the exception clauses. An "offensive" use of freedom of speech would thus also apply to state policies of systematic repression and censorship of political speech (broadly defined).

The WTO judiciary has so far not been willing to go down this road. *China–Publications*[375] and *China–IPR*[376] show that complaining states, third parties, and the dispute settlement bodies have shied away from confronting China's comprehensive system of "content review" and have decided the disputes on narrower grounds. As a consequence, the free speech implications of the dispute were also ignored. Although both reports found against China, without challenging the legitimacy of content review in the first place, the narrow reforms necessary to comply with the WTO rulings may have a negative impact on the free flow of information. Although clearly connected, freedom of speech and international trade law passed each other like "ships in the night, without acknowledging each other's existence."[377] Within the multilateral trading system, free speech and free trade "pretend that they never have met: it's easily done."[378]

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375 See note 320.

376 *China–IPR,* see note 361. For an analysis from the vantage point of freedom of expression, see Broude, see note 361.

377 Broude, see note 361, 16.

378 Id., see note 361, 17.