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Human Rights and Unfair Competition

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Although human rights and unfair competition have been part of the legal discussion for decades their relations have mostly been analysed from the perspective of commercial communications and not with a view to freedom of economic activities. This paper proposes several conceptual changes. A new concept has to overcome the notion of the passive role of consumers and consequently the concept of their defensive rights. Consumers need to be given an active role in the market place and voice direct economic choices. Providing for comprehensible information in the market (in the sense of the transparency principle) is therefore essential. Consequently, consumers must have protective rights, including proactive entitlements to protection (for example through the application of the precautionary principle). Legislators, regulators, and courts are called to define the 'public' consumer interests ('public' because widely dispersed among the consuming public). Philosophically, an interest that is converted into a fundamental right 'trumps' any opposing, utilitarian interest or policy. Courts need to ask the question whether the consumers' position and role in the contemporary globalized markets would call for a special degree of legal protection (of a high order). In this regard, basic rights protection could become a legal strategy. A further important aspect is the empowerment of consumers. Only if consumers are aware of risk assessments and precautionary measures, they can decide to "opt-out" in respect of eg health or environmental risks.

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1. Introduction

Human rights and unfair competition have been quite well-known notions in the legal discussion for decades. The relations between human rights and unfair competition, however, are mostly unilaterally addressed, namely under the angle of commercial communications, not so much from a freedom of economic activities' perspective. Therefore, the following questions are worth to be looked at in detail: Are there any specific connections? Can comparable developments be observed? Is an influence of one of the concepts on the other recognisable?

As mentioned, from a systematic point of view, different segments are to be distinguished, namely a more idealistic expression-oriented and a more economic activity-oriented field:

(i) *Human rights, in particular freedom of expression, and unfair competition (mainly related to commercial communication)*: this topic has been intensively debated in view of frequently analyzed court cases (Nike,[1] Hertel,[2] Markt intern[3]); in substance, an interests' balancing test must regularly be applied in order to evaluate whether the freedom of expression or the aim of avoiding competition distortion prevails. Looking at the already available legal literature,[4] this paper does not intend to shed light on potential insights in the respective field but tackle new research fields.

(ii) *Freedom of economic activity and unfair competition*: this topic refers to the fact that unfair competition rules contain limits for the exercise of the freedom of economic activity (examples: prohibition of child labour, acceptance of public morals, etc.). On the one hand, this not yet extensively discussed topic focuses on the enterprises as market participants (e.g. trading in good faith). On the other hand, the consumer deserves to be put more into the centre of human rights discussions since the consumer not only benefits from unfair competition regulations but is also a holder of the right to enjoy consumer autonomy.[5] Furthermore, it seems to be equally

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1 Nike, Inc. v. Kasky, Supreme Court of California 2002, 45 P.3d 243, 248, certiorari granted, 537 U.S. 1099, certiorari dismissed, 539 U.S. 654 (2003).

2 Hertel v. Switzerland, Judgement of August 25, 1998, 59/1997/843/1049.

3 Markt intern Verlag and Beermann v. Germany, Judgment of November 20, 1989, Series A, No. 165, Application No. 10572/83, European Human Rights Reports 12 (1990), p. 161.

4 See, for example, Cottier, Thomas/Jevtic, Ana, The Protection Against Unfair Competition in WTO Law: Status, Potential and Prospects, in: Josef Drexl (ed.), Technology and Competition. Contributions in honour of Hanns Ullrich, Bruxelles 2009, pp. 669-695.

5 See below No. 4.

important that both human rights and unfair competition law at least partially pursue the same objective by protecting markets and thereby contributing to human welfare.

Hereinafter, emphasis will be put on the last aspect often overlooked in the legal debate, namely the question whether some basic human rights of a consumer as an individual can be identified in a fair and adequate competitively structured economy.

2. Notions of Human Rights and Unfair Competition under the Consumer Autonomy Angle

The short introduction into human rights and unfair competition shall provide the basic background information for the subsequent discussion of a potential "consumer autonomy" right. Usually, human rights are qualified (i) as civil and political rights being invoked by individuals and (ii) as economic liberty serving the enterprises, however, human rights are much less evaluated from the consumers' angle; therefore, light needs to be shed on the particularities of the consumers' status. In the given context, consumers should be seen as autonomous and rational actors, being capable of exercising specific choices based on preferences in order to accommodate their own interests ("pursuit of happiness").[6] Insofar, consumers do have a specific identity since it is a basic human condition to be a consumer of some kind; consumption is a vital activity which requires some regulatory protection[7] in order to enable consumers to actually exercise their autonomy.

2.1 Human Rights

a) Basic Framework

As agreements between states, the international human rights treaties are generally subject to the interpretation rules of Articles 31-33 of the Vienna Convention on the Law of Treaties.[8] In particular, the interpretation of human rights treaties has to respect the particularities inherent in this special treaty.

Article 31 of the Vienna Convention states the following principle: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Furthermore, the interpretation can have recourse to supplementary elements such as the preparatory work of the treaty and the circumstances of its conclusion. Over time, legal doctrine has more and more acknowledged that effective human rights

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6 See also Harding, Christopher/Kohl, Uta/Salmon, Naomi, Human Rights in the Marketplace, Aldershot/Burlington 2008, p. 77.

7 Harding/Kohl/Salmon, supra note 6, p. 67.

8 Vienna Convention on the Law of Treaties of May 23, 1969, 1155 U.N.T.S 331, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

protection would require a dynamic interpretation of the human rights treaties, taking into account the changing social context in which they are applied.[9]

The international human rights treaties, such as the Universal Declaration of Human Rigths,[10] the International Covenant on Civil and Political Rights (ICCPR),[11] the European Convention on Human Rights (ECHR),[12] the American Convention on Human Rights (ACHR),[13] and the African (Banjul) Charter on Human and Peoples' Rights[14] mainly encompass the so-called "idealistic" human rights, such as freedom of expression, right of live and privacy, principle of non-discrimination etc. Economic freedoms are less frequently guaranteed since the contents of such freedoms are more disputed in the international discussion and the economic systems of the various countries in the world do not always allow the application of a broad economic freedom's concept. Nevertheless, the relationship of supply and demand has become an always stronger factor in international trade, particularly under the auspices of the WTO, and manifold interests are promoting a liberalized market place.

A major role in this context is played by the social rights (for example the life protection right and the subsistence right) being the basis for consumer autonomy. Internationally looking, the most important legal instrument is the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).[15] Article 12 ICESCR provides for the protection of human health and health care, Article 11 ICESCR introduces a right of a minimum standard of living expressed as subsistence right leading to a "freedom from poverty", and Article 15 ICESCR protects the cultural diversity and indigenous ways of life.[16] Looking at its scope, the ICESCR plays an important role in respect of the development and allocation of economic resources in

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9 See for example the following cases: Schlumpf v. Switzerland, Judgement of December 3, 2009 (no. 22028/04); Schüth v. Germany, Judgement of September 23, 2010 (no. 1620/03); M.S.S. v. Belgium and Greece, Judgement of January 21, 2011 (no. 30696/09).

10 Universal Declaration of Human Rights of December 10, 1948, United Nations General Assembly, Resolution 217A(III), available at: http://www.ohchr.org/en/udhr/pages/introduction.aspx.

11 International Covenant on Civil and Political Rights of December 16, 1966, 999 U.N.T.S. 171, available at: http://www2.ohchr.org/english/law/ccpr.htm. .

12 Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, 213 U.N.T.S. 222, available at: http://conventions.coe.int/treaty/en/Treaties/Html/005.htm.

13 American Convention on Human Rights of November 22, 1969, 1144 U.N.T.S. 123, available at: http://www.oas.org/juridico/english/treaties/b-32.html.

14 African Charter on Human and Peoples' Rights (called Banjul Charter) of June 27, 1981, OAU Doc. CAB/LEG/67/3/rev. 5, reprinted in 21 I.L.M. 58 (1982), available at: http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf.

15 International Covenant on Economic, Social and Cultural Rights of December 16, 1966, 993 U.N.T.S. 3, available at: http://www2.ohchr.org/english/law/pdf/cescr.pdf.

16 For further details see below 3.1.a).

favour of the whole (consumer) society.[17] In respect of less developed countries, the Declaration on the Right to Development is relevant.[18]

Consequently, the question has to be dealt with to what extent the consumers as the last link in the supply chains are entitled to specific human rights in their consumption of goods and services. Thereby, it must be taken into account that not only natural persons but also legal persons are human rights holders to a certain extent: the legal fiction of treating a company as a "person" like a human being is not uncontested,[19] however, in the meantime widely accepted in legal doctrine.[20] The debate mainly concerns the problems of (i) defining what kind of human rights could be sensibly invoked by legal entities[21] and of (ii) describing the possible scope of such an extension.[22]

b) Indirect Effects of Human Rights

Unfair competition mainly encompasses relations between competitors. Even if its concept of three-dimensionality[23] includes the consumers and the public into its scope of protection, the human rights dimension is not covered by such approach. Moreover, the question arises whether human rights also apply in horizontal private law relations.

The typical wordings of international law provisions are generally centered around the formulation "everyone has the right to …".[24] Consequently, the human rights are directed against state interventions into a protected sphere of individuals. In addition, however, states also have a horizontal duty to protect, i.e. states have to take care that non-state actors are complying with human rights.[25] Non-state actors can be bound by the material provisions of a human rights treaty, even if no legal instrument contains a respective commitment (which is exceptionally the case for slavery trade).

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17 See also Weber, Rolf H., ICT Policies Favoring Human Rights, in: John Lannon/Edward F. Halpin/Steven Hick (eds.), Human Rights and Information Communication Technologies: Trends and Consequences of Use, forthcoming.

18 Declaration on the Right to Development of December 4, 1986, United Nations General Assembly, Resolution 41/128, available at http://www.un.org/documents/ga/res/41/a41r128.htm.

19 Art. 2 para. 1 of the International Covenant (supra note 11) excludes companies from its protective regime; a different approach has been taken by the European Convention (supra note 12).

20 See Harding/Kohl/Salmon, supra note 6, pp. 29-51; Bakan, Joel, The Corporation, London 2004, pp. 25-26; Dine, Janet, Companies, International Trade and Human Rights, Cambridge 2005; Joseph, Sarah, Corporations and Transnational Human Rights Litigation, Oxford 2004; for a critical view see Müller, Jörg Paul/Baldegger, Mirjam, Grundrechte juristischer Personen, in: Festschrift für Wolfgang Wiegand, Bern 2005, pp. 551-572.

21 See Harding/Kohl/Salmon, supra note 6, pp. 37-45.

22 See also Alston, Philip, Conjuring up New Human Rights: A Proposal for Quality Control, American Journal of International Law, Vol. 78, 1984, pp. 607 et seq.

23 See below 2.2.a).

24 See Art. 19 Universal Declaration, supra note 10; Art. 19 International Covenant, supra note 11; Art. 10 European Convention, supra note 12; Art. 13 American Convention, supra note 13; Art. 9 Banjul Charter, supra note 14.

25 Cheung, Anne/Weber, Rolf H., Internet Governance and the Responsibility of Internet Service Providers, Wisconsin International Law Review, Vol. 26, 2008, pp. 403-477, p. 420.

Therefore, even to the extent that legal regulations (i) directly binding non-state actors to human rights horizontally and (ii) establishing their liability do not exist today, neither the wording nor the context of the human rights in international treaties preclude such an obligation either.[26]

A further differentiation concerns the question of whether states are (also) obliged to protect human rights from violations committed by non-state actors. Article 2 ICCPR, Article 1 ECHR, and Article 1 ACHR acknowledge the principle that the implementation of human rights in international law is primarily a domestic matter. In particular, the ECHR is obliging the states "to secure everyone within their jurisdiction the rights and freedoms defined in […] the Convention". Similar provisions underlining that horizontal obligations must apply to all human rights are contained in the ICCPR and the ACHR holding that each state party "undertakes to respect and to ensure" to all individuals the rights and freedoms recognized in the Convention or Covenant.[27]

From these provisions the conclusion can be drawn that states have to actively secure the protection of human rights apart from the obligation to refrain from violating these provisions. To this extent, the classical "negative" perception of human rights and freedoms is complemented by positive obligations. A state is obliged to balance the legally protected interests.

Furthermore, the general responsibility of states for their internationally wrongful acts, regulated in the General Assembly Resolution on "Responsibility of States for Internationally Wrongful Acts", may be applied.[28] Even if the UN General Assembly has only taken note and not adopted these principles, they are to be considered as customary law in the meantime. Therefore, a state can be held responsible if the conduct of an "entity which is not an organ of the state [...] but which is empowered by the law of that state to exercise elements of the governmental authority" is considered an act of the state.[29]

c) Consumer as Rightholder

In the meantime it can be considered as being generally accepted that consumers are holders of rights and not only passive objects of protective regulations, i.e. certain rights of consumers are invested with the higher value of human rights.[30] Practically

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26 Cheung/Weber, supra note 25, pp. 420/21.
27 Cheung/Weber, supra note 25, pp. 424-437.
28 Responsibility of States for Internationally Wrongful Acts of December 12, 2001, United Nations General Assembly, Resolution 56/83, available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.
29 Cheung/Weber, supra note 25, p. 423.
30 Harding/Kohl/Salmon, supra note 6, pp. 60 and 239.

looking, it goes without saying that consumer behavior requires individual decision-making power. In this context two questions should be addressed:[31]

- Under a substantive angle the question must be tackled what kind of right or rights should be considered for promotion to the higher order so as to address the perceived compromise in regulatory protection.

- Under a procedural angle the necessary strategy for enabling an effective independent assertion of rights by individual consumers is at stake.

The interests in human health and physical integrity, which feed into the right to live, are already well-established in the canon of human rights protection,[32] even if the analysis is presented that concept and practical assertion of basic (human) consumer rights would still be in its infancy.[33] In other words, economic self-determination and human subsistence as ethical values are worth to be protected; nevertheless, public interests should not be overlooked, such as the objective to realize a fair and adequate competitive environment by legal framework regulations.[34] An important aspect in this connection is standardization: the process of setting basic standards helps to achieve a minimum level of life subsistence and consumer choice.[35] For example, accurate food labelling[36] is an essential tool allowing consumers to exercise their autonomy; a vegetarian or a politically sensitive consumer might wish to avoid products from certain countries or products that have been transported thousands of miles.[37]

Based on this foundation the legal protection deficit as a consequence of increasing deployment of basic rights is worth to be analyzed. Obviously, the perspectives of the different economic actors are not identical; however, some key pillars of a consumer "autonomy" right might constitute the acknowledgement of a collective good which by its nature has the consequence that public regulation must properly be put into place. Several related aspects such as safe life, healthy environment and ethical business conduct can be considered as types of collective goods which by their nature are more susceptible to guarantee through public regulation rather than through individual or private claims.[38]

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31 See Harding/Kohl/Salmon, supra note 6, p. 69.
32 See above 2.1.a).
33 See Harding/Kohl/Salmon, supra note 6, p. 239.
34 See also Harding/Kohl/Salmon, supra note 6, pp. 65, 67.
35 For an overview over the importance of standardization in a comparative environment see Rolf H. Weber, Competition Law v. FRAND Terms in IT Markets, World Competition Law and Economics Review, Vol. 34, 2011, pp. 51-71.
36 See below 4.3.
37 Harding/Kohl/Salmon, supra note 6, p. 70.
38 Harding/Kohl/Salmon, supra note 6, p. 240; see also Koskenniemi, Martti, The Effects of Rights on Political Culture, in: Philip Alston (ed.), The EU and Human Rights, Oxford 1999, pp. 99, 102, 104.

A further aspect being worth to shed light on relates to the degree of violation of consumer human rights. Indeed, approaches are discussed which evaluate certain consumer rights higher than other consumer rights (i.e. a distinction is made between basic or fundamental and ordinary consumer human rights). However, by applying this differentiation it should not be underestimated that the market place is relying on a complex web of interdependent and co-dependent producer, supplier and consumer relationships. Furthermore, consumer rights may come into conflict with corporate freedom to trade; indeed it would be difficult to argue that the consumers' human rights have a superior value in comparison with the suppliers' corporate right.[39]

In order to establish an adequate relationship between any consumer-centered rights-oriented scheme of protection and interests of enterprises in the supply chain, a new procedural framework would have to be implemented, encompassing consumer rights such as direct participation in policy-making and critical discussion, in legal standing and effective representation for purposes of direct legal challenge as well as in access to information and transparency.[40]

In a nutshell, the concept and practical assertion of the crucial consumer rights has not yet been based on a comprehensive and compulsory infrastructure of rights protection to enable consumers to exercise their rights. Therefore, a more detailed research in this field merits to be undertaken, shedding light on existing legal instruments, on respective hints in court practice and on theoretical concepts allowing to develop actual consumer autonomy.

2.2 Unfair Competition

a) Three-dimensionality of Unfair Competition

Traditionally, unfair competition law has dealt with the (competitive) relationship between two market participants. Thereby, the main aspect concerned the fairness in the market behavior; no wrong or misleading information should be spread out in relation to a competitor and no activity should be executed which tackles a competitor in a manner contradicting the principle of good faith.[41]

International legal instruments have so far not widely addressed unfair competition issues.[42] The only substantive exception can be seen in Art.10bis para. 1 of the Paris Convention (1883) in the Stockholm version (1967),[43] requesting member states to

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39 Harding/Kohl/Salmon, supra note 6, p. 233.
40 See below 4.3; Harding/Kohl/Salmon, supra note 6, p. 72.
41 See for example Art. 2 of the Swiss Unfair Competition Act and § 1 of the German Unfair Competition Act.
42 See Weber, Rolf H., Internationale Harmonisierungsansätze im Lauterkeitsrecht, sic! 1998, pp. 158-174.
43 Paris Convention for the Protection of Industrial Property of March 20, 1883. Treaty available at: http://www.wipo.int/treaties/en/ip/paris.

release an unfair competition law without, however, giving any specific guidance as to its contents.[44] Due to the openness of the provision, a direct application in a state's legal framework is generally excluded.

This traditional concept has changed during the last 20 years: More and more other actors are considered, in particular the consumers and the general public.[45] Consequently, modern unfair competition laws are based on the three-dimensionality concept:[46] All activities and behavioral measures which could mislead the consumers or the general public are potentially unfair; for instance, even media could influence markets by publishing wrong or misleading reports.[47] This new concept of unfair competition laws does not directly provide for a specific human right in favor of consumers, however, consumers do have a legal claim if fairness is not anymore realized in the market (law of market behavior).[48]

b) Principle of Good Faith

The governing principle of unfair competition laws is based on the good faith understanding related to adequate market behavior.[49] Market participants are required to act in a way which is expected to be fair and reasonable by other market participants and by the general public. By doing so, competitive activities are executed in compliance with a state of the art framework which considers legal rules as well as social and moral norms.[50]

The principle of good faith encompasses many elements such as the obligation to act in a transparent manner in the market, to restrain from misleading behavior, to except general standards of understanding in the community and to comply with the given moral expectations.[51] This foundation can already be identified in Article 26 of the Vienna Convention on the Law of Treaties requiring all states to perform their treaty obligations in good faith.[52] The contents of this principle are to be derived from the principle of estoppel and the customary rule of "pacta sunt servanda".[53] Obviously,

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44 See Weber, supra note 42, p. 164.

45 See Hilty, Reto M., The Law Against Unfair Competition and Its Interfaces, in: Hilty/Henning-Bodewig (eds.), Law Against Unfair Competition, Berlin/Heidelberg 2007, pp. 1, 6-7.

46 See Thouvenin, Florent, Funktionale Systematisierung von Wettbewerbsrecht (UWG) und Immaterialgüterrechten, Köln/Berlin/München, 2007, pp. 99, 146, 153, 161-162.

47 See the cases mentioned in the introduction (supra foot notes 1-3).

48 See also Hilty, supra note 45, p. 4.

49 See Thouvenin, supra note 46, pp. 128-130 with further references.

50 See Hilty, supra note 45, pp. 4-5; Weber, Rolf H./Weber, Romana, Unlauteres Marktverhalten des Importeurs bei Nichteinhaltung von Arbeitsbedingungen durch ausländische Lieferanten?, GRUR Int. 2008, pp. 899-906.

51 See Weber, Rolf H./Weber, Romana, Unlauteres Marktverhalten des Importeurs bei Nichteinhaltung von Arbeitsbedingungen durch ausländische Lieferanten?, GRUR Int. 2008, pp. 899-906, pp. 899, 902/03.

52 Vienna Convention, supra note 8, Article 26: „Every Treaty in force is binding upon the parties to it and must be performed by them in good faith".

53 Panizzon, Marion, Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement, Oxford/Portland 2006, p. 11.

good faith is an open term and has some kind of umbrella function; nevertheless, guidance can be drawn from such a principle, since fairness and adequacy are notions generally accepted and applies in a legally structured society.[54]

c) Effects of Antitrust Laws

Legal doctrine for quite some time discussed whether specific market structures, being basically an issue of antitrust laws, could also influence the application of unfair competition laws. In particular, the question is debated whether a market dominant supplier which does comply with the antitrust requirement of not misusing its market power (therefore acting in conformity with the applicable law on cartels) would nevertheless have to obey to a higher level of behavioral standards as described in unfair competition law than small suppliers.[55]

A clear answer to this question is not yet available. Indeed, it is difficult to justify why a market dominant supplier would have to adjust itself to a higher level of fairness. To a certain extent, such a requirement could be considered as a discrimination of larger market participants.[56] Nevertheless, the counterargument would read that market dominant enterprises do have a much more important influence on the market and in particular on the consumers per se leading to the consequence that particular fairness could be expected from such a supplier.[57] As mentioned, a final conclusion has not yet been drawn in legal doctrine; however, this aspect should be kept in mind when further discussing the elements of consumer autonomy.

3. Consumer Relevant Issues in International Trade Law

Consumer autonomy as a fundamental principle is not directly addressed in agreements and treaties related to liberalized international trade (based on the assumption that economic liberty leads to social benefits). Nevertheless, some underlying concepts are founded on the perception that consumers' rights need to be taken into account in the context of trade regulations. Often, special references to consumers' interests also do have an impact on competition even if a clear link is missing. Therefore, in part 3 a general overview over the relevant legal instruments and the most important court practice will be given, to be followed in part 4 by the discussion of those main principles which constitute the substantive contents of consumer autonomy.

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54 See in general Franck, Thomas M., Fairness in International Law and Institutions, Oxford 1995.

55 See Swiss Federal Court, Judgement of May 12, 1981, Veledes/Denner, BGE 107 II 277 et seq.

56 Baudenbacher, Carl, Unlauterer Wettbewerb und Kartellrecht, SAG 1984, pp. 169, 174 et seq.

57 For a more detailed discussion see Baudenbacher, Carl, Marktbedingte Wettbewerbsstörungen als Unlauterkeitstatbestände, GRUR 1981, pp. 23 et seq.; Ulmer, Peter, Der Begriff „Leistungswettbewerb" und seine Bedeutung für die Anwendung von GWB- und UWG-Tatbeständen, GRUR 1977, pp. 565 et seq.; Raiser, Ludwig, Marktbezogene Unlauterkeit, GRUR 1973, pp. 443 et seq.

3.1 Legal Instruments

Many legal instruments shed light on consumer relevant issues; subsequently, some international constitutional norms having the character of social (human) rights, the Codex Alimentarius (within the context of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, SPS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) will be addressed as examples for different ways of approaching the scene. The SPS Agreement and the TRIPS Agreement are two out of three WTO agreements that rely on standards set by other international bodies as a basis for their harmonization obligations.[58]

a) Social (Human) Rights

The social (human) rights (particularly in the form of the life protection right and the subsistence right) have their international origins in the Universal Declaration of Human Rights of 1948;[59] its Article 25 para. 1 states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services etc. In the meantime, this basic framework has evolved and now includes a wider scope of entitlements encompassing the highest attainable standards of physical and mental health.[60] These basic rights directly relate to the role of consumers in the economic life; individuals are in need of the respective goods and services; consequently, the choice made by consumers to get hold of such goods and services corresponds to their survival strategy.

The mentioned general principles have been taken up by the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.[61] Article 12 ICESCR refers to such high standards and concretizes them in respect of environmental and industrial hygiene as well as the prevention, treatment and control of epidemic, endemic, occupational and other diseases.

Furthermore, subsistence is a special issue dealt with in Article 11 ICESCR: According to this provision, the Covenant recognizes the right of everyone to an adequate standard of living for himself and his family; the states are obliged to take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.[62] Furthermore, Article 11 para. 2 lit. a ICESCR introduces a duty of states to improve

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58 Van den Bossche, Peter, The Law and the Policy of the World Trade Organization: Text, Cases and Materials, Cambridge, 2nd ed. 2008, p. 741.

59 See Universal Declaration, supra note 10.

60 See also Riedel, Eide, Article 55 (c), nos. 24 et seq., in: Bruno Simma (ed.), The Charter of the United Nations, A Commentary, Vol. II, 2nd ed. Oxford 2002.

61 See International Covenant, supra note 15.

62 See Kälin, Walter/Künzli, Jörg, The Law of International Human Rights Protection, Oxford 2009, pp. 303 et seq.; Riedel, supra note 60, no. 43.

methods of production. Conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources (i.e. food security).[63]

In addition, Article 15 ICESCR contains a long list of rights related to the protection of indigenous ways of life, for example to take part in cultural life, to enjoy the benefit of scientific progress and its applications, and to benefit from the protection of the idealistic and economic interests resulting from any scientific, literary or artistic production. The states are obliged to respect, protect and fulfil cultural diversity, i.e. to take specific measures aimed at achieving respect for the right for everyone to freely choose his own cultural identity, to enjoy freedom of opinion and expression, to have access to his own cultural and linguistic heritage and to freely take part in any decision making process.[64]

The principle of sustainability is not explicitly stated in the ICESCR, however, its general acknowledgement can be drawn from the Covenant's underlying concept, in particular since the provisions of the ICESCR highlight the responsibility of the state to ensure the applicability of such kind of standards (state obligation to respect, protect, and fulfill), even if no obligation is conferred to the consumers or civil society or in general to non-state actors.[65] Sustainability complements consumer autonomy insofar as it requests a (competitive) behaviour by a particular consumer in a way which does not interfere with the corresponding rights of other consumers.

b) Codex Alimentarius

The Codex Alimentarius was created in order to develop food standards, guidelines, codes of practise and related recommendations.[66] The Codex Alimentarius has gained general acceptance and also been acknowledged as standard for food safety under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS-Agreement) of the WTO (Annex A: 3 [a]).[67] In particular, Article 7 SPS entitles

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63 See Kaufmann Christine/Heri, Simone, Liberalizing Trade in Agriculture and Food Security – Mission Impossible? Vanderbilt Journal of Transnational Law, Vol. 40, 2007, pp. 1039 et seq.; Kaufmann, Christine/Ehlert, Caroline, International and Domestic Trade Regulations to Secure the Food Supply, Deakin Law Journal, Vol. 14, 2009, pp. 239 et seq.; Häberli, Christian, Food security and WTO rules, in: Baris Karapinar/Christian Häberli (eds.), Food Crises and the WTO, Cambridge 2010, pp. 297-322.

64 See Kälin/Künzli, supra note 62, pp. 409-412.

65 See Kaufmann/Heri, supra note 63, pp. 1052-1054.

66 For further information see: http://www.codexalimentarius.net/web/index_en.jsp.

67 See http://www.wto.org/english/thewto_e/coher_e/wto_codex_e.htm.

the member states to take appropriate measures based on the available pertinent information.[68]

The food standards programme aims at protecting health of consumers and ensuring fair practices in the food trade. The 1963 established Codex Alimentarius Commission, maintaining the administrative tasks related to the Codex, has the role of creating standards that lead to consumer protection and fair trade practices in the sale of food.[69] The Commission is also charged with the duty to sensitize the global community to the danger of food hazards as well as to the importance of food quality; possible measures are different forms of food labelling, relating to product characteristics, for instance labels stipulating the procedures of pesticides or drugs in food.[70] The Codex Commission allows consumer involvement in food standard setting through representative organizations on various occasions of the Commission's work.[71]

State measures should be based on scientific and sufficiently evidenced principles; in other words, the standards need to be designed to correspond to the principle of proportionality and necessity.[72] The standards should also focus on reducing trade restrictions following the implementation of food rules. In principle, the international standards function as a ceiling and not as a floor,[73] however, the standards should not be arbitrary or unjustifiable discriminatory.[74]

c) TRIPS

The TRIPS Agreement is fundamental since it adopts the Paris Convention for the Protection of Industrial Property (1883)[75] being the only international treaty providing for the protection from unfair competition (Article 10^{bis}).[76] This provision prohibits (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor, (ii) false allegation in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor,

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68 See also Weber, Rolf H./Vlcek, Michael, "Vorsorgeprinzip" als Wegweiser im Lebensmittel- und Gesundheitsrecht, Weblaw-Jusletter, April 3, 2006, N 13, available at: http://jusletter.weblaw.ch/article/de/_4663.

69 World Health Organization and Food and Agriculture Organization of the United Nations: Understanding the Codex Alimentarius, 3rd ed., Rome 2006, p. 2.

70 World Health Organization, supra note 69, p. 4.

71 World Health Organization, supra note 69, p. 28.

72 Effects of international legal regimes and policy measures aimed at the protection of human, animal or plant life or health on animal genetic diversity, NCCR Trade Regulation Working Paper No. 2010/09, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707265##.

73 Masson-Matthee, Marielle D., The Codex Alimentarius Commission and Its Standards, T.M.C. Asser Press, The Hague 2007, p. 140.

74 Masson-Matthee, supra note 73, p.138; Kaufmann/Heri, supra note 63, pp. 1048-1055.

75 Paris Convention for the Protection of Industrial Property of March 20, 1883, available at: http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

76 See above 2.2.a).

(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of goods. Initially, the Paris Convention was not considered to be for the protection from unfair competition as a separate legal concept.[77] In the meantime, however, unfair competition has developed as a separate field of law, particularly the below mentioned Articles 39 and 40 of the TRIPS can be considered as proof of this development.

Apart from the important reference to the Paris Convention, according to Article 7 of the TRIPS, the protection of intellectual property rights should be done in a manner conducive to social and economic welfare, and be designed in a way that a balance of rights and obligations is achieved. Concretely, this provision, containing a specific reference to a "balance of rights", points to the consideration of rights of consumers, users of technological knowledge and intellectual property right holders. According to legal doctrine customary law requires WTO dispute settlement bodies to interpret TRIPS provisions (e.g. compulsory licenses) in conformity with human rights obligations.[78] Article 8 of the TRIPS accords the right to member states to formulate or amend their laws and regulations in view of adopting measures necessary to protect public health and nutrition. In addition, Article 27 of the TRIPS entitles member states to exclude from patentability specific inventions related to the protection of human, animal or plant life or health. Finally, Articles 39 and 40 of the TRIPS call upon the member states not to release any laws which would allow licensing practises or conditions which lead to an abuse of an intellectual property right having an adverse effect on competition in the relevant market.

The importance of public health in the light of the TRIPS has been a special issue of the Doha discussions and is reflected in the Doha Declaration of 2001;[79] according to its paragraph 17 the TRIPS should be interpreted and implemented in a manner supportive to public health. As mentioned in the Doha WTO Ministerial Conference 2001,[80] the TRIPS should not prevent members from taking measures to protect public health. It is especially important from a social and a public health point of view that new drugs and vaccines treating and preventing diseases are generated, and that the incentives provided by the patent system[81] efficiently promote this

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77 Henning-Bodewig, Frauke, Unfair Competition Law – European Union and Member States, Amsterdam 2006, p. 258.

78 See Petersmann, Ernst-Ulrich, International Economic Law, Public Reason, and Multilevel Governance of Interdependent Public Goods, Journal of International Economic Law, Vol. 14, 2011, pp. 1, 42-43; Hestermeyer, Holger P., Human Rights and the WTO: The Case of Patents and Access to Medicines, Oxford 2007.

79 Declaration on the TRIPS Agreement and Public Health of November 14, 2001, available at: http://www.worldtradelaw.net/doha/tripshealth.pdf

80 Ministerial Declaration, WT/MIN(01)/DEC/2, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

81 It could even be argued that a patent system is in the interest of the consumers since for example patented pharmaceuticals do have to goal through rigorous testing and approval prior to the obtaining of market access which indirectly protects consumers.

objective[82]. Otherwise, the TRIPS does not focus on consumer participation directly or indirectly in the acquisition of the compulsory licenses or the other exceptions under the patenting system.

d) EU Regulations

In a common market, a harmonized food policy and law is of major importance.[83] Nevertheless, for quite some time, the EU approach has been rather vague and the developments were based on incremental and haphazard initiatives. Only the BSE epidemic and the reluctance to see genetically modified (GM) food arriving in the European market has put some pressure on the EU authorities to move to a coherent policy. Subsequently, the Green Paper on Food Law[84] and the White Paper on Safety[85] realized some kind of a "new approach" to food policy, trying to strengthen governance across all aspects of food production chains "from farm to table".[86]

Two years after the White Paper, Regulation 178/2002 was adopted.[87] This Regulation being directly applicable in the EU member states has built the first overarching legislation in the European Union in the field of food law. The principles as developed in the Green Paper and the White Paper have been taken up and in particular the Regulation established the European Food Safety Authority (EFSA).[88] Looking at the substance of the Regulation it is evident that consumers should be able to enjoy a high level of protection as core objective. In particular, food shall not be placed on the market if it is unsafe and shall be deemed to be unsafe if it is considered to be injurious to health or unfit for human consumption.[89] Furthermore, the basic safety standards must encompass the long-term health implications of food, including the potential implications of food consumption for the health of future generations.[90] Thus, from the consumers' angle, the task of regulators is to identify and where possible remove hazardous products from the food chain; where this is

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82 See WTO Agreements and Public Health – A Joint Study by the WHO and the WTO Secretariat, Geneva, Switzerland, World Health Organization and World Trade Organization, 2002, p. 41, available at: http://www.who.int/media/homepage/en/who_wto_e.pdf.

83 For a comprehensive overview see van der Meulen, Bernd M. J., The System of Food Law in the European Union, Deakin Law Review, Vol. 14, 2009, pp. 305 et seq.

84 Commission of the European Communities, The General Principles of Food Law in the European Union, Commission Green Paper of April 30, 1976, COM (97) 176 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1997:0176:FIN:EN:PDF.

85 Commission of the European Communities, White Paper on Food Safety of January 12, 2000, COM (1999) 719 final, available at: http://ec.europa.eu/dgs/health_consumer/library/pub/pub06_en.pdf.

86 COM (1999) 719 final, supra note 85, p. 3.

87 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:031:0001:0024:EN:PDF..

88 Article 1 para. 2 and Chapter III of Regulation 178/2002, supra note 87.

89 Articles 14 para. 1 and 14 para. 2 of Regulation 178/2002, supra note 87.

90 Article 14 para. 4 of Regulation 178/2002, supra note 87.

either impossible or impractical, their role is to assess, manage and effectively communicate risks.[91]

Furthermore, the Regulation requires a common EU-led and "sound science"-based approach to risk and risk analysis which should become an integral and inclusive part of the overall food chain processes. In this context, the precautionary principle is introduced into food law regulation; as outlined below the precautionary principle plays a crucial role in the context of consumer autonomy.[92]

3.2. Court Practice

Court practice has already dealt with the principles of precautionary measures, risk assessment, and proportionality in the various jurisdictions, mainly in the context of the protection of public health. Partly, the respective decisions highlight the lack of consumer participation in the standard setting processes albeit these standards aim at protecting the consumers. The following cases are worth to shed light on in view of consumers' relevance under the different legal instruments:[93]

a) EC-Hormones

In the EC-Hormones case[94], Canada and the United States have complained that the prohibition on the importation of beef and beef product treated with 6 types of hormones by the European Community (EC) would not be in line with WTO-law, in particular with the SPS Agreement; the Panel found that the EC measures were not based on the existing codex standards and that risk assessments should rely on scientific evidence and should not involve value judgements. The Panel decision centered at the discriminatory effect of the measure. The Appellate Body rejected the argument of the EC that the measures were precautionary; the complainant was not in the position to sufficiently evidence the negative impact on health or (at least) the sufficient scientific evidence for potential damages. Indeed, information should also be from related or relevant international organizations. The approach obviously asks for the attempt to seek obtaining additional information and execute the risk assessment correctly (scientific evidence).[95]

b) BSE (Bovine Spongiform Encephalopathy)

The United Kingdom (UK) and Northern Island brought an action against the Commission's measures to protect human health and life against the BSE disease

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91 Harding/Kohl/Salmon, supra note 6, p. 144.
92 See below 4.1.
93 See also Weber/Vlcek, supra note 68, N 16-24.
94 EC Measures Concerning Meat and Meat Products (EC-Hormones), Report of the Appellate Body, WT/DS26/AB/R and WT/DS48/AB/R, 1998, available at: http://www.law.georgetown.edu/iiel/cases/ec-hormones%28abr%29%28ab%29.pdf.
95 For a very detailed discussion of the EC-Hormones case see Harding/Kohl/Salmon, supra note 6, pp. 167-196.

that had broken out in the UK[96]. The BSE disease was originally found to affect animals only, but new research showed that it could be also transmitted to humans. The EU-Commission imposed a ban on the import of beef from the UK into other EU states; the UK challenged this ordinance by referring to the fact that measures had already been introduced leading to a protection against the spread of the disease mainly by imposing a ban on the food containing proteins from carcasses of sheep affected by scrapie; particularly in order to reduce hazards to human health, the UK prohibited the sale of the head and spine cord areas of the cow to humans. Notwithstanding the fact that it was not possible to clearly prove that BSE was transmissible to humans, the Court rejected the plea from the UK that the Commission had failed to observe the conditions governing the breach of the principle of free movement of goods by imposing the ban. The Court also acknowledged that the ban would comply with the principle of proportionality, i.e. the ban was proportional to the protection of human health from BSE.[97] The court decision was also based on the fact that there was no scientific proof to show that BSE is not transmittable to humans; therefore, it regarded the prevention of such risk as critical meaning that the ban could only be removed if scientific proof would confirm the contrary.[98]

c) Sandoz

The Sandoz case[99] involved the prohibition imposed on the marketing and sale of muesli bars and analeptic beverages that contained added vitamins within the Netherlands. Excessive consumption of vitamins was supposed to be dangerous to human health, however, there was no scientific data showing the exact rates of consumptions that pose health risks. The problem of the case consisted in the availability of actual evidence that excessive consumption of vitamins would indeed cause a risk to human health even if such consumption could not be measured or would be unforeseeable and therefore not be suitable for a monitoring.[100] The European Court of Justice (ECJ) expressed the opinion that so long as there are uncertainties in the current scientific research about the risk of excessive consumption, the member states do have the right and obligation to decide what degree of protection of health and life of humans would have to be ensured.[101] The ECJ further observed that the intention of the EU legislation would consist in the attempt to restrict the use of food additives. Nevertheless, the principle of

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96 United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities, Judgement of the Court of 5 May 1998, Case C-180/96, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61996J0180:EN:HTML.

97 See Case C-180/96, supra note 96.

98 To the aspect of the scientific proof in detail see below 4.2. (iv).

99 Criminal proceedings against Sandoz BV, Judgement of the Court of 14 July 1983, Case 174/82, further details available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61982J0174:EN:HTML.

100 See Case 174/82, supra note 99.

101 See Case 174/82, supra note 99, grounds no. 17.

proportionality has to be observed.[102] The ECJ also found that since uncertainties would exist in respect of scientific resources at the given moment, member states could determine the level of protection they deem appropriate; the measures would be considered sustainable as long as no scientific evidence was available to show the absence of a risk.

d) Kellogg's

In the Kellogg's case[103], the Norwegian Food Control Authority refused the application of a Danish company for authorization to sell "fortified" cornflakes in Norway, on the grounds that the addition of nutrients which might entail allergy risks for some consumers would only be justified if there would be an unmet nutritional need among the Norwegian population at large. According to the EFTA Court, a proper application of the precautionary principle presupposes (i) an identification of potentially negative health consequences arising from an additive and (ii) a comprehensive evaluation of the risk to health based on the most reasoned scientific information. Furthermore, the Norwegian Food Control Authority stated that the extensive use of fortification would lead to an unbalanced addition of nutrients with a high intake of substances added to many products.[104]

During the Court proceedings Norway stated that the prohibition was a precautionary measure and that there was sufficient evidence to show that some vitamins and minerals in large doses, although not actively toxic, could cause a health hazard by themselves and through their interactive effects. The main hazard identified was the increase of iron stores due to small needs and a limited ability of the human body the excrete iron. According to Norway, a precautionary attitude towards fortification would be reasonable because of the unknown causal relations between the iron level in the body and certain diseases and the motive of preventing the health risks to a bigger population instead of addressing the nutritional needs of the minority of the population should not be underestimated.[105]

The EFTA Court expressed the opinion that the precautionary principle could be invoked in case of scientific uncertainties, however, that the measures would have to be transparent, proportionate and non-discriminatory; in fact, according to the EFTA Court, Norway did only refer to hypothetical risks, but not support the allegation by submitting evidence for actual risks, and not comply with the non-discriminatory principle.[106] Furthermore, Norway did not comply with the national (equal) treatment

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[102] See Case 174/82, supra note 99, summary.
[103] Case E-3/00, EFTA Surveillance Authority v The Kingdom of Norway, EFTA Ct. Rep. 2000-2001, p. 73, available at: http://www.eftacourt.int/index.php/cases/case_e_3_00.
[104] See Case E-3/00, supra note 103, Report for the Hearing, no. 8.
[105] See Case E-3/00, supra note 103, Report for the Hearing, no. 13.
[106] See Case E-3/00, supra note 103, Judgment of the Court, nos. 26-32.

principle since Norwegian suppliers of similar products were not exposed to the same regulations.[107]

4. Legal Principles Related to Consumer Autonomy

The preceding discussion of the legal instruments and the court practice addressing consumer related issues in liberalized international trade has shown that consumer autonomy is not directly "regulated", however, that its notion is underlying many aspects of trade rules. Therefore, three key principles applying to the benefit of consumer autonomy will now be discussed in more detail, namely the precautionary principle, the risk assessment principle, and the transparency principle. For each of the three broad concepts the main emphasis will be put on their inherent elements supporting the self-determination and protection of consumers.

4.1 Precautionary Principle

The precautionary principle as such is mostly not clearly defined in the available legal instruments, but its applicability is more or less precisely stated; due to its manifold appearances, however, a universally accepted description is lacking.[108] Substantively, the principle requests a specific behavior in situations of uncertainty, i.e. the principle should improve the predictability in the regulatory environment, particularly in case of technological risks.[109] This behavior usually concerns the reasonable and fair use of available resources; historically, the precautionary principle has evolved in the area of environmental protection and food safety.[110]

a) Legal Instruments

The number of legal instruments addressing the precautionary principle has become quite high;[111] subsequently, some important treaties and regulations will be shortly described:

(i) The first important document, prominently addressing the precautionary principle, is the Rio Declaration on Environment and Development negotiated at the Rio Earth Summit 1992.[112] Principle 1 of the Declaration states that human beings are at the centre of concerns for sustainable development being entitled to a healthy and

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107 See Weber/Vlcek, supra note 68, no. 21; van der Meulen, supra note 82, pp. 314 et seq.

108 For an overview see Sunstein, Cass R., Laws of Fear: Beyond the Precautionary Principle, New York 2005; a far-reaching literature list is given by Harding/Kohl/Salmon, supra note 6, p. 149, footnote 96.

109 Harding/Kohl/Salmon, supra note 6, p. 145.

110 See Jordan Andrew/O'Riordan, Timothy, The precautionary principle: a legal and policy history, in: Marco Martuzzi/Joel A. Tickner (eds.), The precautionary principle: protecting public health, the environment and the future of our children, Copenhagen 2004, p. 33.

111 For an overview see Harding/Kohl/Salmon, supra note 6, p. 150, footnote 98.

112 Report of the United Nations Conference on the Environment and Development, Rio de Janeiro 3-14 June 1992, Annex I, Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I) of August 12, 1992.

productive life in harmony with nature. Principle 15 of the Declaration then hits the point: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

(ii) The Cartagena Protocol on Biosafety to the Convention of Biological Diversity specifically deals with the protection of biological diversity related to potential threats from the Living Modified Organs.[113] The Convention itself offers guidance to the protection of biological diversity based on the precautionary principle. The Protocol also recognizes this principle in the preamble. The precautionary approach is taken up in Article 1 of the Protocol expressing the objective to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of Living Modified Organisms resulting from modern biotechnology (particularly in the light of the risks to human health). Article 10.6 of the Decision Making Procedure grants the parties the right to take appropriate measures in order to protect human health and the environment even if there would be a lack of scientific certainty due to insufficient relevant information. Furthermore, Article 11.8 thereof similarly provides for the precautionary approach in the procedure for the direct use of Living Modified Organs as food or feed for animals.

(iii) The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS-Agreement) of the WTO does not expressly mention the precautionary principle, however, its Article 7 authorizes member states to take provisional measures on the basis of available pertinent information.

(iv) The precautionary principle is addressed in Article 191 TFEU (ex-Article 174 ECT), however, the reference is solely made in the context of environmental protection; EU policies should be designed in a way that natural resources are used in a precautionary manner. Consumers are not mentioned as objectives of protection in the provision. Nevertheless, the European Commission has looked at the precautionary principle in general for more than a decade.

The EC Communication of February 2, 2000,[114] defines three elements to consider, namely the risk assessment, the risk management and the risk communication. Recourse to the precautionary principle presupposes a potential danger derived from a phenomenon, product or process not allowing a determination of the actual risk with sufficient certainty based on a scientific evaluation. Precautionary measures should be proportional to the chosen level of protection, non-discriminatory in

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113 Cartagena Protocol on Biosafety to the Convention of Biological Diversity of January 29, 2000, available at: http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf.

114 See Communication from the Commission on the precautionary principle, COM (2000)1, available at: http://ec.europa.eu/environment/docum/20001_en.htm.

application, consistent with similar measures already taken, based on an examination of potential costs and benefits or action or non-action, subject to review in light of scientific data and capable of assigning responsibility. The mentioned elements can be described as follows:[115]

- *Proportionality*: The chosen level of risk allowed can rarely be zero and therefore a total ban as a measure is often not proportional, except if specific conditions to the contrary prevail.

- *Non-discrimination*: Comparable situations should not be treated differently and different situations should not be treated the same way.

- *Consistency*: A measure should be of a comparable scope and nature to those already taken in equivalent areas.

- *Examination of costs and benefits*: This evaluation should not only encompass economic factors such as efficiency of the measure, but also social and political elements, for example the acceptability in the public.

- *Review process*: The precautionary measure should be maintained as long as the scientific information is inconclusive and the risk too high in view of the level of protection, but such measure should be periodically reviewed in light of new scientific evidence.

- *Capability of assigning scientific data*: Procedure need to be established leading to a demonstration that the products or services are safe, subject to the allocation of the burden of proof to the business or the state authorities.

The Commentary to the Communication[116] recalls that a number of recent events had undermined the confidence of public opinion and consumers since decisions (or the absence of decisions) were not supported by full scientific evidence and the legitimacy of such decisions was questionable. Again, the Commentary makes clear that the precautionary principle is only a basis for action if science is unable to give a clear answer to pertinent risks.

Following the White Paper on Food Safety of 1999,[117] the Regulation 178/2002 of the European Parliament and of the Council of January 28, 2002,[118] laying down the general principles and requirements of food law, establishing the European Food Safety Authority and outlining the procedures in matters of food safety, addresses the precautionary principle in Article 7, requiring a provisional risk management applying

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115 See Communication on the precautionary principle, supra note 114, N 6.
116 See supra note 114.
117 See White Paper on Food Safety, supra note 85.
118 See Regulation (EC) No 178/2002, supra note 87.

measures necessary to ensure a high level of health protection.[119] Furthermore, the provision reinstates the already established principles of proportionality, technical and economic feasibility and review process. Therefore, member states are invited to apply precautionary measures in cases in which risk to health is identified, but there is insufficient scientific evidence in respect of the actual level of risk involved.[120]

b) Analysis of Legal Doctrine and Court Practice

Since the precautionary principle remained without specific definition in the different legal instruments, the concrete interpretation is often quite vague in court practice. Usually, the given circumstances play an important role. Nevertheless, a few general statements can be made: Mostly, the precautionary principle is seen as encompassing a two-step analysis, namely the risk assessment and the risk management.[121] The risk assessment is a mathematical or scientific procedure; it involves (i) hazard identification, (ii), dose-response assessment, (iii) exposure assessment, and (iv) risk characterization.[122] The second step (risk management) is more politically driven, looking at legislative and economic dimensions of the problem. The decision for what level of risk the application of the precautionary principle should warrant is left to the institutions to be determined on a case-by-case basis; a regulatory guideline determining an acceptable level of risks is not available.[123] For example in current food safety law the precautionary principle is evidenced by pre-market authorization requirements and by safeguard measures.[124] However, it should not be overlooked that the distinction between risk assessment and risk management can be questioned.[125]

The concretization of the risk assessment is not at least problematic due to the fact that no clear methodology in international law for carrying out the analysis is available; not even within the European Union, the Regulation 178/2002 and the Directive 2001/18 on genetically modified organisms (GMO) use identical methods.[126] The Appellate Body of the WTO distinguishes between the qualitative and the quantitative risk assessment.[127] Furthermore, uncertainty exists as far as the role of the dissenting scientific evidence is playing; usually it is hold that risk assessors

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119 See also Harding/Kohl/Salmon, supra note 6, p. 154.
120 See also Weber/Vlcek, supra note 68, no. 11.
121 For a general overview see Lauterburg, Dominique, Food Law: Policy & Ethics, London/Sydney 2001, pp. 253 et seq.
122 See Epps, Tracey, International Trade and Health Protection, Cheltenham/Northampton 2008, pp. 160-163; De Sadeleer, Nicolas, The Precautionary Principle in EC Health and Environmental, European Law Journal, Vol 12, 2006, p. 146; Simpson, Craig, The Precautionary Principle in European Community Food Law, Brussels 2005, pp. 5/6.
123 De Sadeleer, supra note 122 p. 149.
124 Simpson, supra note 122, pp. 6/7.
125 See Epps, supra note 122, pp. 156/57 and pp. 173/74.
126 See Regulation (EC) No 178/2002, supra note 87, and Directive 2001/18/EC of 12 March 2001 on the deliberate release into the environment of GMO, available at: http://www.biosafety.be/PDF/2001_18.pdf.
127 See Epps, supra note 122, p. 158.

cannot ignore the minority opinions, but should set out both the prevailing view and the diverging opinions.[128] Additional uncertainties are eventually caused by ambiguity.

The openness of the interpretation of the precautionary principle is evidenced in court practice: For example in the Monsanto Case[129] a complaint has been filed asking for annulment of an Italian decree which prohibited the marketing of genetically modified maize within Italy; the maize had already been approved and there was no scientific evidence showing that the GMO added to the maize would be dangerous to human health and life. Not identically, the Appellate Body in the EC-Hormones Case was of the opinion that any relevant risk assessment would have to comply with Article 5 paras. 1 and 2 of the SPS-Agreement, which has the consequence that precautionary measures not being within the scope of the SPS-Agreement could be of a temporary nature only.[130] The evaluation done by the Appellate Body, however, does not seem to be fully convincing since the requirements set on the burden of proof related to the risk analysis appears to be very high and, therefore, not easy to be met in case of technological uncertainty.[131] A slight weakening of this interpretation might be seen in the EC-Tariff-Preferences Case:[132] Precautionary measures which enable the application of a so-called "drug arrangement" in connection with food can be implemented as long as they are proportionate even if trade restrictions are caused.[133]

The European Court of Justice has been more open to the acceptance of precautionary measures and has held that such measures can be instituted as long as this is done on the basis of scientific evidence even of an uncertain nature.[134] However, out-dated scientific information would not be suitable to be invoked; new pertinent scientific evidence needs to be applied, notwithstanding the fact that such evidence is usually subject to review in the light of new developments.

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128 De Sadeleer, supra note 122, p. 153.

129 Monsanto Agricoltura Italia S.p.A and others v Presidenza del Consiglio dei Ministri and Others, Case C-236/01, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001C0236:EN:HTML .

130 See EC-Hormones, supra note 94, nos. 121 et seq.

131 See Weber/Vlcek, supra note 68, no. 18; Sander, Gerald G., Internationaler und europäischer Gesundheitsschutz, Baden-Baden 2004, p. 145.

132 European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, Report of the Appellate Body, WT/DS246/AB/R, N 98.

133 See also Howse, Robert, 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, American University International Law Review, Vol. 18, 2003, pp. 1333 et seq., p. 1373.

134 Schlumpf v. Switzerland, Judgement of December 3, 2009 (no. 22028/04) and in particular the follow-up Judgement of the Swiss Federal Court of September 15, 2010 (9F_9/2009).

c) Burden of Proof in Particular

The burden of proof in connection with the precautionary principle causes special concerns.[135] According to a generally accepted rule in civil law, the state introducing trade related impediments has to prove that the conditions for applying precautionary measures are fulfilled. An exception might apply in case of dangerous products. However, partly it is argued that a change of the burden of proof should be considered in the sense that evidence of the lack of any risks should be imposed on the importer of the goods coming from a country with lower health and environmental standards.[136]

The SPS Agreement provides for two main conditions to be considered as a standard of proof for precautionary measures:[137] First, the measure must be based on an international standard, i.e. the Codex Alimentarius, and second, the measure has to be appropriately linked to a risk assessment under Article 5 of the SPS Agreement. Deviating from the Codex standards or setting a measure which is of a higher standard also requires the proof that the international standard does not need the appropriate standard level of protection.[138] In the EC-Hormones case, the Appellate Body held that a precautionary measure should be of a temporary nature, but albeit being temporary, it has also to be based on available pertinent information.[139] The Appellate Body stressed that evidence in the given case had not been scientific, however, that it should be significant enough to warrant a precautionary measure. The Appellate Body further added that for such a measure to be sustainable, the member implementing it should show that additional information is being sought and the risk assessment amounting to scientific evidence is due to be conducted.

The EFTA Court applied a slightly varied standard of proof, particularly in the Kellogg's case. The EFTA Court held that the proper application of the precautionary principle presupposes that a potentially negative health consequence has been identified and that risk evaluation (or assessment) to health is based on the most reasoned scientific information. The main hazard identified in the Kellogg's case was the increase in iron stores in the body; it was also agreed that the human body needs a limited amount of iron yet has no capacity to excrete access iron, does posing a potential health risk. Albeit the fact that there was no scientific evidence showing the exact amounts of iron potentially dangerous to human health, the ban was held to be a reasonable precautionary measure under the given circumstances.

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135 See Morris, Julian, Rethinking Risk and the Precautionary Principle, Oxford/Woburn 2000, p. 9, with a critical assessment of present practice.

136 See Weber/Vlcek, supra note 68, no. 12.

137 See also UNCTAD, Training Module on the WTO Agreement on Sanitary and Physosanitary Measures, Geneva, November 2005, available at: http://www.unctad.org/en/docs/ditctncd20043_en.pdf

138 Masson-Matthee, supra note 73, p. 147.

139 See EC Hormones, supra note 94.

d) Synthesis

The (cumulative) substantive application conditions for the precautionary principle can be summarized as follows:[140]

- Existence of plausible scientific risk analyses and risk hypotheses;[141]
- Lack of scientific knowledge for an extensive risk evaluation;
- High likelihood of damage occurrence or substantial threat to important legal rights such as life and health.

If applied, precautionary measures need to fulfil the following more procedurally oriented requirements:[142]

- Non-discriminatory application;
- Proportional application in view of the level of protection;
- Coherent application (same measures for similar situations);
- Foundation of measures on generally accepted scientific research and knowledge;
- Temporary character of measures and continuous review of for evaluating whether they are still appropriate;
- No disguised trade restriction;
- Transparent procedure for introduction and participation of concerned persons/businesses.

Obviously, the scope of discretion is relatively wide in evaluating these criteria; therefore, the level of inquiry done by the courts into the technical, environmental, and health-related elements is of utmost importance.[143] Notwithstanding the amount of scientific evidence, however, legal predictability can be improved if internationally acknowledged guidelines are applicable. This predictability is also important for how consumer behavior is developing; consumer autonomy might increase if consequences of choices related to the consumption of goods and services can be properly evaluated.

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140 See Weber/Vlcek, supra note 68, no. 26.
141 See also WTO, Summary on the SPS Risk Analysis Workshop, 19-20 June 2000, G7SPS/GEN/209, 3 November 2000.
142 See Weber/Vlcek, supra note 68, no. 26.
143 To this aspect see in more detail below 4.2 (iv).

4.2 Risk Assessment Principle

The assessment of risks is a difficult issue for courts and legal doctrine since other disciplines are playing a more important role than law. Technical considerations are often not easily comprehensible for legally trained persons and economic appreciations also need to be often taken into account. Notwithstanding this fact, the adequate evaluation of the (potential) risks is of utmost importance in the light of consumer autonomy since proper choices can only be taken by consumers if the assessment of risks is plausible.

(i) The SPS Agreement does not contain any specific provision on consumer participation since the addressees of the WTO Agreements are the member states not the individuals and since they relate to cross-border trade, not directly to consumer rights. Nevertheless, the risk assessment as a precondition of the risk mitigation is dealt with in the SPS Agreement. Article 2 para. 2 of the SPS Agreement is referring to the scientific principles to be taken into account when implementing measures which protect human, animal or plant life or health. Such measures are to be applied in a proportional way; this conclusion can be drawn from the term "sufficient evidence" in Article 2 para. 2 as well as from Article 5 para. 1 addressing a risk assessment being appropriate in view of the circumstances, in particular the risks to human, animal or plant life or health.[144] Furthermore, Article 3 of the SPS Agreement requests the member states to base their measures on international standards (harmonization); a higher standard than internationally recognized should only be considered if there is scientific justification for doing so and after having made an assessment of the risks involved in not applying such higher standards (Art. 3 para. 3 SPS Agreement).[145] The footnote to this provision refers to an examination of scientific information by highlighting its "availability". A similar conclusion can also be drawn from Article 5 para. 2 of the SPS Agreement which requires the member states to apply adequate methods in risk assessment processes (inspections, sampling and testing methods).[146] However, the involvement of consumer opinions or consumer representative groups is not provided for in the risk assessment requirements.

(ii) The above mentioned Cartagena Protocol provides for risk assessment and risk management in Articles 15 and 16. In particular, appropriate mechanisms as well as measures and strategies to regulate, manage and control risks identified in the risk assessment provisions of the Protocol are to be established and maintained. Annex III extensively provides for risk assessment principles and methodology, putting

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144 For an overview see Gruszczynski, Lukasz, Regulating Health and Environmental Risks under WTO Law, Oxford 2010, pp. 75 et seq.

145 See Gruszczynski, supra note 144, pp. 107 et seq.

146 Prévost, Denise/Van den Bossche, Peter, The Agreement on the Application of Sanitary and Phytosanitary Measures, in: Macrory/Appelton/Plummer (eds.), The World Trade Organization: Legal, Economic and Political Analysis, Berlin 2005, p. 308; Gruszczynski, supra note 144, pp. 215 et seq.

emphasis on the assessment being transparent and scientifically sound. Article 20 of the Protocol addressing the information sharing includes the sharing of summaries on risk assessment.

(iii) The already mentioned Regulation 178/2002 of the European Union contains Article 6 on issues of a risk analysis: According to this provision food law shall be based on risk analyses except where this is not appropriate in the light of the circumstances or the nature of the measures (para. 1). Furthermore, the risk assessment shall be based on the available scientific evidence and undertaken in an independent, objective and transparent manner (para 2.). In addition, the risk management shall take into account the results of risk assessment and, in particular, consider the precautionary principle. As mentioned, transparency is an explicit objective of Article 6 para. 2 Regulation 178/2002.

(iv) An important problem in the risk assessment context consists in the uncertainties and complexities inherent in risk analyses and the use of science policies. Courts should make sure that the decision-making process is rational. Legal doctrine refers insofar to three aspects of scientific evaluation:[147] (a) Balancing categories of evidential reasoning; (b) judging data and theories; and (c) considering desiderata of rationality. The balancing categories involve issues on how to weigh different risk estimates; judging data encompasses the determination of quality of data and theories used, depending on statistical properties, methodology, reliability, relevance and the level of scrutiny by the scientific community.[148] Rationality is described as including conceptual clarity for all terms used in the discourse, logical deduction, methodological rigour, practicality, ontological realism, epistemological reflection, and valuation.[149]

An interesting example can be seen in the recent decision of the International Court of Justice (ICJ) in the Pulp Mills Case:[150] Whereas the Court has only vaguely referred to the scientific risk assessment, Judge Al-Khasawneh and Judge Simma laid down a model for the ICJ to consider scientific evidence:[151] According to the

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147 Crawford-Brown, Douglas/Pauwelyn, Joost/Smith, Kelly, Environmental Risk, Precaution, and Scientific Rationality in the Context of WTO/NAFTA Trade Rules, Risk Analysis 24 (2004), pp. 461, 465.

148 Epps, supra note 122, pp. 166/67; for a general overview see Holmes, John/Bammer, Gabriele/Young, John/Saxl, Miriam/Stewart, Beth, The Science – Policy Interface, in: John Ingram/Polly Ericksen/Diana Liverman (eds.), Food Security and Global Environmental Change, London 2010, pp. 149-168.

149 Epps, supra note 122, pp. 167.

150 Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), for details regarding this case see http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=88&PHPSESSID=ee326a5421564afb6181adc54fb31003&case=135&code=au&p3=0.

151 See also Christine Kaufmann, International Law in Recession? The Role of International Law When Crisis Hits: Food, Finance and Climate Change, in: Fastenrath/Geiger/Khan/Paulus/von Schorlemer/Vedder (eds.), From Bilateralism to Community Interest, Essays in Honor of Bruno Simma, Oxford 2011, pp. 1189, 1197.

Dissenting Opinion of the two judges, the Court needs to engage in an "interweaving of legal process with knowledge and expertise that can only be drawn from experts properly trained to evaluate the increasingly complex nature of the facts put before the Court".[152] Furthermore, the two judges call upon an assessment of "the relevance and the weight of the evidence produced in so far as is necessary for the determination of the issues which it [the Courts] finds it essential to resolve".[153] The reliance on experts is all the more unavoidable in cases concerned with highly complex scientific and technological facts.[154]

This concept has been taken up in several cases of the Appellate Body in the WTO dispute settlement mechanism, for example in Australia – Salmon[155], in Japan – Apples[156] as well as in EC – Hormones[157]. In all three cases, evidence acceptable was that which was guarded through the scientific methods, no consideration was given to other forms of evidence to justify a specific (precautionary) measure.

(v) Burden of proof: The SPS Agreement provides for the burden of proof in Article 6 para. 3 according to which the exporting members claiming that areas within their territories are pest- or decease-free areas shall provide the necessary evidence thereof in order to objectively demonstrate to the importing member the factual situation. Accordingly, the country in whose territory the risk to health is prevalent is under the obligation to prove that the products of export do not cause a risk to the importing country.

In the Japan – Apples case the Panel discussed the burden of proof under the SPS Agreement and stated that a greater expertise of the exporting country (United States) as a factor which should automatically justify a different allocation of burden of proof or the imposition of a heavier burden of proof on one party could not be recognized.[158] Accordingly, the burden of proof does not fall on a party simply because it is the exporting party and assumed to have more information on a health risk. However, the exporting country should at least raise a presumption that there are no relevant scientific studies or reports in order to demonstrate that the measure at issue would not be supported by sufficient scientific evidence; the importing

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152 Case concerning Pulp Mills on the River Uruguay, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, 20 April 2010, para. 3, available at: http://www.icj-cij.org/docket/files/135/15895.pdf.

153 Dissenting Opinion, supra note 152, para. 5.

154 Dissenting Opinion, supra note 152, para. 11.

155 Appellate Body Report, Australia – Measures Affecting Importation of Salmon, WT/DS18/AB/R, 1998, for details see http://www.wto.org.

156 Appellate Body Report, Japan – Measures Affecting the Importation of Apples, WT/DS245/AB/R, 2003, for details see http://www.wto.org.

157 Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), supra note 94.

158 Japan – Measures affecting the importation of Apples, WT/DS245/R, paras. 7.1-7.5 and 8.44-8.46, available at: http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS245%FCR%2A+and+not+RW%2A%29&language=1.

country could than submit elements to rebut the presumption. Furthermore, the Panel hold that the burden of proof in principle lies with the party alleging the application of a legal provision by submitting a prima facie case supporting its position.

4.3 Transparency Principle

Transparency is an important prerequisite for an adequate governance in all economic fields having an influence on consumers' well-being. Transparency can be understood as three-dimensional concept:[159] The first dimension encompasses institutional aspects, i.e. procedures and decision-making which should lead to legal certainty. The second dimension looks at the substantive values' backbone of the rules governing a specific economic sector. The third dimension concerns the accountability of market participants as an essential element for providing confidence in the "system".

The transparency aspect can be addressed under a consumer protection and autonomy perspective in the light of the above risk assessment considerations as follows:

(i) *Global instruments*: In the SPS Agreement, transparency is provided for in Article 7 and Annex B: According to Article 7, members shall notify changes in their sanitary or their phytosanitary measures and shall provide information on these measures; Annex B requests the publication of SPS measures by each member state through notification to the SPS Secretariat, with special emphasis on "enquiry points".

Partly, the WTO in general is criticized by legal doctrine for lack of transparency in its decision making processes.[160] National interests can play a role in the Dispute Settlement Body (DSB), in particular if a big country is applying political pressure through general actions. In addition, the weight given to amicus curiae briefs from non-governmental organizations and civil society is not clear. Although the WTO decision making system does not necessarily lead to human rights violations, it nevertheless limits the participation of consumers' or non-governmental organization or consumer representatives in its decision-making processes.[161]

(ii) *EU instruments*: The already mentioned Regulation 178/2002[162] states in its Article 8 that the aim of food law consists in the protection of the interests of consumers and that the law shall provide a basis for consumers to make informed choices in relation to the food consumed; fraudulent or deceptive practices, the adulteration of food and

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159 Weber, Rolf H., Shaping Internet Governance: Regulatory Challenges, Zürich 2009, pp. 122-123.

160 Dommen, Caroline, The WTO, International Trade and Human Rights, in: Windfuhr (ed.), Mainstreaming Human Rights in Multilateral Institutions, 2004, available at: http://www.3dthree.org/pdf_3D/WTOmainstreamingHR.pdf.

161 This fact is institutionally due to the legal situation that only member states can be parties in the dispute settlement proceedings; insofar, it would have to be considered to what extent consumer organization could be accepted as third parties being admitted to the proceedings.

162 See supra note 87.

any other practices which may mislead the consumer are to be avoided. Consequently, unfair competition rules apply and the consumer should be protected by receiving correct and reliable information. Furthermore, two additional provisions address transparency: According to Article 9 of the Regulation, there shall be open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow it. Article 10 states that public authorities are requested to take appropriate steps to inform the general public of the nature of any risk which a food or feed would cause for human or animal health, identifying to the fullest extent possible the food or feed, or type of food or feed, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk. The result of this provision might be that precautionary measures are imposed as risk mitigating action.

(iii) Transparency means to make the relevant information public. Particularly, legal rules must be subject to publication which is effective and efficient if it reaches both, the holder of rights and the holder of obligations; once rules are published, those who are bound by these rules and do not comply with them can be hold accountable as a logical consequence.[163] Therefore, the notion of transparency "contains an element of visibility and clarity on the one hand and an element of empowerment and capability on the other".[164] Consequently, from a consumer's perspective, transparency entails the process of "seeing through" as well as the "object" that is being looked at.[165] In concretizing this notion, the information given to consumers must be clear, robust and comprehensible; not the quantity, but the quality of information is essential.[166]

A specific concretization of the transparency principle in the health and food sector encompasses the labelling requirements. If products are correctly labelled, consumers know what could be expected from the respective goods. Labelling is not only a trademark aspect, but also a major issue of transparency. The clearer the label complies with informational requirements, the easier it will be for consumers to make their autonomous choices.

(iv) Transparency and procedural fairness are also important in respect of the burden proof and the level of evidence: The discussed risk assessment procedures and the appreciation of scientific information by courts[167] do only allow consumers to act in self-determination if the presented "results" are comprehensible and show the

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163 See Kaufmann, Christine/Weber, Rolf H., The Role of Transparency in Financial Regulation, Journal of International Economic Law, Vol. 13, 2010, p. 779, 782.

164 Kaufmann/Weber, supra note 163, p. 782.

165 See also Weber, supra note 159, p. 132, and Weber, Rolf H., Datenschutz v. Öffentlichkeitsprinzip Zürich 2010, nos. 18 und 24.

166 For more details see Weber, Rolf H., Kassandra oder Wissensbroker – Dilemma im Global Village, in: Becker/Hilty/Stöckli/Würtenberger (eds.), Festschrift für Manfred Rehbinder, Bern/München 2002, pp. 405, 407.

167 See above no. 4.2 (iv).

available alternatives. Looking at the described court practice, room for manoeuvre in improving adequate transparency requirements still seems to be available: clear procedural rules, a framework for the delivery of technical documentation (incl. amicus curiae briefs), a more concise focus of the case-relevant issues, and a coherent understanding of the decision-making motives and elements would substantially increase the consumers' understanding of the given (technical) circumstances.

5. Synthesis and Outlook

The relations between human rights and unfair competition in the activity-oriented field which have not yet been studied in depth need to realize an interests' balancing test in the light of consumer autonomy based on the assumption that a consumer as an individual also fulfils specific functions in the market and that human rights provide for the liberty to make choices. A new concept has to overcome the notion of the passive role of consumers and consequently the concept of defensive rights of consumers.[168] Actions against ant-competitive harm and for compensation of caused damages should obviously be possible, however, such actions can only complement the fundamental position of consumers acting in the market place and thereby voicing direct economic choices which makes it necessary to provide for comprehensible information in the market (in the sense of the transparency principle). Consequently, consumers must have protective rights, including proactive entitlements to protection (for example through the application of the precautionary principle).

In this context, legislators, regulators, and courts are called to define the 'public' consumer interests ('public' because widely dispersed among the consuming public). Based on the respective legal framework, regulatory bodies can serve as guardians of 'public' consumer interests in relation to such issues as consumer autonomy, fair economic treatment, life protection and health, and a safe and sustainable environment.[169] In a wider sense, the guardian function might also encompass economic development in general, thereby broadening economic self-determination of individuals. Consequently, principles of sustainability, biodiversity, and social welfare become topics of assertion; insofar the political bodies will have to balance specific consumer preferences against objectives in the general interest.

So far, consumers have often not been considered as actors being the typical or expected beneficiaries of fundamental human rights protection. Looking form a philosophical perspective, if an interest is converted into a fundamental right it achieves a higher currency; in Dworkin's well-known argument, such a fundamental

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168 See Harding/Kohl/Salmon, supra note 6, pp. 13/14 with further details.
169 See Harding/Kohl/Salmon, supra note 6, pp. 68/69 and 177/78.

legal entitlement 'trumps' any opposing, utilitarian interest or policy.[170] As stated in legal doctrine, the impact of the human rights argument must be realized at the meta-level and at the more specific level and context of individual cases, for example by evaluating whether an adequate risk assessment does reflect technical assessments against (potential) interference with individual human rights. Courts need to ask the question whether the consumers' position and role in the contemporary globalized markets would call for a special degree of legal protection (of a high order). Considering such kind of thoughts, basic rights protection could become a legal strategy.[171]

A specific problem which is outside the scope of this contribution, which, however, merits to also attract more attention concerns the fact that an individual consumer is likely to be at a disadvantage in terms of resources and general awareness in the public. The lack of collective manifestation is a particular aspect of the consumers' vulnerability. Theoretically, consumers could possess and exploit considerable market power, but the "entry barriers" for collective actions are quite high; an individual consumer rather tends to vote with his/her feet.[172] Therefore, the use of representative bodies of consumers should be encouraged and facilitated. Such an approach would make it necessary to not only provide for better transparency and adequate access to information, but also to establish the possibility of direct participation in policy-making and critical discussion as well as to allow effective representation for purposes of direct legal challenge.[173]

A further important aspect is the empowerment of consumers. Only if consumers are aware of risk assessments and precautionary measures, their autonomy will be exercised in a manner which leads to the situation that a policy shift away from protecting pure economic success to the detriment of health or safety or environmental concerns is occurring, i.e. consumers will "opt-out" in respect of certain developments. Change signals have become apparent in the recent years; for example, the classic human rights law with its vertical focus on the 'public' power imbalance between the state and the citizens has been more and more extended to horizontal 'private' relationships, not at least through the Ruggie framework, thereby improving the relative power equality of private actors.[174] Nevertheless, a further strengthening of the human rights approach in connection with the competitive fairness facettes could bring additional back-winds to this movement.

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170 Dworkin, Ronald, Taking Rights Seriously, London 1977.
171 See for further details Harding/Kohl/Salmon, supra note 6, p. 234.
172 Harding/Kohl/Salmon, supra note 6, pp. 15 and 72.
173 For further details see for example Hodges, Christopher, Collective Redress in Europe: The New Model, Civil Justice Quarterly, Vol. 29, 2010, pp. 370-395.
174 See above 2.1 a).