

#### IV. Effects of International and European Integration on Switzerland and its Operators

##### 1. General

Today, the broadest direct influence on Swiss economic law is exercised by the European Union. Economically, Switzerland is to a large extent part of the EU single market. The **sheer existence** of this market bears the risk of discrimination of third country operators since EU operators have a tendency to trade with each other. This is reinforced by the legal framework of the EU single market and by the actions of its organs. As a matter of principle, third country nationals cannot invoke the provision of the TFEU on free movement. There is an exception with regard to **free movement of capital**. Article 63(2) TFEU states: «Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and **between Member States and third countries** shall be prohibited.»<sup>312</sup> In its landmark judgment in Case C-452/04 *Fidium Finanz* the ECJ has, however, narrowed the scope of that provision. *Fidium Finanz*, a company incorporated under Swiss law with its registered office and central administration in St. Gallen granted credits of EUR 2 500 or EUR 3 500 at an annual interest rate of 13.94% to clients established abroad, mostly in Germany. The credits were offered by an internet site run from Switzerland and by means of credit intermediaries operating in Germany. *Fidium Finanz* was not subject to the Swiss banking supervision. The *Bundesanstalt für Finanzaufsicht (BAFIN, Federal Office for the Supervision of Financial Services)* denied *Fidium Finanz* the right to grant such credits on the ground that it did not have the authorization required by German law. It was not possible for the Swiss firm to obtain said authorization because it did not have its central administration or a branch in Germany. In the proceedings before the ECJ, *Fidium Finanz*, supported by Advocate General STIX-HACKL and the European Commission, contended that the activity in question fell within the free movement of capital and that it was entitled to rely on the third country clause mentioned above. The ECJ held, however, that national rules such as the ones in question affect primarily the exercise of the **freedom to provide services**. It thereby followed the position taken by the German and Greek Governments, Ireland, and the Italian and Portuguese Governments. Since there is no third country clause in the field of free movement of services, a company established in a non-member country cannot rely on the respective provisions.<sup>313</sup> It is clear that the ECJ's judgment was motivated by **reciprocity considerations**. If Switzerland wants its operators to enjoy freedom to provide services in the EU, it will have to conclude a respective agreement with the EU.

312 Emphasis added.

313 ECR 2006, I-9521.

The same holds true for every third country.<sup>314</sup> Financial service providers from third countries lack a **European passport** which is based on the license in the country of origin.<sup>315</sup> It is to be noted that the three EEA/EFTA States are no third countries within the meaning of Article 63(2) TFEU. As to the rest, the Union may accentuate discrimination by the enactment of secondary law which precludes third country actors from doing business on its market or by making it more difficult. An example is provided by EU investment fund legislation.<sup>316</sup>

## 2. Unilateral action of foreign powers

### a. General

Powerful countries and organizations may resort to unilateral measures in order to force smaller countries to comply with their wishes. The champion of this type of policy is the **United States of America**. American foreign policy is to a large extent characterized by a tendency to act without the consent of those who are affected by the action. University of Yale international law professor JED RUBENFELD has described what seems to be the majority view in the U.S. in that regard: «Since 1945 [...] America has spoken out of both sides of its mouth on international law, championing internationalism in one breath, rejecting it in the next.»<sup>317</sup> Whereas continental Europe's elites were keen «to embrace an antinationalist, antidemocratic international legal system» after the horrors of nationalism in World War II, the U.S. was not. «The war had a very different meaning here, which led to a very different understanding of the internationalist project pursued in its wake. Basically, the United States promoted the new internationalism as part of an ambition to **Americanize as much of the world** as it could, which meant both the export of American institutions, including constitutional law, and the strengthening of American global influence. [...] Because the point of the new international law was to Americanize, the United States, from its own perspective, did not really need international law (being already American). Accordingly, we would lead the world in creating a new international legal order to which we ourselves never fully acceded. The new international institutions

314 See CARL BAUDENBACHER, *Der Finanzplatz Schweiz im Angesicht der Reziprozitätspolitik der EU*, *European Law Reporter* 2006, 398 ff. – The ECJ has also in other cases made access to the EU market dependant on reciprocal treatment for Union operators. See with regard to the international exhaustion of trademark rights Case C-355/96 *Silhouette*, 1998 ECR, I-4799, at paragraph 30.

315 From a Liechtenstein perspective, see the interview with the Princely Head of Government KLAUS TSCHÜTSCHER in NZZ of 13 May 2012 <[http://mobile.nzz.ch/wirtschaft/aktuell/ewr-ist-eine-riesige-erfolgsgeschichte\\_1.16875633.html](http://mobile.nzz.ch/wirtschaft/aktuell/ewr-ist-eine-riesige-erfolgsgeschichte_1.16875633.html)> visited 12 June 2012.

316 <[http://www.efd.admin.ch/dokumentation/022881\\_024801\\_02517/index.html?lang=de](http://www.efd.admin.ch/dokumentation/022881_024801_02517/index.html?lang=de)> visited 8 March 2012.

317 JED RUBENFELD, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 1973 (2004); see with regard to the history of American unilateralism, e.g., JOHN E. NOYES, *Universalism and the American Tradition of International Law*, 21 Conn. J. Int'l L. 199, 200 ff. (2006).

would be for the rest of the world, not really for us, and certainly not superior in authority to our own legal system. As a result, in the ensuing decades, the United States frequently found itself championing international law for other countries, while rejecting or resisting it for itself.»<sup>318</sup> From there, it is only a small step to concluding that «the antidemocratic nature of international organizations, particularly when contrasted with the trend toward democratically sovereign nation states, makes the actions of these entities presumptively illegitimate.»<sup>319</sup> American unilateralism is coupled with **exceptionalism**. Unilateralism and exceptionalism have materialized in foreign policy, in the use of military force, the non-participation in international human rights agreements, the refusal to become part of the Kyoto Protocol and of the ICC (Rome statute).<sup>320</sup> They are not, however, limited to these fields, but also extend to **economic law** where special mechanisms have been developed. The Foreign Account Tax Compliance Act (FATCA) is the most recent example.<sup>321</sup>

On closer inspection, one realizes, however, that things are rather **complex**. German International Law Professor PETER-TOBIAS STOLL has rightly stated that «[t]he threat of US unilateral action was a significant driving force behind the establishment of the WTO, which widely satisfies US interests and – it should be added – those of other industrialized countries.»<sup>322</sup> In fact, the restructuring of the old GATT which had become inefficient in particular due to its dispute settlement mechanism was greatly helped by the U.S. systematically targeting «alleged violations by other States of trade agreements or even disregard by other countries of substantial US trade interests.»<sup>323</sup> Section 301 Trade Act was the basis for these actions.<sup>324</sup> At the same time, the WTO dispute settlement system has **limited the leeway** for US unilateral action.<sup>325</sup>

318 JED RUBENFELD (fn 317), 1974, emphasis added.

319 SUMON DANTIKI, *Power Through Process: An Administrative Law Framework for United Nations Legislative Resolutions*, 40 Geo.J. Int'l L. 655, 675, criticizing JED RUBENFELD; see also the negative remarks of Spanish international law professor RAFAEL DOMINGO, *The Crisis of International Law*, 42 Vand. J. Transnat'l L. 1543, 1586 (2009).

320 See, e.g., SABRINA SAFRIN, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 Vand. J. Transnat'l L. 1307 (2008); ONDER BAKIRCIOGLU, *The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement*, 19 Ind. Int'l & Comp L. Rev. 1, 34 (2009).

321 See, for example, DAVID E. SPENCER, *Fatca and Automatic Exchange of Tax Information*, 21 J. Int'l Tax'n, 62 ff. (2010).

322 PETER-TOBIAS STOLL, *Compliance: multilateral achievements and predominant powers*, in: Michael Byers/Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law*, Cambridge 2003, 456 ff., 476.

323 PETER-TOBIAS STOLL (fn 322), 461.

324 See, e.g., JAGDISH BHAGWATI/H.T. PATRICK (eds.), *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System*, Ann Arbor 1990; THOMAS PAULSEN, *Economic Diplomacy. Die Ökonomisierung der amerikanischen Aussenpolitik unter Präsident Clinton 1993–1996*, Opladen 1999.

325 PETER-TOBIAS STOLL (323), 476.

During the past 25 years, the U.S. enjoyed unprecedented economic and military might. But unilateralism alone does not explain the American success in influencing the legal orders of other countries and of a supranational organization like the European Union. The Soviet Union was also a very powerful state in the 1950's and 1960's. And yet it was not able to export its legal concepts to the same extent as the U.S. What makes America particularly influential are its legal system and its **attitude towards international law**. It has been said that «the peculiar American obsession with law, and the inclination of Americans to litigate matters that in other countries would not be regarded as suitable for judicial attention» has already become apparent in the early 19<sup>th</sup> century.<sup>326</sup> More recently, the American Way of Law, i.e. of policy-making and dispute resolution, has been described by American political scientist ROBERT KAGAN as «**adversarial legalism**». Kagan has summarized the characteristics of this legal style as entailing «(1) more complex bodies of legal rules; (2) more formal, adversarial procedures for resolving political and scientific disputes; (3) more costly forms of legal contestation; (4) stronger, more punitive legal sanctions; (5) more frequent judicial review of and intervention into administrative decisions and processes; (6) more political controversy about legal rules and institutions; (7) more politically fragmented, less closely-coordinated decision-making systems; and (8) more legal uncertainty and instability.»<sup>327</sup> One main feature of this system is **litigant activism**, «a style of legal contestation and decision-making in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence is dominated not by judges or governmental officials but by disputing parties or interests, acting primarily through lawyers. Organizationally, adversarial legalism typically is associated with decision-making institutions in which authority is fragmented and in which hierarchical control is relatively weak.»<sup>328</sup>

In the given context, two forms of unilateral action shall be discussed: Extraterritorial application of domestic law in domestic courts and imposing sanctions of foreign countries and private operators.

#### b. Extraterritorial application of domestic law

A common unilateral measure is the **extraterritorial application** of domestic law. Again, the U.S. has been leading the pack in this respect. Not only were and are American courts inclined to apply American law to foreign conduct in

cases brought by American plaintiffs including government agencies. Due to certain features of American procedural law, also foreign plaintiffs have been attracted to American courts. These factors are, in particular, pre-trial discovery rules, contingency fees, class actions and the possibility to obtain treble damages. The fact that American courts are in vogue among foreign plaintiffs has famously been described by the English Law Lord ALFRED DENNING in 1983 with the following words:

«As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side.»<sup>329</sup>

International **comity** should guide states and in particular judges in using restraint when asserting jurisdiction.<sup>330</sup> Broadly speaking, comity is the recognition a nation grants to another nation's acts within its own territory. That is, in principle, also accepted by U.S. courts. Another American concept to regulate jurisdictional conflicts is the common law doctrine of «**forum non conveniens**». It permits a court to decline, at its discretion, the exercise of jurisdiction on the ground that the interests of justice are best served if the trial takes place in another court.<sup>331</sup> It may be added that the principle of *forum non conveniens* is not part of Swiss domestic law. Article 19 (3) of the preliminary draft for a Swiss Civil Procedure Code of 19 December 2008 which provided for such a principle has been omitted from the final version of the statute after it met with widespread opposition in the consultation procedure.<sup>332</sup> The principle has furthermore not been recognized by the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 to which Switzerland is a signatory state.<sup>333</sup> However, Swiss companies have been involved in a number of cases in the U.S. where the principle of *forum non conveniens* has been applied or discussed by the seized court.<sup>334</sup> Despite considerable efforts to provide clear-cut criteria for the application of the doctrine, the Supreme Court has acknowledged that it is accompanied by a **lack of legal certainty**. It stated in *American Dredging Co. v. Miller*,<sup>335</sup> that «[t]

326 PAUL D. CARRINGTON, *Moths to the Light: The Dubious Attractions of American Law*, 46 U. Kan. L. Rev. 673, 676 f. (1998), emphasis added.

327 ROBERT A. KAGAN, *American and European Ways of Law: Six Entrenched Differences*, 2/2/06, 3, <[http://www.law.columbia.edu/center\\_program/legal\\_theory/papers/spring06/exclusive=filemgr.download&file\\_id=g41783&rtcontentdisposition=filename%3DRAKonatilo-30-os.pdf](http://www.law.columbia.edu/center_program/legal_theory/papers/spring06/exclusive=filemgr.download&file_id=g41783&rtcontentdisposition=filename%3DRAKonatilo-30-os.pdf)> visited 20 March 2012; ID., *Adversarial Legalism. The American Way of Law*, Cambridge, MA/London 2003, passim.

328 ROBERT A. KAGAN, *American and European Ways of Law* (fn 327), 4.

329 *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730 at 733 (Eng.).

330 See, for example, JOEL R. PAUL, *The Transformation of International Comity*, 71 L. & Con temp. Probs. 19, 38, 27 ff. (2008).

331 See RONALD A. BRAND/SCOTT R. JABLONSKI, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements*, New York 2007, 1.

332 Botschaft zur Schweizerischen Zivilprozessordnung (ZPO) of 28 June 2006, BBl 2006,7264.

333 ATF 129 III 295; Federal Supreme Court 4C.318/2006 of 13 March 2007. See with regard to the Lugano Convention infra, E. V. 11.

334 See, e.g., United States District Court, S.D. New York, No. 10 Civ. 0139 in re *Alcon Shareholder Litigation*, 719 F.Supp. 2d 280 (2010) of 24 May 2010; United States Court of Appeals, 10th Cir., *YA VUZ v. 61 MM, LTD.*, 576 F.3d 1166 (2009) of 13 August 2009; in re *Holocaust Victim Assets Litigation*, 105 F.Supp. 2d 139 D.C. E.D.N.Y. (2000).

335 510 U.S. 443 (1994).

he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application [...] make uniformity and predictability of outcome almost impossible.»<sup>336</sup>

### c. Imposing sanctions

America has a tradition of imposing sanctions on those who do not comply with its policy goals. This goes back to President WILSON's belief that sanctions are an **alternative to war**. In 1919, when trying to convince Americans of the need of the League of Nations, WILSON famously proclaimed:

«A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.»<sup>337</sup>

Normally, sanctions are **primary** in nature. A state or an international/supranational organization imposes primary sanctions by restricting its own actors from doing business with a targeted foreign state or another international pariah. Primary sanctions are imposed on foreign states which do not comply with certain standards a country or an international organization would like them to. One method is the establishment of black or grey lists.<sup>338</sup> It may happen that the threat of sanctions is sufficient to prompt the target country to comply. In the case of Switzerland, the usually slow pace of politics may then change into swift action, which is possible because the country is small and it suffices that the most important decision-makers in politics and in the associations are convinced. Whereas all the major powers in the world resort to primary sanctions, imposing **secondary sanctions** by targeting private operators who do business with a «rogue state» is an American specialty.<sup>339</sup>

### 3. Treaties

Treaties may be entered into because the Swiss government has come to the conclusion that they lie in the country's best interest. Experience shows, however, that Switzerland may also be **forced** by foreign pressure to conclude an international treaty. This is the case if a foreign power is of the view that certain parts of the Swiss legal order and/or their interpretation by the Swiss authorities

is harming its interests and acts accordingly, e.g. by putting forward reciprocity requirements.

Treaties with economic law relevance are often **janus-faced**. On the one hand, their very purpose is to avoid discriminatory treatment of Swiss operators and to secure their access to foreign markets. On the other hand, treaties in many cases can only be concluded if foreign law is made part of them. Treaty law is therefore in many cases heteronomous law. In recent times, the content of international agreements has mostly been defined by Switzerland's partners. This holds true, not only but in particular, for the **sectoral agreements** concluded with the European Union. Since under the rules of public international law treaties become part of the Swiss legal order, the bilateral agreements concluded with the European Union are an important entrance door for European law. The principle of equivalence of the respective legal order, a maxim which is frequently evoked by the Swiss government, is of lesser importance. It has aptly been characterized as a political-programmatic principle which cannot be legally enforced.<sup>340</sup>

### 4. Import/export of law

A small country like Switzerland does not have the means to develop its own solutions to all the challenges related to economic law. The Swiss legislature therefore has always looked abroad and **imported** foreign solutions. Idea-givers were by tradition the neighboring countries, in particular Germany and France. In the more recent past, the U.S. and the European Union have become important suppliers. Generally speaking, foreign law may enter the domestic legal order due to four causal mechanisms: Coercion, competition, learning, or emulation.<sup>341</sup> Comparative law literature focuses, in particular, on reception and thereby on learning and emulation. The term **reception** describes the voluntary adoption of foreign law by a legislature or a court in a given jurisdiction. The receiving country did have a choice.

It may also happen that Switzerland is **forced** to take over the rules of a larger and more powerful country or of an association of countries. In other words, foreign law may be actively **exported** and imposed on Switzerland by a foreign state or organization. The exporting country may pursue such a strategy in order to open the Swiss market or to secure a familiar legal framework for its own ex-

<sup>336</sup> 10 U.S. 443, 463 (1994).

<sup>337</sup> Woodrow Wilson, *Wilson's Ideals*, edited by Saul K. Padover, Washington, D.C. 1942, 108, cited by BARRY E. CARTER, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 Cal. L. Rev. 1159, fn 20.

<sup>338</sup> *Infra*, E. V. 3.

<sup>339</sup> See with regard to the American policy of imposing sanctions GARY CLYDE HUFBAUER/JEFFREY J. SCHOTT/KIMBERLY ANN ELLIOTT/BARBARA OEGG, *Economic Sanctions RECONSIDERED*, 3<sup>rd</sup> ed., Washington, D.C. 2009, 130; see also *infra*,...

<sup>340</sup> MATTHIAS OESCH, *Die Europäisierung des schweizerischen Rechts*, nccr trade regulation, Working Paper No 2011/051 October 2011/70 <[http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3873/e4378/e6749/oesch\\_europaesierung\\_nov-11\\_ger.pdf](http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3873/e4378/e6749/oesch_europaesierung_nov-11_ger.pdf)> visited 2 May 2012, 10 f., and the sources cited in fn 28.

<sup>341</sup> See BETH A. SIMMONS/FRANK DOBBIN/GEOFFREY GARRETT, *Introduction: The International Diffusion of Liberalism*, 60 Int'l Org. 781, 787 (2006); a further entrance door for foreign law are references to **international standards** in domestic law; see PETER V. KUNZ, *Dealing with International Law and European Law: Overview of the «Swiss Approach»*, Jusletter of 2 July 2012, 1 ff., 4.

port industry. An example of the former is the German Empire's threat in the late 19th century to impose trade sanctions if Switzerland did not enact adequate patent legislation.<sup>342</sup> In some cases, the export may simply be an expression of power. After World War II, the U.S. arranged for the **systematic export** of its law and of its legal thinking to the Western world, partly by unilateral action and partly by way of conclusion of (forced) international agreements. Certain features of American law were adopted by other countries by way of **voluntary reception**, but there is no clear cut dividing line between export and import. Without any claim to comprehensiveness, the following areas may be mentioned: new types of contracts such as leasing, franchising or factoring; the principle of strict liability; the change of paradigm in accounting law from the principle of caution, which aimed at protecting creditors, to the principle of true and fair view, which orients itself to the shareholders interest; the concept of antitrust including substantive rules on cartels, monopolization and merger control; procedural features of antitrust law such as sentencing guidelines or leniency programs and private as well as criminal enforcement. Moreover, corporate governance and compliance are American concepts,<sup>343</sup> and the very idea of enacting special rules for corporations that are listed on a stock exchange is of American origin.<sup>344</sup> The fact that many Europeans including Swiss attended LL.M. programs at American universities played an important role in this development.

American and European legal thinking may also be channeled to other jurisdictions via **international law**. In the case of antitrust, the OECD and the International Competition Network ICN are important transmitters.

It is a very Swiss phenomenon that sophisticated foreign concepts are taken over in a simplified form. This is usually done in the name of pragmatism, but there may also be the wish of watering down regulations which by a majority in Parliament are considered to go too far. Sometimes, such «de-scientification» is successful, sometimes it isn't. The boundaries between imposing a treaty and exporting law are blurred. And so are the boundaries between voluntary and forced import of foreign law.

**Legal transplants** are as old as the law is. Historic examples are the reception of Roman law by the Holy Roman Empire of German Nation in the middle ages, the export of the French civil code to Italy, Spain and Portugal, and from the latter countries to Latin America, the export of the German civil code to China, Japan, and Greece, or the adoption of the Swiss civil code by Turkey. Most importantly, the proliferation of the English common law throughout the

342 Supra, C. IX. 2.

343 See from a Swiss perspective OTHMAR STRASSER, Zur Entwicklung der Funktion Legal und Compliance unter dem Aspekt von Corporate Governance – ein Plädoyer für eine integrierte Funktion Recht, in: Susan Emmenegger (ed.), Corporate Governance, Schweizerische Bankrechtstagung 2011, Basel 2011, 93 ff.

344 See MARC BAUEN/ROBERT BERNET, Schweizer Aktiengesellschaft: Aktienrecht, Fusionsrecht, Börsenrecht, Steuerrecht, Zurich/Basel/Geneva 2007, 5.

Anglo-Saxon world and beyond must be mentioned. It was claimed that a difference exists between, say, the export of French law to Latin American countries and the export of English law to the United States. Whereas the French civil code was said to have been imposed on people living under a different legal system, English law was said to have been brought in and applied by the settlers who were familiar with its basic principles.<sup>345</sup> Whether there is really a difference, may, however, be doubted. In the end, the English settlers imposed their law as much on the indigenous people as the French (or, for that matter, the Spaniards).

In 1974, German comparatist OTTO KAHN-FREUD, who during the Third Reich had emigrated to Britain, and Scottish-American scholar ALAN WATSON engaged (in unrelated works) in a seminal dispute which was based on different views of the **relationship between law and society**. Watson submitted that there is no inherent relationship between law and society, that law is autonomous and can be transplanted to other countries without major problems.<sup>346</sup> Kahn-Freud believed that law cannot be separated from the purpose or the circumstances in which it has been created.<sup>347</sup> As a matter of principle, it would seem that Kahn-Freud's approach is more convincing. But there may be – and in fact there have been – cases in which foreign law is successfully imposed on a country with different societal structures.<sup>348</sup>

## 5. Judicial dialogue

### a. General

Foreign law and legal thinking may also find their way into another legal order through that order's judiciary. Whereas the legislative adaptation of foreign law lies in the hands of the Parliament and ultimately of the people, judicial reception is more difficult to control.

Commentators have noticed an increasing **similarity of real life problems** in times of globalization and regionalization in particular in the fields of human rights law, environmental law, and economic law. IP law, unfair competition law, strict liability, antitrust law and corporate law are prominent examples of the latter category. This is the starting point for the development of the theory of judicial globalization, which has originated in Canada and the U.S.<sup>349</sup> Its re-

345 DANIEL BERKOWITZ/KATHARINA PISTOR/JEAN-FRANCOIS RICHARD, Economic Development, Legality, and the Transplant Effect, November 1999, passim <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=183269](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=183269)> visited 12 June 2012.

346 ALAN WATSON, Legal Transplants: An Approach to Comparative Law, Edinburgh 1974.

347 OTTO KAHN-FREUND, On the Uses and Misuses of Comparative Law, 37 Modern Law Review, 1 ff.

348 Infra, F. IV. 3.

349 See, in particular Canadian Supreme Court Justice CLAIRE L'HEUREUX-DUBÉ, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court, 34 Tulsa

representatives contend that high court judges around the world should build (informal) networks, and should enter into a global judicial dialogue. They argue that a global judicial dialogue will enhance the rationality of judicial decisions. It will also increase the standing of courts. An important advantage is provided by cross-fertilization: judges must not reinvent the wheel in every case. The main means of dialogue are **references** to foreign judgments and **meetings** of judges. In economic law, the Swiss Federal Supreme Court has always referred to other Supreme Courts, in particular of the neighboring countries. The German and the Austrian Supreme Courts have for their part cited rulings of the Swiss Federal Supreme Court. From a global perspective, the **U.S. Supreme Court** has after World War II long been the most important idea giver. Professor ANTHONY LESTER stated in 1988:

«[T]he Bill of Rights is more than an historical inspiration for the creation of charters and institutions dedicated to the protection of liberty. Currently, there is a vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law. When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.»<sup>350</sup>

The ECJ does not make reference to the U.S. Supreme Court, but its **Advocates General** do.<sup>351</sup> To give an example: In *Brooke Group v Brown and Williamson*, the U.S. Supreme Court found that sales below cost can be predatory in nature only if the dominant firm had a reasonable prospect of subsequently recouping its deliberately incurred losses. In Case *Tetra Pak II*, the ECJ held that such proof was not necessary and held: «It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated.»<sup>352</sup> Advocate General RUIZ-JARABO COLOMER had referred to the judgment of the Supreme Court, but advised the ECJ not to follow it.<sup>353</sup> The ECJ confirmed its case law in Case *France Télécom* against the advice of AG MAZÁK who proposed to follow – in substance – the Supreme Court. The respective considerations of the AG were in fact rather circular.<sup>354</sup> In the last decades, the **ECTHR** and the **ECJ** have become influential exporters.

L. Rev. 15, 24 (1998); ANNE-MARIE SLAUGHTER, *Judicial Globalization*, 40 Va. J. Int'l L. 1103 (1999).

<sup>350</sup> The Overseas Trade in the American Bill of Rights, 88 Colum. L. Rev. 537, 541 (1988).

<sup>351</sup> See PETER HERZOG, *United States Supreme Court Cases in the Court of Justice of the European Communities*, 21 Hastings Int'l & Comp. L. Rev. 903 ff (1998); CARL BAUDENBACHER, *Judicial Globalization: New Development or Old Wine in New Bottles?*, 38 Tex. Int'l L.J. 505, 516 ff. (2003); LEE FAIRCLOTH PEOPLES, *The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities*, 35 Syracuse J. Int'l L. & Com. 219.

<sup>352</sup> Case C-339/94 P *Tetra* 1996 ECR, I-5951, paragraphs 39 ff., 44.)

<sup>353</sup> Case C-333/94 P *Tetra* [1996] ECR, I-5951 point 77.

<sup>354</sup> C-202/07 [2009] ECR, I-2369, see with regard to the AG's opinion points 68 ff.

Experience shows that judicial dialogue is capable of securing the development of **coherent** case law across national boundaries. In a globalized world, this is of particular significance. A case in point is the House of Lords' landmark judgment in *Fairchild*. Mr. Fairchild had worked for a number of different employers, all of whom had negligently exposed him to asbestos. As a consequence, he contracted *mesothelioma*. A single asbestos fibre, inhaled at any time, can trigger mesothelioma. The risk of contracting an asbestos related disease increases depending on the degree of exposure to it. However, because of long latency periods (it takes 25 to 50 years before symptoms of disease become evident) it was impossible to know when the crucial moment had been. It was therefore impossible for Mr. Fairchild to identify the employer whose fiber was causal. The House of Lords held that the employers were joint and severally liable. Their Lordships reviewed jurisprudence from as far afield as Australia, Austria, Canada, Germany, Greece, Italy, France, the Netherlands, Norway, South Africa, Spain, Switzerland and the United States; reference was also made to opinions of classical Roman jurists.<sup>355</sup> LORD BINGHAM stated:

«In a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries), there must be some uniformity of outcome, whatever the diversity of approach in reaching that outcome.»<sup>356</sup>

In comparatist circles it is often said that the Swiss Federal Supreme Court plays a leading role when it comes to referencing foreign law. On closer inspection one discovers, however, that comparative considerations are in many cases limited to the neighboring countries. In economic law, American sources are sometimes referred to.

#### b. *Prescribed dialogue in particular*

Whereas the above described form of judicial cooperation is based on voluntariness and accordingly on the persuasiveness of the judgment which is followed, there are important fields of economic law where dialogue is prescribed. The cooperation between the ECJ and the national courts of the EU Member States in the framework of the Article 267 TFEU **preliminary ruling procedure** is the most important example. This cooperation is vertical in nature, since the referring national courts are bound to follow the ECJ's ruling. But the procedure is initiated by the national court which can hardly be compelled to make such references. Thus, the ECJ will have to consider whether its jurisprudence may diminish the national courts' willingness to submit questions for preliminary rulings. Moreover, by formulating the questions and by giving its own view on

<sup>355</sup> *Fairchild (suing on her own behalf) etc. v. Glenhaven Funeral Services Ltd and others etc.* [2002] UKHL 22.

<sup>356</sup> Cited in <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd020620/fchild-3.htm>, visited 26 July 2011.

them, a national court may have considerable influence on the outcome of the case in Luxembourg. The same applies *mutatis mutandis* to the preliminary reference procedure before the EFTA Court. A form of prescribed cooperation also exists (at least in effect) between the ECtHR and the national Supreme Courts of the Member States to the European Human Rights Convention. As a matter of principle, the national Supreme Courts have to base their jurisprudence on the case law of the **ECtHR**.

The ECJ is also the center of gravity when it comes to the application and interpretation of the so-called extension agreements concluded between the EU (and in some cases its Member States) on the one hand and the EFTA States on the other. Under the **EEA Agreement**, EU single market law has largely been extended to Iceland, Liechtenstein and Norway. The **Lugano Convention** on jurisdiction and the enforcement of judgments in civil and commercial matters has extended the rules of the Brussels Convention and the Brussels Regulation to Iceland, Norway and Switzerland. Certain parts of EU law have been adopted by Switzerland through **sectoral bilateral agreements**. In all these cases, there are separate legal orders with separate courts, but the law is identical in substance. The question arises how a homogeneous development of the case law can be secured. The 1988 **Lugano Convention** contains a mutual homogeneity mechanism, according to which the courts of the EFTA States Iceland, Norway and Switzerland ought to take into account the jurisprudence of the ECJ, whereas the ECJ should consider the case law of the courts of the said EFTA States. Special emphasis is put on the old ECJ case law, i.e. judgments rendered before the signature of the agreement in 1988. In reality, there has been so far, with one exception, only one way street homogeneity. Whether this will change under the new Lugano Convention of 2007 remains to be seen.<sup>357</sup> The homogeneity regime of the **EEA Agreement** of 1992 is, on the face of it, unilateral. As already mentioned, the EFTA Court, according to Articles 6 EEA and 3 II SCA, is supposed to follow old and to take into account new ECJ case law. In the majority of its cases the EFTA Court is, however, faced with fresh legal questions. In such cases, the ECJ is making reference to EFTA Court case law. The latter form of cooperation constitutes (necessary) dialogue. It occurs explicitly and implicitly.<sup>358</sup> Under the bilateral agreements on **Free Movement of Persons** and on **Air Transport**, the Swiss Federal Supreme Court is obliged to follow ECJ case law rendered before the date of signature.<sup>359</sup> The ECJ does not conduct a dialogue with the Federal Supreme Court in the form of citation. But the latter takes part in the bi-annual meetings of the

357 *Infra*, E. VI. 6.

358 See MARTIN JOHANSSON, *The Two EEA Courts – Sisters in Arms*, in: EFTA Court (ed.), *Judicial Protection in the European Economic Area*, Stuttgart 2012, 212, 214.

359 *Infra*, E. VI. 5. B. bb. and cc.

ECJ, the ECtHR and the Constitutional Courts of the German speaking countries, as well as, in recent times, of the EFTA Court.

#### c. *Necessary dialogue in particular*

Judicial cooperation becomes an objective necessity in the case of **uniform law**. Since there is no common court that would effectively supervise the homogeneous application of the law, this must be assured by dialogue.<sup>360</sup> The respective treaties do not contain homogeneity rules. Examples are provided by the multilateral **IP law conventions** such as the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the European Patent Convention and the TRIPS Agreement. Articles 28 of the Paris Convention and 33 of the Berne Convention which state that disputes may ultimately be brought before the International Court of Justice are without any practical relevance.<sup>361</sup> One may also recall the longstanding practice of the ECJ of making reference to the case law of the **ECtHR** when dealing with fundamental rights. This is a case of necessary judicial dialogue, at least as far as horizontal cooperation is concerned. One may say that reference to the case law of the Strasbourg court has become routine for the ECJ. On the other hand, the ECtHR also makes reference to the ECJ.<sup>362</sup> A similar situation exists with respect to the relationship between the ECJ and the **WTO Dispute Settlement Mechanism**. The ECJ in one judgment made reference to a decision of the WTO Appellate Body when interpreting the TRIPS Agreement.<sup>363</sup>

#### d. *Criticism and pitfalls*

In the U.S., judicial dialogue is eyed suspiciously by conservative scholars and politicians. It is argued that judges enter an international dialogue in order to gain more power, that using non-U.S. opinions in constitutional interpretation undermines U.S. sovereignty, that it sets aside the domestic **majoritarian impulse**, that it is incompatible with the supremacy of the U.S. Constitution over

360 See Judge and Chamber President of the German Supreme Court JOACHIM BORNKAMM, *The German Supreme Court: An Actor in the Global Conversation of High Courts*, *Tex. Int'l L.J.* 415, 417 f. [2004].

361 With regard to uniform contract law see ERICH SCHANZE, *Dispute Resolution in the Shadow of Uniform Contract Law?*, in: Carl Baudenbacher (ed.), *Dialogue Between Courts in Times of Globalization and Regionalization*, *International Dispute Resolution Volume 2*, Stuttgart 2010, 153 ff.

362 See ECJ Judge ALLAN ROSAS, *Methods of Interpretation – Judicial Dialogue*, in: Carl Baudenbacher/Erhard Busek, *The Role of International Courts*, Stuttgart 2008, 185 ff.; ECJ Judge LARS BAY LARSEN, *Dialogue Between the ECJ and the ECHR*, and ECtHR Judge PEER LORENZEN, *Dialogue Between the ECJ and the ECHR and the WTO judiciary*, both in Carl Baudenbacher (ed.), *Dialogue Between Courts in Times of Globalization and Regionalization*, *International Dispute Resolution Volume 2*, Stuttgart 2010, 31 ff., 41 ff.

363 Case 145/02 *Anheuser-Busch*, 2004 ECR, I-10989, paragraphs 49, 67.

international law, that getting inspiration from foreign judges is without democratic legitimation.<sup>364</sup> In his dissenting opinion in *Lawrence v Texas*, U.S. Supreme Court Justice ANTONIN SCALIA defined any reference to foreign law as meaningless, but dangerous dicta.<sup>365</sup> In this case, the Supreme Court overruled *Bowers v Hardwick* and found the Texas Sodomy Statute to be unconstitutional by 6: 3 votes. It criticized Bowers' sweeping references to the history of Western civilization for failing to take account of other authorities pointing the other direction, specifically the landmark ruling of the ECtHR in *Dudgeon v United Kingdom*, which disapproved of British legislation out-lawing sodomy.<sup>366</sup> Republican members of the House of Representatives called for the **impeachment** of judges who «substitute foreign law for American law or the American Constitution».<sup>367</sup> Concerns regarding the counter-majoritarian problem and the democratic legitimacy of international judicial dialogue appear to be undue. LEE FAIRCLOTH PEOPLES has rightly stated that the Advocates General of the ECJ who routinely reference foreign case law have never been attacked in academic literature or in the press.<sup>368</sup> Likewise, the adoption of foreign solutions by the Swiss Federal Supreme Court has as such hardly been a bone of contention in Swiss legal and political circles.

It is clear though that a court will not take over foreign solutions blindfolded, but will assess them in their specific context and – if it concludes that they are persuasive – it will make reference to them. However, this is easier said than done. Judges who are willing to look abroad must be aware of pitfalls: First of all, it is debatable whether courts are able to fully understand any foreign judgment in context, i.e. whether they are able to understand the social realities and the values as well as the **spirit** of the foreign law.<sup>369</sup> Geography, climate, the concept of government, the litigiousness of individuals and economic operators are some of the non-legal factors of a legal culture which must be taken into account.<sup>370</sup> Critics complain that judges are ill-suited to carry out comprehensive research, stating that there is a danger of them acting as «bricoleurs» and that international and foreign materials may be used selectively.<sup>371</sup> The latter would

364 ROGER P. ALFORD, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int'l L. 57 [2004].

365 Dissenting opinion in 539 U.S. 558 *Lawrence v. Texas* [2003].

366 Application No. 7525/76, Judgement of 22 October 1981.

367 See TOM CURRY, *A flap over foreign matter at the Supreme Court. House members protest use of non-U.S. rulings in big cases*, <<http://www.msnbc.msn.com/id/4506232>>, visited 18 December 2012.

368 LEE FAIRCLOTH PEOPLES (fn 351), 221.

369 See MAX RHEINSTEIN'S statement that English administration of justice has that smell of «fine old cheese», 24 Am. J. Comp. L., 118 (1976).

370 See CARL BAUDENBACHER, *Judicial Globalization: New Development or Old Wine in New Bottles* (fn 351), 505, 523 ff.

371 See ROGER P. ALFORD, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int'l L. 57, 57 f. (2004); RONALD J. KROTOSZYNSKI, JR., «I'd Like to Teach the World to Sing (In Perfect Harmony)»: International Judicial Dialogue and the Muses – Reflections on

mean that the judge draws on the foreign legal order which helps him confirm his pre-understanding. These points are to be taken seriously. The language issue may also be mentioned in that respect. One must not, however, exaggerate. This is what U.S. Chief Justice JOHN ROBERTS did when stating in his Confirmation Hearing:

«In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent.»<sup>372</sup>

It must be emphasized in this context that nobody has ever claimed that a foreign judgment ought to have the force of precedent.

#### e. *What is the purpose of (voluntary) dialogue?*

In the discussion on judicial dialogue, the question of its **purpose** arises. Is judicial dialogue merely an additional tool which allows a court to confirm a result it has found based on the interpretation of domestic law? Or does it have a similar significance as traditional elements of interpretation such as the wording or the purpose? In many cases, the international conversation will simply provide an additional confirmation to a result which has been found based on domestic methodology. It does not follow from this that the dialogue is useless since it may still serve as an additional support for the deciding court's approach to the matter. There are, however, cases, where it was the look abroad that **convinced a high court** to opt for a certain solution. Examples of this can particularly be found in cases where a high court fills gaps or overrules its earlier case law. In its 1971 *Agfa* judgment, the Austrian Supreme Court switched from national to international exhaustion in trademark law, explicitly following the examples of the German and the Swiss Supreme Court.<sup>373</sup> Experience also shows that courts may refer to a foreign judgment in a dialectic way by concluding that, for certain reasons, it should not be followed.<sup>374</sup> Another dialectic technique is sometimes used in courts which adhere to an open vote and dissenting opinion system: Whereas the majority decides the case based on con-

the Perils and the Promise of International Judicial Dialogue, 104 Mich.L. Rev. 1321, 1329 (2006); CARL BAUDENBACHER, *Some Considerations on the Dialogue between High Courts*, in: Carl Baudenbacher (ed.), *Dispute Resolution*, Stuttgart 2009, 175 ff.

372 Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 200–01 [2005].

373 1974 Österreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht, 84.

374 See *infra*, E. V. 8.



siderations stemming from national law, **dissenting judges** refer to judgments of foreign courts.<sup>375</sup>

*f. Practical issues*

A practical question is whether a Court should or is able to carry out a comparative analysis on its own motion or whether it should only do so if the parties plead accordingly. In most cases, the parties' **lawyers** will put the comparative material on the court's table. In the case of the ECJ, the **Advocates General** play an important part in that respect. Even so, the Court will still have to verify whether the foreign material can and should be used. The ECJ is in a particularly favorable situation in this regard since it has its own research department which may be asked to write a *note de recherche* in a given case. The ECtHR, too, has a specialized research unity. In addition, the ECJ and the ECtHR have the advantage of disposing of a judge from each Member State. German courts may ask one of the Max Planck Institutes for expertise and, in Switzerland, the Swiss Institute of Comparative Law will provide assistance. Courts which do not have the resources for comparative research will only exceptionally be able to participate in the global conversation. Generally speaking, there seems to be room for improvement in many courts. Databases containing foreign judgments should be established. There are also new challenges for attorneys who have to take account of foreign material in their pleadings as well as for universities and university institutes.