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Swiss Economic Law Facing the Challenges of International and European Law

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A. The Concept of Economic Law

I. General

1. History

The concept of economic law is of German origin. The scientific debate concerning *«Wirtschaftsrecht»* began in the 1920s and 1930 s. It was triggered by economic interventionism and war economy during World War I, the New Deal in the U.S. and its European roots.[1] Economic interventionism was, however, only the starting point for the development of a theory of economic law.

As a matter of principle, one can imagine an economic system which refrains from any state intervention in the market thereby implementing a full *laissez-faire* approach. This, too, would be a system governed by economic law. Basically, three coordination mechanisms are to be distinguished: competition; planning; and collective bargaining.[2] In Switzerland, important work has been accomplished by the St. Gallen (later Swiss) school of economic law. In 1968, its most important representative, the author's academic mentor WALTER R. SCHLUEP, gave his inaugural lecture at the University of St. Gallen entitled «What is economic law?». He posed this question because the notion of economic law was new. Based on an analysis of the writings of 33 German-speaking authors and of Italian, English, Belgian, French contributions and socialist models, Schluep presented a concept which defines economic law as the law of the economy. The economy is the subject of economic law, as things are the subject of property law. More precisely, economic law is the law that governs the **coordination** of economic activity.[3]

This means, in essence, that the theme of economic law is the relationship between **the state and the economy**.[4] As a starting point, a market economy must guarantee private autonomy, freedom of property, freedom of contract, freedom of association, freedom to make a will, and party autonomy (the freedom to choose the applicable law). The initial question of economic law is: who is legally entitled to produce, distribute, consume what, how, where, in what quantity and at what level of quality, and who has the right to invest and to receive investments?

In a market economy the answer is: essentially everybody. However, there may be restrictions: Not everybody has the right to produce or offer medical or

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1 See WALTER R. SCHLUEP, Was ist Wirtschaftsrecht, Festschrift für Walther Hug, Berne 1968, 25, 40 ff.; with regard to the New Deal DAVID L. STEBENNE, Modern Republican: Arthur Larson and the Eisenhower Years, Bloomington 2006, 161 f.

2 WALTER ADOLF JÖHR, Das Problem der Wirtschaftsordnung, Festschrift zur Fünfzig-Jahr-Feier der Handels-Hochschule St. Gallen, St. Gall 1949.

3 WALTER R. SCHLUEP, Was ist Wirtschaftsrecht?, (fn 1), 71 ff.

4 WALTER R. SCHLUEP, Was ist Wirtschaftsrecht?, (fn 1), 69 ff.; see furthermore WALTHER HUG, Die Problematik des Wirtschaftsrechts, St. Gall 1939; CHRISTIAN J. MEIER-SCHATZ, Über Entwicklung, Begriff und Aufgaben des Wirtschaftsrechts, ZSR 1982 I, 267 ff.

legal advice. Not everyone may open and operate a bank. Not everything can be freely produced, distributed and consumed. There may be an outright prohibition or production may be reserved to the government or to licensed private operators and consumption to those who have a prescription. Production cannot take place everywhere because there are protected areas such as national parks, forests, lakes, oceans, and it cannot take place in any manner because workers, consumers and the environment need to be protected. Even the quantities may be restricted, as, for example, in agriculture.

These questions, which point to the concept of **regulation**, have been answered in different ways in different economic systems. In fact, the relationship between the state and the economy is politically contested and has changed over time. Professor FRANK H. EASTERBROOK, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, rightly stated that every political confederation must decide where to intervene in the market.[5] Every phase in history has its own economic law. Accordingly, one may distinguish the economic law of mercantilism, liberalism, the welfare state, neo-liberalism, socialism, and the mixed economy, to give but a few examples. Currently we are witnessing a comeback of state intervention in the global financial and economic crisis.

The concept of economic law has been taken over in other continental European countries («droit économique», «diritto economico», «derecho económico», «direito econômico»).[6] Scandinavian authors speak of «market law» when discussing the relationship between the regulating state and the free economy. The grand old man of European law in Sweden, Professor ULF BERNITZ, has aptly stated that «[O]ne of the basic problems running through all market law is the resolution of conflicts between economic freedom and regulation of business activities.»[7] In the context of economic law, regulation means state intervention into an area which can also be imagined as being free. Intervention may also be made by non-state actors or by hybrid actors. The crucial question is how much room is left for businesses to make unrestricted use of the freedoms that constitute a market and how much regulation and thus **juridification** of business activities is warranted.

2. *The notion of business law*

The notion of business law is of American origin. The focus is not on the macroeconomic question of what type of coordination of business activities leads to the common good, but on the **business operators** themselves. The initial question is: what must business people know about the legal framework of a

5 FRANK H. EASTERBROOK, Federalism and European Business Law, in: Richard M. Buxbaum/Gérard Hertig/Alain Hirsch/Klaus J. Hopt, European Economic and Business Law, Berlin/New York 1996, 1 ff., 2.

6 WALTER R. SCHLUEP, Was ist Wirtschaftsrecht? (fn 1), 62 ff.

7 ULF BERNITZ, European Law in Sweden, Stockholm 2002, 151.

country or of an organization in order to be able to successfully conduct business? In other words, the essential thing is a transaction specific approach which concentrates on the exchange of goods, capital, and services; persons being a special case. The protagonists of business law are first and foremost those **who create wealth**, i.e. entrepreneurs, dealers, workers, investors, financial actors, and consumers. The main emphasis lies on entrepreneurial freedoms, on the opportunities to shape the law within the limits of mandatory provisions by drafting legal documents such as contracts, articles of incorporation or wills. But actors must know the **legal framework**. Mandatory law constitutes a restriction of the freedom of contract; dispositive law contains an *ersatz* legal order. All in all, business law and economic law are two sides of the same coin. As the American economic law professor JOEL TRACHTMAN has put it: «[T]he perspective of economics is often that of the government, which is assumed to act as optimizer for the aggregate of society rather than for the individual or firm. Business analysis, on the other hand, often takes the perspective of the individual or firm.»[8]

II. Functional approach in legislation and adjudication

From a methodological perspective, in economic law special emphasis must be put on the functional method. When enacting new law and interpreting existing law, the legislature and the judiciary respectively must choose the solution which presumably contributes best to the implementation of the **economic system** or sub-system. The economy is the subject of economic law in the meaning of a function.[9] Function means task, activity to solve the task and the accomplishment of the task. Legislation and interpretation must therefore also be guided by considerations concerning their effects on the economic system. In legal methodology, the functional method must be distinguished from traditional teleology. In light of the present conditions, it aims at the **macro implications** of the law, at maintaining public policy, public order and the general interest, and the protection of legal institutions such as competition or the freedom of contract from their self-abolition.[10] Functional interpretation has been called

8 JOEL TRACHTMANN, The International Economic Law Revolution, 17 U. Pa. J. Int'l Econ. L. 33, 38 (1996).

9 WERNER KRAWIETZ, Das positive Recht und seine Funktion, Schriften zur Rechtstheorie, Heft 9, Berlin 1967, 21; WALTER R. SCHLUEP, Was ist Wirtschaftsrecht (fn 1), 83; CARL BAUDENBACHER, Suggestivwerbung und Lauterkeitsrecht, Zurich 1978, 134 ff.; ID., Wirtschafts-, schuld- und verfahrensrechtliche Grundprobleme der Allgemeinen Geschäftsbedingungen, Zurich 1982, 62 ff., 106 ff.; see also ERNST STEINDORFF, Politik des Gesetzes als Auslegungsmassstab im Wirtschaftsrecht, in: Gotthard Paulus/Uwe Diederichsen/Claus-Wilhelm Canaris (eds.), Festschrift für Karl Larenz zum 70. Geburtstag, Munich 1973, 217 ff.

10 See CLAUS-WILHELM CANARIS, Gesamtwirksamkeit und Teilgültigkeit rechtsgeschäftlicher Regelungen, in: Jürgen F. Bauer/Klaus J. Hopt/K. Peter Mailänder (eds.), Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990, Berlin/New York 1990, 519.

interpretation in light of the policy of the law.[11] It has similarities with interpretation according to the principle of effectiveness in EU and EEA law.[12]

III. Systematic considerations

In the last three decades of the 20th century, economic law had to fight for recognition as an independent legal discipline. Today, however, the terms «economic law» and «business law» seem to be used rather interchangeably and extremely broadly. Virtually every university offers bachelor, master, sometimes also executive education programs in economic law and business law, chairs and institutes of economic law and business law are springing up like mushrooms. In most cases, not much thought is presently given to methodological and systematic problems. Economic law and business law are regarded as law which is related to economic or to business activity respectively. With such a **tautological definition**,[13] almost any legal field may have economic and business law implications. By contrast, economic law can only claim to be a legal field of its own if the focus is on the regulatory (or non-regulatory) state. Regulation may, however, also be imposed by non-state actors.

As far as the position of economic law in the legal system is concerned, the dichotomy between **private law** and **public law** becomes largely irrelevant. Whether a certain problem is tackled by way of a private law regulation or a public law norm is a question of utility which needs to be answered politically. One must notice, in particular, that **criminal law** is on the rise in regulating economic and business matters. All this means is that economic law is characterized by a horizontal approach.

IV. International and European economic law

Economic law is a category of the law which has been developed in the context of domestic law. It is, however, clear that questions of how economic activity ought to be coordinated, and where the borderline between freedom and regulation should be drawn also arise on the regional and international level. In the course of the regionalization and globalization of the economies, the concept of economic law may therefore be transposed to regional (in particular Eu-

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11 Ernst Steindorff, Politik des Gesetzes als Auslegungsmassstab im Wirtschaftsrecht (fn 9), 217 ff.

12 Carl Baudenbacher, The EFTA Court in Action. Five Lectures, Stuttgart 2010, 56 ff.; see also Walter R. Schluep, Über die Verantwortung schweizerischer Boten bei der Übermittlung des Rechts der EU, in: Peter Forstmoser/Hans Caspar von der Crone/Rolf H. Weber/Dieter Zobl, Der Einfluss des europäischen Rechts auf die Schweiz, Festschrift für Roger Zäch zum 60. Geburtstag, Zurich 1999, 63 ff., 90.

13 See already the critical remarks of Walter R. Schluep, Was ist Wirtschaftsrecht? (fn 1), 66 ff.

ropean) and international economic law. In Europe, the functional approach is illustrated by the fact that the law of European integration was, from the beginning, aimed at creating a **common** (today internal) **market**. Constituent elements are, in particular, the general prohibition against discrimination, the fundamental freedoms (of goods, services, workers, establishment, and capital), the rules on competition law including state aid and large parts of harmonized law.

The rationale underlying a single market are, as a matter of principle, the teachings of liberal economics. From that perspective, the goal of the fundamental freedoms is simply to secure the **free movement of the production factors**. It must be added though that labor is not a production factor like goods, services or capital. Since the late 1970s, the EU has, therefore, developed its own social policy. One must also not overlook that collective bargaining remains to a large extent outside of the competition rules,[14] while the fundamental freedoms apply to industrial action and to collective agreements in general.[15] Essential elements of EU law are the surveillance by the European Commission and the strong position of the ECJ which leads to a very high degree of **judicialization**. The EEA single market has been extended to the three EEA/EFTA States: Iceland; Liechtenstein; and Norway through the 1992 Agreement on the European Economic Area (EEA). For these three countries, surveillance and judicial control lie in the hands of the EFTA Surveillance Authority (ESA) and the EFTA Court.

The term international economic law is often used as a synonym for **international trade law**, in particular WTO law.[16] However, that is too narrow an approach, and there is no precise usage of the term. To give an example, the International Economic Law Interest Group of the American Society of International Law includes the following non-exhaustive list of topics within the term «international economic law»: (1) International trade law, including both WTO law and domestic trade laws; (2) International economic integration law, including the law of the European Union, NAFTA and Mercosur; (3) Private international law, including international choice of law, choice of forum, enforcement of judgments and the law of international commerce; (4) International business regulation, including antitrust or competition law, environmental regulation and product safety regulation; (5) International financial law, including private transactional law, regulatory law, the law of foreign direct investment and international monetary law, including the law of the International Monetary Fund

14 ECJ C-67/96 *Albany*; more nuanced EFTA Court E-8/00 *Landsorganisasjonen* [2002] EFTA Court Report 2002, 114.

15 Cases C-341/05 *Laval* [2007] ECR I-11767; C-438/05 *Viking* [2007] ECR I-10779; C-346/06 *Rüffert* [2008] ECR I-1989; see also EFTA Court Case E-2/11 – *Norway Offshore*, judgment of 23 January 2012, nyr.

16 See, e.g., Steve Charnovitz, What is International Economic Law?, 14 J. Int'l Econ. L. 3, 5 ff. (2011).

and World Bank; (6) The role of law in development; (7) International tax law; and (8) International intellectual property law.[17] In the following, the term international econmic law is used to describe a body of legal norms that are agreed upon by states, but also by non-state actors.

A number of players participate in the creation of international economic law. International law is being made by state actors (national governments, parliaments and courts), international organizations, international courts, international arbitration institutions, business and trade associations, law firms and legal departments of multinational corporations, universities, and university institutes as well as specialized research institutes. The **European Union** is a particularly important player, although its own law has emancipated itself from international law as an autonomous legal order with its own sources and its own (unwritten) constitution.[18] International economic law is mostly treaty law with customary law being only of minor importance. International law can also emerge in the form of *soft law*.

V. Conclusions

In light of the fact that other reports to the 2012 Swiss Jurists Conference will deal with overlapping subjects, a choice must be made. The present report will deal in particular (but not only) with the following **legal cornerstones** of the Swiss market economy: the relevant articles of the constitution; internal market law; contract and tort law; unfair competition and antitrust law; the governance model of corporations; labor law; intellectual property law; and gender equality law. The latter field is an economic law subject of paramount significance. Statistics show that Switzerland has not yet tapped into the full potential of women as economic actors. Narrowing the scope of this report to these (pivotal) areas of Swiss economic law is not only necessary for reasons of capacity. It is also justified by the fact that a main focus will be on the **mechanisms** Swiss economic law has developed in order to face the challenges of international and European law.

The traditional Swiss school of economic law in one respect has remained somewhat one-sided. Its main focus was always on the substantive law and only to a lesser extent on its **enforcement**.[19] There is, however, no reason for such self-restraint. This report will put appropriate emphasis on the models of dispute resolution (negotiation, arbitration and court adjudication) and on the

17 <http://www.londoninternational.ac.uk/prospective_students/postgraduate/laws/study_guides/international_economic_law.pdf> visited 8 March 2012.

18 See, e.g., Samantha Besson, How international is the European legal order? Retracing Tuori's steps in the exploration of European legal pluralism, (2008) 5 No Foundations, 8 <http://www.helsinki.fi/nofo/> visited 8 January 2012.

19 However, see Carl Baudenbacher, Der Zivilprozess als Mittel der Wirtschafts- und Sozialpolitik, Zeitschrift für Schweizerisches Recht (ZSR) 1983, 161 ff.

consequences of the judicialization of European and international law for Swiss economic and business law. It will discuss issues such as access to justice, the types of law enforcement (administrative, private and criminal), and judicial dialogue. Enforcement is not only about deciding individual conflicts: from a functional perspective, the design of dispute resolution mechanisms is an important tool of steering economic processes.

B. The Swiss Governance Model

I. General

Switzerland is a **federal state** with 26 cantons. The Confederation was created by the Federal Constitution of 12 September 1848 after the *Sonderbund War* which lasted from 3 November to 29 November 1847 and claimed some 150 casualties. This last Swiss civil war saw liberals and conservatives, Catholics and Protestants, the cities and the countryside, the elites and the ordinary people rise against each other. It was not *a priori* a religious war, but religion sparked the fire.[20] At the time, Switzerland was the **only republic** in Europe.[21] As a side remark, it may be recalled that when the Norwegian parliament declared independence from Sweden more than half a century later, in 1905, it did not dare to establish Norway as a republic out of fear that the European powers could refuse recognition. It was therefore decided that the state should remain a monarchy which meant that the Norwegians chose to have a King without power.[22]

After the collapse of the liberal revolution in neighboring countries, many highly-educated and skilled immigrants fled to Switzerland. Some of them founded some of the country's most famous industrial flagships and others became university professors and grammar school teachers. Apart from Basel, there were no other universities in Switzerland before the 19th century.

Professor Wolf Linder, a political scientist at the University of Berne, has written that the Swiss constitutional state was an «artificial founding of a state made up of cantons with different languages, confession, culture and history.» In that respect, Switzerland was a multicultural antithesis to the national unification of its neighbors Germany and Italy which referred to the cultural, linguistic or even ethnic unity of the people. Nation-building elements made use of were Swiss symbols such as *Helvetia* and *William Tell* on coins and stamps,

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20 Virginia Bischof Knutti, Darum nerven die Schweizer, Norderstedt 2011, 114.

21 France was no longer a monarchy after the revolution of February 1848. On 10 December 1848, the nephew of the former Emperor Napoleon, Louis-Napoléon Bonaparte, was elected President of the Second Republic. However, after a *coup d'état* in 1851, President Bonaparte ascended to the throne as Napoleon III on 2 December 1852.

22 Tor Boman-Larsen, Double Biography of King Haakon VII and Queen Maud, Vol. II, The People, 2004, 299, 301 f.

the introduction of a national holiday and the fostering of a Pan-Swiss patriotism. Decisive, however, were the federal political institutions. From that perspective, Switzerland is a paradigmatic example of **political integration**. National unity was based on a settlement between the liberal-protestant majority and the catholic-conservative minority, a federalist system with limited central power and utmost autonomy of the cantons. Switzerland's political culture is therefore shaped by the **political institutions** themselves.[23]

The emergence and the peculiarities of Swiss economic and business law cannot be understood without taking into account the Swiss model of state, government, legislature and judiciary. In all these respects, Switzerland differs from most other countries. Due to its location at the periphery of the Holy Roman Empire of German Nation and the fact that with the St. Gotthard Pass it possesses one of the most important routes through the Alps, Switzerland was able to develop and keep certain unique structures. Of course, other countries also have their own history and their own particularities. What makes the Swiss case especially interesting is the fact that the Swiss do not only see themselves historically as a special case *(Sonderfall)*, but also seem to be determined to **remain a special case** in these times of globalization and regionalization. The European Union appears to have understood this in a recent document. The 2010 Report «Internal Market beyond the EU: EEA and Switzerland» of the European Parliament's Committee on Internal Market and Consumer Protection states:

> «Switzerland has (political) elements that complicate issues but also make relations with the EU unique. Examples are the element of direct democracy in the form of referenda and the federal structure involving the cantons in implementing legislation and deciding on issues on local and regional level.»[24]

After World War II, Switzerland was a **latecomer** with respect to most (but not all)[25] regional and international economic law initiatives. Today, the Confederation is the only European country which has deliberately chosen to be neither a member of the European Union nor of the European Economic Area. With regard to European integration, Switzerland has been acting according to the maxim of Groucho Marx «I don't care to belong to any club that will have me as a member.»[26] The United Nations were only joined ten years ago.

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23 Wolf Linder, Politische Kultur, in: Ulrich Klöti/Peter Knoepfel/Hanspeter Kriesi/Wolf Linder/Yannis Papadopoulos/Pascal Sciarini, Handbuch der Schweizer Politik, 4th ed., Zurich 2006, 15, 16, author's translation.

24 <http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf> visited 13 March 2012, 32. The Swiss contributor to the report was the Professor of European Law at the University of Basel, Christa Tobler.

25 Exceptions are, e.g., Switzerland's participation in the foundation of OECD in 1961, in the setting of the European Patent Organisation in 1973 and in the foundation of the WTO in 1994.

26 See Benedikt von Tscharner, Switzerland's Groucho Marx syndrome, in: Europe's World, Spring 2006 <http://www.europesworld.org/NewEnglish/Home_old/Article/tabid/191/ArticleType/articleview/ArticleID/20456/language/en-US/Default.aspx> visited 12 February 2012

II. No Hegelian concept of state

Unlike in other continental countries, the Hegelian concept of state has never been influential in Switzerland. The glorification of the state as «the reality of the moral idea»[27] and similar theories have barely found followers. The state is seen as a useful institution, nothing more. In that respect, the Swiss concept of state is much closer to English and American than German or French thinking. Calvinism and Zwinglianism have played a part in this. If we were to adopt WERNER SOMBART'S (in)famous juxtaposition of «merchants and heroes» which described the Germans as a nation of heroes animated by primordial motives and the English as calculating merchants, the Swiss would certainly appear among the **merchants**.[28] In fact, important authors have described the money-mindedness of the Swiss. The saying «point d'argent – point de suisses» which dates to JEAN RACINE, and is an allusion to the times when many Swiss men were much sought after and very greedy mercenaries, seems to be of an enduring timeliness.[29] PETER VON MATT, Professor of literature at the University of Zurich, has aptly remarked that unlike Austria, France or Italy, Switzerland does not define itself outwardly by its culture. It rather behaves as a utilitarian enterprise and defines and presents itself from a market perspective.[30] In the recent past, the unwillingness of Switzerland to engage in international political integration and to limit its respective efforts to securing its industry access to foreign markets has resulted in the criticism that the country is a **cherry picker**.[31]

Due to the lack of a Hegelian concept of state, Swiss people are less likely than others to expect the state to ensure their well-being. In Switzerland, as in the United States, there is a **civil society** which takes responsibility in important areas of social life.[32] The Swiss Federal Constitution (FC) heavily borrowed from the U.S. Constitution. In the 19th century, some commentators went as

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27 GEORG WILHELM FRIEDRICH HEGEL, Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse (1821), Suhrkamp Werkausgabe, Bd. 7, Frankfurt am Main 1970, § 257, 398.

28 WERNER SOMBART, Händler und Helden, Munich 1915, 9 ff., 53 ff.; see BEAT KAPPELER, Die Gesellschaft denken – jenseits des Einheitsbreis, <http://www.beatkappeler.info/4537.html> visited 3 January 2012.

29 See, e.g., CONRAD FERDINAND MEYER'S poem «Old Swiss» *(Alte Schweizer)*, describing the revolt of the Swiss Guard against Pope Leo XIII who denied them the usual inaugural gift which culminated in the threat to auction off the Holy See, reprinted in: Peter von Matt, Das Kalb von der Gotthardpost. Zur Literatur und Politik der Schweiz, Munich 2012, 82; STEFAN HOWALD, Point d'argent, point de Suisses, Geld und Geist in der Schweizer Literatur, 2005, <http://www.stefanhowald.ch/pdf/texte/Point_d_argent.Ill.pdf> visited 13 March 2010.

30 PETER VON MATT (fn 29), 167 ff.

31 See infra, E. V. 1.

32 See, e.g., JOSCHKA FISCHER, Für einen neuen Gesellschaftsvertrag. Eine politische Antwort auf die globale Revolution, Köln 1998, 77; CARL BAUDENBACHER, Europa und Globalisierung: Einführung, in Carl Baudenbacher/Erhard Busek, Europa im Zeitalter der Globalisierung, Vienna 2000, 25 f.

far as to call the two countries «sister republics».[33] However, in contrast to the U.S., unrestricted competition has only to a limited extent been the main coordination mechanism in economic law. **Corporatist thinking** has always been widespread. After a short blossoming of liberalism in the wake of the abolition of the guilds in the mid-19th century, the world economic crisis of 1873 led to cartelization and monopolization. The most important industry, trade and labor associations were founded at that time.[34] Subsequently, the Federal Supreme Court has been reluctant to interfere with the freedom of contract, and antitrust legislation worthy of the name was only enacted in the years 1995/2003.[35]

III. Swiss social and legal culture

1. General

Swiss legal life and Switzerland's attitude towards international law and European law are quite naturally shaped by the country's national identity. University of Berne historian Ulrich Im Hof points out that the guild movement in the 14th and 15th centuries fostered the emergence of an **egalitarian society** and that a collective consciousness coupled with a republican solidarity in the small and the grand city councils prevented the development of seigniorial structures.[36] Following the establishment of the Confederation in 1848, there was, as Im Hof writes, a certain simpleness which was the consequence of a peasant-civil imprint reflected by the general democratization. With few exceptions, Swiss children have always attended publicly-funded schools whose goal it has been to raise the **solid average** rather than elites.[37] And unlike most other countries, Switzerland has also remained true to the dual education system with vocational training on the one hand and university education on the other.

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33 See James H. Hutson, The Sister Republics. Switzerland and the United States from 1776 to the Present, Washington 1991; also Peter Böckli, Osmosis of Anglo-Saxon Concepts in Swiss Business Law, in: Nedim Peter Vogt et al. (eds.), The International Practice of Law, Liber Amicorum for Thomas Bär and Robert Karrer, Basel/Frankfurt Main/The Hague/London/Boston 1997, 9, 11 f.

34 See, e.g., André Mach, Associations d'intérêts, in: Ulrich Klöti/Peter Knoepfel/Hanspeter Kriesi/Wolf Linder/Yannis Papadopoulos/Pascal Sciarini, Handbuch der Schweizer Politik, 4th ed., Zurich 2006, 369, 371 ff.

35 See with regard to the cartel tradition, e.g., Kartell und Wettbewerb in der Schweiz. 31. Veröffentlichung der Preisbildungskommission des Eidgenössischen Volkswirtschaftsdepartements, Berne 1957, passim; Paul Erni, The Basle Marriage: History of the Ciba-Geigy Merger, Zurich 1979, passim; further, the description of the market order in the watchmaking industry in the 1950s and 1960s in *U.S.* v. *Watchmakers of Switzerland Info. Center*, 1963 Trade Cas. (CCH) ¶ 70600 (S.D.N.Y. 1962).

36 Ulrich Im Hof, Geschichte der Schweiz, 8th ed., Stuttgart 2007, 40.

37 Ulrich Im Hof, (fn 36), 132 f.

2. *The militia system*

These factors have contributed to the formation of an order which requires the active collaboration of citizens on the communal, the cantonal and the federal level, the «militia system». Originally, the term «militia» referred to a military force composed of civilians, mostly in addition to the regular professional army. In fact, the Swiss army has, by tradition, not been an army of professional soldiers, but of militiamen (and later women). The same term is used in a broader sense for the practice of citizens taking on public office on a **part-time basis**. In other words, the office is not exercised as a main profession.[38] Beyond that, being a «militiaman» is also a matter of attitude of mind.

The members of the bicameral **Federal Assembly** (Parliament) are a good example of this. The same holds true for the members of the Competition Commission (ComCo). Appointments to ComCo are based on political considerations such as party affiliation or regional provenance. There is not even a public invitation to submit applications. Five out of the twelve members of ComCo are effectively appointed by associations of business, farmers, consumers and labor unions.[39] Similar systems apply to other commissions. Most party officials and representatives of the associations are «militiamen». The members of the **Federal Council** are obviously employed on a full-time basis, but they have been socialized as «militiamen» and they are elected by Parliament. To a certain extent, the militia system is a necessity in a small state because there is in certain areas insufficient business for professionals.[40]

«Militiamen» are said to have more **common sense** and be more **pragmatic** than professionals, but the lack of professionalism may affect the quality of the work. Since «militiamen» by definition play multiple roles in politics, society and economy, they may find themselves more frequently in a **conflict of interest** than professionals, a situation which can only to a limited extent be remedied by disclosure requirements. A St. Gallen doctoral thesis from 1979 lists the following **advantages** of the militia system: participation and co-responsibility of the citizens; identity of state and people as well as administration by the people; national integration; national cohesion; decentralized decision-making; critique and control of state activities; expertise and experience; factual and local proximity; optimal use of personal resources including the leading personalities; objectivity, balance of interests and strengthening of the confidence in public authorities; assertiveness due to closeness to the people; low degree of bureaucracy; freedom of expression; cost-effectiveness; idealism and enjoyment of work. The **disadvantages** are: Interconnection of power and undermining of the separation of powers through accumulation of charges; influence of

38 <www.swissworld.org> visited 16 January 2012.

39 Article 18(2) Competition Act states only that the majority of the members must be independent experts.

40 Raimund E. Germann, Experts et commissions de la Confédération, Lausanne 1985, 82.

special interest; lack of transparency; lack of time, minimalism and insufficient performance; irregular presence; political, legal and technical dilettantism; limited capacity; double duties; coordination problems, duplications and slow processing of problems; high personal costs and limited attractiveness of the posts; endangerment of professional secrecy.[41]

Exemplary for the last point concerning the endangerment of professional secrecy is that companies not listed on the stock exchange have seemingly refrained from contacting ComCo or have dropped merger plans out of fear that sensitive information could end up in the wrong hands.[42] Today, the militia system is coming under additional pressure from **globalization** and the IT revolution. The system is also put at risk because the CEOs of more and more multinational firms are foreigners who do not actively participate in Swiss political life.[43]

3. Low degree of juridification

In addition to the militia system, Switzerland's legal life is characterized by a **politization** of processes which elsewhere are subject to legal rules. Economic relations are less juridified than in most other countries. And if juridification becomes inevitable, it usually occurs with a time lag. In domestic matters, the lack of competence of the Federal Supreme Court to review the constitutionality of federal statutes must be mentioned.[44] Democracy and independence have by tradition been more important than freedom and the rule of law. My late friend PETER NOLL, who after a very successful time at the University of Mainz joined the law faculty of the University of Zurich as the Chair of Criminal Law, used to compare Germany and Switzerland by saying that Germany is no democracy and Switzerland is no state governed by the rule of law *(Rechtsstaat)*. That may be an exaggeration, but there is some truth in it.[45] The notion of «Swiss freedom» *(Schweizerfreiheit)* always had more to do with **in-**

41 RETO HERMANN MÜLLER, Das Milizsystem unter besonderer Berücksichtigung der Organisation für wirtschaftliche Landesvorsorge, Diss. St. Gall 1979, 45 ff., 60.

42 CARL BAUDENBACHER, Institutionelles Setting/Vertikale Abreden/Sanktionierung von Einzelpersonen/Zivilrechtliche Verfahren, with an English summary, Studie im Auftrag des Staatssekretariats für Wirtschaft, begleitet von der Evaluationsgruppe Kartellgesetz, Berne 2009, 45 f., 235 <http://www.google.lu/#hl=de&sclient=psy-ab&q=Baudenbacher+Institutionelles+Setting&oq=Baudenbacher+Institutionelles+Setting&aq=f&aqi=&aql=&gs_l=hp.3...14691120161011225015514119131310142215998110j27j3j0j1152l0.frgbld.&pbx=1&bav=on.2,or.r_gc.r_pw.r_qf.,cf.osb&fp=81a8c4d9cb0a2b96&biw=1024&bih=479> visited 12 March 2012.

43 MICHAEL GONIN, Personalwirtschaftliche Aspekte des schweizerischen staatlichen Milizsystems am Anfang des XXI. Jahrhunderts, Berne 2002, 20 ff.

44 Article 190 FT states: «The Federal Supreme Court and the other judicial authorities shall apply the federal acts and international law.» See further infra, E. V. 9. b. gg.

45 See also CLAUSDIETER SCHOTT, «Fremde Richter – fremde Gerichte». Tradition oder Missverständnis?, NZZ No 224 of 26/27 September 1992, 25.

dependence than with freedom.[46] In international affairs, Switzerland has by tradition relied more on political dispute resolution and arbitration than on court adjudication.

4. The Swiss character

Switzerland is a **small country**. It is clear that this has an influence on the Swiss identity. Sociologists and diplomats in the recent past addressed a sensitive phenomenon: that in particular many German Swiss seem to suffer from an inferiority complex vis-à-vis Germans.[47] In view of Germany's strong position in the EU, this is also relevant in European relations. As is well known, such a complex can easily turn into arrogance. In relation to foreigners and foreign countries in general, the Swiss tend to show a certain degree of self-righteousness which has an impact on the country's attitude towards international and European integration. The fact that Switzerland was spared World War II combined with its post-war economic success tend to reinforce said sense of **complacency**. The specific Swiss character has been the subject of the country's most famous authors who were not really beloved during their lifetimes. Max Frisch has described what it means to be Swiss:

> «Disposition towards pragmatism, mistrust of utopia, mastership in moderation, solidity, which looks pleasant vis-à-vis brisk pretenders, vis-à-vis others a little honest man and sanctimonious, also educated people with a countrified vigilance, one is not impressed, and with regard to own personal accomplishments a confirmed, almost masochistic penchant for understatement and so on [...]».[48]

5. The beheading principle

Swiss egalitarianism and the militia system are coupled with a tendency to avoid excellence in politics and legal life. Those who carry their head high risk having it truncated. The classical historic example is the Mayor of Zurich Hans Waldmann who had become too powerful and was sentenced to death and beheaded on 6 April 1489.[49] That outstanding actors risk decapitation is a fun-

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46 Ulrich Im Hof (fn 36), 133.

47 See, e.g. <http://www.swissinfo.ch/eng/swiss_news/Germans_experience_tide_of_xenophobia.html?cid=8292198>; further the statements of the Swiss Ambassador in Germany Tim Guldimann at <http://www.tagesanzeiger.ch/schweiz/standard/Schweizer-Botschafter-fuerchtet-anti deutsche-Aversionen/story/25492823> and of Thomas Borer, former Swiss Ambassador in Germany at <http://www.tagesanzeiger.ch/schweiz/standard/Die-Schweizer-Diplomatie-ist-un faehig-hart-aufzutreten/story/29302379> all visited 12 March 2012.

48 Öffentlichkeit als Partner, Frankfurt am Main 1975, 115, author's translation; see also Werner Koller, Nation und Sprache in der Schweiz, in: Andreas Gardt, Nation und Sprache, Berlin/New York 2000, 563 ff., 596 f.

49 See Otto Sigg, Hans Waldmann, Begleitschrift zur Ausstellung zum Gedenken an den vor 500 Jahren hingerichteten Zürcher Bürgermeister, Frühjahr 1989, Zurich 1989; also Ulrich Im Hof (fn 36), 40, who mentions parallel cases in Berne and St. Gall.

damental principle of Swiss politics and society. In a country in which **(refined) mediocrity** is the measure of all things, outstanding people must discreetly hide their superiority. Switzerland may accept extraordinary individuals, but they must not show their brilliance. That is, as a matter of principle, equally true for holders of political office and for university professors, at least in fields in which performance can hardly be measured. No king is accepted with the exception of the king of Swiss-wrestling *(Schwingen)*, the champion shot *(Schützenkönig)* and the king of *Jass* (a Swiss card game). After the Chairman of the Governing Board of the Swiss National Bank, PHILIPP HILDEBRAND, was forced to resign following accusations of having been engaged in inappropriate currency transactions made by his wife, the editor-in-chief of Switzerland's most important newspaper *NZZ* wrote on 14 January 2012:

> «Switzerland has a tense relationship with the above-average, with the brave and visionary. They are tolerated as long as they do not provoke too much. But to the corporatist milieu of this Alpine republic, they ultimately remain suspect, especially if they combine individual success, power and wealth [...]. In such a climate it is the quiet, inconspicuous, fainthearted, but also the opportunists and strategists who prosper. It favors mediocrity, not excellence [...].»[50]

The beheading maxim is usually legitimized with the contention that it has **prevented any extremist movements**, such as fascism or communism, from taking power. That is true, but it does not justify the tendency towards mediocrity. It may be added that the principle does not seem to apply to business leaders.

IV. Directorial system of government

Switzerland is the only modern democracy which has implemented a directorial system of government.[51] The Federal Council consists of 7 members of equal status. It is politically independent of the Federal Parliament, but due to the principle of collegiality, the government is **structurally weak**. The members of the Federal Council control each other. Since they are elected by Parliament rather than by the people, the college lacks respective legitimacy. This is in contrast to the members of the cantonal governments who, as a consequence, may enjoy considerable power. In particular, there is no strong head of state or of government. The Federal President is elected for one year according to the principle of rotation. During this short time, he or she cannot build up a power basis. It was said that the Federal Council is not a government in its own right, but that its function is rather to coordinate the moves of the federal administration. In that regard, a former spokesman of the Federal Council contended that the latter is «a Federal Administration Council which has to implement what Parlia-

50 Author's translation.

51 The same system exists at the level of the cantons.

ment, the people and the cantons decide, and this with a strong federal administration».[52] And PETER BÖCKLI, Professor of economic law at the University of Basel wrote: «[I]n a crisis, the ‹Bundesrat› proves to be unable to take the lead until the bureaucracies below it finally come up with a solution it can approve reactively.»[53] To give an example, for decades there has hardly been a Federal Councilor who has had firm control over the Europe dossier. This finding holds true at least for the Federal Department of Economic Affairs and the Federal Department of Foreign Affairs.

With the Federal Councilors holding each other in check and the parliamentarians being «militiamen», the professionalized **federal administration** becomes influential. Federal Councilors are heavily reliant on their top civil servants. As an example, the history of the EEA negotiations may be mentioned which ended in a fiasco not least because top diplomats pursued their own agenda.[54] Unfortunately, in recent times, the federal administration has been considerably politicized. To give an example, the federal administration seems to have oppressed the option of Switzerland joining the EEA following the negative referendum of 6 December 1992, be it out of fear that a second referendum would also fail or because it favors EU membership. After the rejection of the EEA in Switzerland, Swiss participants at EFTA Ministerial meetings for years would ostentatiously not listen when EEA issues were discussed. This changed only recently in the course of the debate on the institutionalization of the bilateral agreements with the European Union.[55] However, the federal administration also enjoys only limited powers. It is contained by other political actors, in particular by the people and by those who have the means to launch a referendum or an initiative. Generally speaking, the Swiss bureaucracy is more citizen-friendly than its counterparts in the neighboring countries.

V. Specificities of the federal legislature

1. Militia Parliament

As mentioned, the members of the two chambers of the Federal Parliament are not full-time politicians. They all exercise another main profession and, what is more, they identify themselves primarily with their tasks outside of federal politics.[56] That obviously gives an advantage to those who are employed by an association or by a political party and to those who have the means to fully con-

52 <http://www.tagesanzeiger.ch/schweiz/standard/So-werden-Sie-Bundesrat/story/12365148> visited 13 January 2012.

53 PETER BÖCKLI, Osmosis, (fn 33), 13 f.

54 See infra, E. VI. 2.

55 See infra, E. VI. 7.

56 PHILIPPE MASTRONARDI, Vorbemerkungen zu Art. 148–173, in: Ehrenzeller et al., Die schweizerische Bundesverfassung, Zurich/St. Gall 2002, paragraph 5.

centrate on politics. As in every modern country, legislation is not entirely and not even predominantly in the hands of Parliament. It is the **federal administration** which prepares new laws in cooperation with associations and experts.[57] Legislation then occurs in two phases, a pre-parliamentarian and a parliamentarian phase. If important federal legislation or other projects of substantial impact are planned, the cantons, the political parties and interested groups are invited to express their views *(Vernehmlassung)*. The same holds true for significant international treaties (Article 147 FC)[58]. The details are laid down in the Consultation Act of 18 March 2005 whose Article 4 states that the umbrella organizations of **Swiss industry** are to be invited. However, every person and every organization has the right to present its view. The responses are taken cognizance of, weighed and assessed (Article 8 of the Consultation Act[59]) and made accessible to the public (Article 9 of the Consultation Act). After this, the Federal Council will present its proposal which will be accompanied by a report called a «message» or «dispatch» *(Botschaft)*. Then follows the parliamentary procedure. The two chambers of Parliament will, as a rule, have their committees preparing the bill. They may again hear experts. The committees will then submit their proposal to the chambers who will deal with the matter separately. In case of differences, a special procedure will take place *(Differenzbereinigungsverfahren)*. In the recent past, significant changes were made last minute by Parliament in important economic law projects.[60]

All in all, **lobbies** may have the possibility to make their influence felt no less than three times, as «experts» in the drafting of the administration's proposal, in the consultation procedure and in the parliamentary proceedings. Some parliamentarians are themselves lobbyists and others are susceptible to lobbyist influence. In federal politics, the most professional actors are therefore the federal administration and the lobbyists. This is even more so in **international negotiations** which are conducted by the administration with the support of the largest associations. In international matters, the role of Parliament is *a priori* limited.

The political parties are, as a matter of principle, not financed by the state, the only exceptions being the allowances to the members of Parliament and the contributions to the parliamentarian groups which, in a way, constitute indirect party financing. The latter payments amount to only approximately CHF 4,8 million per year[61]. This must be viewed against the background that there is no

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57 See, e.g., Theodor Bühler, Prospektive Gesetzgebung und Vertragsgestaltung, Zurich/Basel/Geneva 2005, 121 ff.; Georg Müller, Elemente einer Rechtssetzungslehre, Zurich 1999, 190 ff.; Peter Noll, Gesetzgebungslehre, Reinbek bei Hamburg 1973, passim.

58 SR 101.

59 SR 172.061.

60 Important examples are the reform of corporate law in 1991, the amendment of the Competition Act in 2003, and the amendment of the Unfair Competition Act in 2011.

61 See Federal Office of Justice, Financement des partis politiques et des campagnes électorales/

legislation regulating the **financing of political parties**. The Swiss group of Transparency International has recently summarized the situation in the following way:

> «Switzerland is together with Sweden the only country in Europe which does not regulate the financing of political parties and other important actors in politics (in particular election and voting committees) in a binding way. The cash flows in Swiss politics are a total black box – one can only speculate how strong the financial influence of firms and of wealthy individuals on political actors actually is.»[62]

In the spring of 2012, an attempt to introduce relevant legislation failed due to the opposition of the parties which presumably obtain the largest payments.[63] The current situation is neither in line with Recommendation Rec(2003)4 of the Council of Europe's Committee of Ministers to Member States on common rules against corruption in the funding of political parties and electoral campaigns[64] nor with the Council of Europe Guidelines on the Financing of Political Parties of the Commission for Democracy through Law (Venice Commission).[65] Recently, however, we may have seen what could be the beginning of a **self-regulatory** regime. In February 2012 *Raiffeisen* – the third largest bank of Switzerland which in a number of fields is taking a pioneering role – announced to donate a certain amount of money to all political parties according to the number of seats the respective party holds in Parliament. The bank will pay a total sum of CHF 246 000: CHF 2 674 per member of the State Council and CHF 615 per member of the National Council. *Credit Suisse* followed with a similar announcement some weeks later.[66]

2. *Popular rights*

Switzerland was one of the first countries to grant voting rights to men and to abolish property qualifications and prerogatives of birth.[67] However, **women's suffrage** on the federal level was not conceded before 1971. This has had an impact on women's position in working life.

A Swiss peculiarity is the participatory democracy. Amendments of the Constitution are subject to a mandatory **referendum**, which will only be successful if

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Rapport de droit comparé of 10 June 2011 <http://www.ejpd.admin.ch/content/dam/data/pressemitteilung/2011/2011-07-14/studie-parteifinanzierung-f.pdf> visited 1 January 2012.

62 <http://www.transparency.ch/de/aktivitaeten/Parteienfinanzierung/index.php> visited 1 January 2012 (author's translation).

63 <http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2012/2012-02-21.html> visited 12 April 2012.

64 <https://wcd.coe.int/ViewDoc.jsp?id=2183> visited 1 January 2012.

65 <http://www.venice.coe.int/docs/2000/CDL-PP(2000)006-e.asp> visited 1 January 2012.

66 <http://www.handelszeitung.ch/politik/raiffeisenbank-finanziert-schweizer-politik>; <http://www.swissinfo.ch/ger/news/newsticker/international/Credit_Suisse_will_Spenden_an_alle_nationalen_Parteien_verteilen.html?cid=32229288> visited 14 March 2012.

67 Article 4 FC 1848.

a double majority is reached: that of the voters of the entire country and that of the majority of the cantons. The same holds true for accession to organizations for collective security or to **supranational communities** and for emergency federal acts which are not based on a provision of the Constitution and whose term of validity exceeds one year (Article 140[1] FC). Federal acts, emergency federal acts whose term of validity exceeds one year, federal decrees, provided the Constitution or an act so requires, **international treaties** that are of unlimited duration and may not be terminated or provide for accession to an international organization or contain important legislative provisions or whose implementation requires the enactment of federal legislation shall be submitted to a referendum if any 50 000 persons eligible to vote, or any eight cantons, request it (Article 141 FC). Moreover, any 100 000 persons eligible to vote may request a partial revision of the Federal Constitution within 18 months of the official publication of their **initiative** (popular initiative, Article 139 FC). If the initiative infringes mandatory provisions of international law, the Federal Assembly shall declare the initiative to be invalid either in whole or in part. If the Federal Assembly is in agreement with an initiative in the form of a general proposal, it shall draft the partial revision on the basis of the initiative and submit it to the vote of the people and the cantons. If the Federal Assembly rejects the initiative, it shall submit it to a vote of the people; the people shall decide whether the initiative should be adopted. If they vote in its favor, the Federal Assembly shall draft the corresponding bill. An initiative in the form of a specific draft shall be submitted to the vote of the people and the cantons. The Federal Assembly shall recommend whether the initiative should be adopted or rejected. It may submit a counter-proposal to the initiative.

In domestic economic law matters, referenda are rare. But they play an important role within the framework of the conclusion of international agreements which are of an economic law relevance. Given the fact that initiatives and referenda are costly undertakings, it is clear that the opaque system of **political financing** has a negative impact on popular rights.

To a certain extent, popular referenda are always unpredictable. Political scientists have examined the question as to what extent the elites can control the people. Between 1947 and 2003, the Government has won 95 % of all initiatives, 78 % of the obligatory and 57 % of the facultative referenda. It is said that the political system has learned how to deal with the people. This is on the one hand ascribed to the fact that Switzerland appears to have the most stable government of all democracies. On the other hand, a high consensus in Parliament makes it unlikely that a proposal will fail in a referendum. Consensus is already aimed at in the pre-parliamentary phase.[68] The referendum forces all actors to **concordance**.

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68 See ALEXANDER H. TRECHSEL, Volksabstimmungen, in: Ulrich Klöti/Peter Knoepfel/Hanspeter Kriesi/Wolf Linder/Yannis Papadopoulos/Pascal Sciarini, Handbuch der Schweizer Politik, 4th ed., Zurich 2006, 459, 475 ff., with further references; PASCAL SCIARINI, Le processus

Generally speaking, the popular rights are one of the main contributing factors to **slowing the pace of politics** because of the need to make compromises. It is also inherent in the system that those who have lost in a campaign must accept their defeat no matter how good or how weak the arguments of the winners were. An important example is the rejection of women's voting rights.[69] This does not exclude the possibility that occasionally a progressive or even revolutionary decision is taken.

3. Negotiated democracy

Political science Professor LEONHARD NEIDHART has coined the expression that the Swiss referendum democracy has been transformed into a negotiatet democracy *(Verhandlungsdemokratie)*.[70] Negotiation and debate are probably the most characteristic elements of Swiss political life. As a matter of principle, no major decisions are taken before a problem has been exhaustively discussed with all pros and cons and all eventualities being weighed. This process in which all political, economic and social forces are involved may take a lot of time. It appears that the tradition of conflict resolution by negotiation goes far **back in history** both in the cities with their guild regimes as well as in the rural areas with their co-operatives. Political cooperation thus has long been a means of dispute resolution in a small society with scarce resources. However, the golden age of concordance or consociational democracy, where political, judicial and in certain cases also social institutions are composed according to the strength of the political forces, whereby ethnic and religious minorities must get their fair share and political decisions must be reached by compromise, started only after World War II once the confessional and class antagonisms had been overcome.[71]

The predilection for negotiation also determines Switzerland's attitude toward international and European law and integration. Foreign observers will be struck by the fact that debates concerning one and the same issue may last for **decades**. To give an example, Professor LUKAS GSCHWEND, a legal historian at the University of St. Gall, has recently stated that at the 1963 Swiss Lawyers' Day, a prominent participant summarized the major objections against Swiss EU membership in the following way: that the EEC is tackling legal problems in an absolutistic way; that there is a confusion of legislation, administra-

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legislative, in: Ulrich Klöti/Peter Knoepfel/Hanspeter Kriesi/Wolf Linder/Yannis Papadopoulos/Pascal Sciarini, Handbuch der Schweizer Politik, 4th ed., Zurich 2006, 491, 495 f.; RUTH LÜTHI, Das Parlament, in: Ulrich Klöti/Peter Knoepfel/Hanspeter Kriesi/Wolf Linder/Yannis Papadopoulos/Pascal Sciarini, Handbuch der Schweizer Politik, 4th ed., Zurich 2006, 125, 128.

69 <http://www.admin.ch/ch/d/pore/va/19590201/det191.html> visited 10 March 2012

70 LEONHARD NEIDHART, Plebiszit und pluralitäre Demokratie. Eine Analyse der Funktionen des schweizerischen Gesetzesreferendums, Berne 1970, 287 ff., 313.

71 WOLF LINDER (fn 23), 17.

tion and partly adjudication; that all this happens in a bureaucratic framework, is not predictable and lacks a democratic basis.[72] Such general verdicts which are made from the perspective of a small nation state can also be found today. Few people are willing to understand that the European Union is a union of law and that, due to the existence and the competences of the European Court of Justice, legal certainty and thereby predictability are guaranteed to a much higher degree than, for example, under the bilateral agreements EU-Switzerland.[73] To be sure, the Federal Council lodged an application for EU membership in May 1992 which has never been withdrawn. According to general linguistic usage, the application is, however, «deep-frozen».

VI. Specificities of the federal judiciary

1. Election of the judges by Parliament for a limited term

Unlike in the U.S., there is no federal judiciary in the states (cantons). The cantonal courts apply both cantonal and federal law. Federal judges are by definition the judges of the Federal Supreme Court, of the Federal Administrative Court, the Federal Criminal Court and the Federal Patent Court. According to Article 188(1) FC, the Federal Supreme Court is the supreme judicial authority of the Confederation. In 2005, the Federal Supreme Social Security Court was integrated into the Federal Supreme Court.[74] The following considerations will be limited to the Federal Supreme Court (and the former Federal Social Security Court).

The judges on the Federal Supreme Court are not part of the Swiss militia system, as they are employed on a full-time basis. Although there is no legal requirement for a law degree,[75] in practice they are lawyers like their colleagues in other European countries. Swiss judges normally start their profession at a low position in the judiciary soon after graduation from law school and move upward to higher courts if their performance is deemed to merit it. There is no special training for judges. Even if experience in lower courts is not formally a precondition for becoming a Supreme Court judge,[76] in practice, Swiss judges are **career judges**. Career judiciaries are said to resemble «a bureaucracy in the patterns of selection and promotion.»[77] The career of Swiss judges insofar resembles that of

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72 Lukas Gschwend/Karin Ingber/Stefan Wehrle, 150 Jahre Schweizerischer Juristenverein, ZSR 2011 II, 10, 109 f., citing Hans Peter Zschokke.

73 See infra, E. VI. 5 and 7.

74 <http://www.bger.ch/index/federal/federal-inherit-template/federal-status/federal-geschichte.htm> visited 12 March 2012.

75 See the judgment of the Federal Supreme Court (Second Civil Law Division) ATF 134 I 16.

76 Walter Kälin, Justiz, in: Ulrich Klöti/Peter Knoepfel/Hanspeter Kriesi/Wolf Linder/Yannis Papadopoulos/Pascal Sciarini, Handbuch der Schweizer Politik, 4th ed., Zurich 2006, 177, 183.

77 Monique Renée Fournet/Kyle C. Kopko/Dana Wittmer/Lawrence Baum, Evolution of Judicial Careers in the Federal Courts, 1789–2008, 93 Judicature 62; see also Nicholas

their continental colleagues. However, unlike their counterparts from other European countries, the judges of the Federal Supreme Court are elected in a political manner by the Federal Parliament for a **term of six years** and may be re-elected more than once. The Federal Parliament also has the right to elect the Court's President and Vice-President for a two-year term. They may be re-elected once only.[78] There is mandatory retirement at the age of 68.[79]

Under Article 40a of the Parliament Act[80], a Judges' Committee has been set up whose task it is to prepare the elections to the Federal Supreme Court and to submit a proposal. The parties do not delegate their most prominent representatives to the Committee. The Committee plays a decisive role in picking the judges. Each parliamentary group has the right to be represented by at least one member. In order to become a judge, a candidate must be a member of or at least have an affinity link to a political party. According to a former chairman of the Committee, the crucial criterion is almost always that the proportional **representation of the political parties** in the Federal Parliament is respected. If the last elections have not led to a change in the composition of Parliament, an outgoing judge shall be replaced by a judge from the same party. The Committee's task is to assess whether a person who has been nominated by the respective party is presentable. This «test» appears to be the only examination of a candidate's professional competence.[81]

In the view of said former chairman of the Committee, this system contributes to enhancing the acceptance of the judgments. The former chairman admits, however, that the possibility of being refused reappointment may **indirectly influence** a judge because he or she may feel prompted to act according to certain expectations. This would affect the judge's independence.[82] In fact, as a consequence of unpopular judgments, politicians have threatened judges that they would not be re-appointed and there have been reports that judges are summoned by their political party in order to be questioned about their activity.[83] Compared with other European countries, this democratic (and thereby

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L. Georgakopoulos, Discretion in the Career and Recognition Judiciary, 7 U. Chic. Law School Roundtable 205, 205 (2000). – On the other hand, it is said that in common-law countries «judges come to the courts not at the start of their legal careers but after serving in other legal and non-legal positions, and they usually become federal judges relatively late in their professional lives. There is no fixed career ladder within the federal judiciary, and most judges on the district courts and courts of appeals do not win promotion to a higher court» (Monique Renée Fournet/Kyle C. Kopko/Dana Wittmer/Lawrence Baum, loc. cit.).

78 Article 14 of the Federal Supreme Court Act (SR 173.110).

79 Article 9 of the Federal Supreme Court Act.

80 SR 171.10.

81 Fabian Wittreck, Die Verwaltung der Dritten Gewalt, Tübingen 2006, 547.

82 Thomas Stadelmann/Stephan Gass, Gewaltentrennung und richterliche Unabhängigkeit – die Justiz im Spiegel der Politik, Interview with Rolf Schweiger, Member of the Council of States, Justice – Justiz – Giustizia 2005/1 <http://richterzeitung.weblaw.ch/content/edition.aspx?id=4> visited 16 January 2012.

83 See Regina Kiener, Richterliche Unabhängigkeit. Verfassungsrechtliche Anforderungen an

political) control is **unique**. It is furthermore an open secret that one of the largest political parties levies a so-called mandate tax from its judges. Other parties expect (and obtain) «voluntary» contributions.[84]

In recent times, a debate has emerged on whether this system sufficiently respects the judges' **independence**. On 9 December 2011, the Federal Supreme Court announced that Judge NICCOLÒ RASELLI, member of the First Public Law Division, will retire on 30 June 2012.[85] In the fall of 2011, Judge Raselli stated in an article in the Swiss Judges' Journal that the current system negatively affects the judges' institutional independence.[86] This is not the right place to elaborate on whether the Swiss model of picking Federal Supreme Court Judges should be improved. The prevailing view has been summarized by the chairman of the Parliament's Judges Committee, in an interview in 2005:

> «According to our idea of state, powers and offices should always be awarded for a limited time. We want to keep the option to question our decisions from time to time and to eventually reverse them. […]. A term of six years is probably the only possible compromise between the legal concern to guarantee judicial independence in an optimal way and the understanding of much of the political scene with regard to reasonable terms. In colloquial terms, we could say the following: ‹We want to have the possibility to re-examine our own decisions at appropriate intervals and you judges can assume that we will prove ourselves worthy of this right.›»[87]

It is doubtful whether anybody has described the political impact of the Swiss democratic system on the federal judiciary in a better way. There are historic reasons for this **political paternalism** vis-à-vis the judiciary, which also manifests itself in the absence of judicial review of federal statutes.[88] Professor CLAUSDIETER SCHOTT, a legal historian at the University of Zurich, wrote that unlike in other European countries, legal culture is less appreciated in Switzerland than political culture. He attributes that to the fact that the country was not involved in the crucial stages of development of the rule of law. It lacks the experience of juridification of conflict which was carried out by the *Reichskammergericht* in cases concerning questions of religion and power. SCHOTT adds

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Richter und Gerichte, Berne 2001, 285 ff.; <http://www.lenouvelliste.ch/fr/valais/?idIndex=0&idContent=193388> visited 16 January 2012; further the critical remarks of the then President of the Federal Supreme Court HEINZ AEMISEGGER in NZZ am Sonntag of 29 August 2004, <http://www.nzz.ch/2004/08/29/il/article 9TJ2B.html> visited 16 January 2012.

84 <http://richterzeitung.weblaw.ch/content/edition.aspx?id=229> visited 11 February 2012.

85 <http://www.bger.ch/ruecktritt_raselli_d.pdf> visited 15 January 2012.

86 NICCOLÒ RASELLI, Richterliche Unabhängigkeit, <http://www.zvr.ch/tl_files/zvr/PDFs/Niccolo%20Raselli_Richterliche%20Unabhaengigkeit.pdf> visited 15 January 2012; see also the critical remarks from an economic perspective by the general manager of the WWZ Forum at the University of Basel BRIGITTE GUGGISBERG in Basler Zeitung of 20 September 2011, 11.

87 THOMAS STADELMANN/STEPHAN GASS, Gewaltentrennung und richterliche Unabhängigkeit – die Justiz im Spiegel der Politik, Interview with ROLF SCHWEIGER, member of the Council of States, Justice – Justiz – Giustizia 2005/1 <http://richterzeitung.weblaw.ch/content/edition.aspx?id=4> visited 16 January 2012, author's translation.

88 See infra, E. V. 9. b. gg.

that Switzerland remained unaffected by the separation of powers and codification experiments in France, Prussia and Austria and later receptions could not replace real-life experience.[89] Another factor which has fostered Swiss exceptionalism was the late reception of Roman law. An academically educated class of jurists only emerged late with the consequence that traditionally judges were laymen.[90]

2. *Some remarks on Swiss legal methodology*

Article 1 of the Swiss Civil Code (CC) famously states under the heading «Application of the Law»:

> «[1] The law applies according to its wording or interpretation to all legal questions for which it contains a provision.
> [2] In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.
> [3] In doing so, the court shall follow established doctrine and case law.»

In light of this, it is not surprising that the dogma of a code without gaps was never advocated in Switzerland. According to traditional Swiss legal methodology, elements to be taken into account when interpreting a norm are the text, the history, the purpose and the system.[91] There is **no fixed hierarchy** of these elements. In case of conflict, a value judgment must be made. The postulate of two leading methodologists that judges could assume the existence of a lacuna *contra legem*, which allows them to correct the written law, only under the narrow circumstances of Article 2(2) CC, but not under the wider provision of Article 1 (2) CC,[92] was not recognized by the Federal Supreme Court. According to Article 2(2) CC, the law does not sanction the «manifest» abuse of a person's rights. The re-discovery of «topics and law» *(Topik)* – an ancient method used by Aristotle and Cicero – by the German legal philosopher Theodor Viehweg and the teachings of modern hermeneutics have fallen on fertile soil in Swiss methodological literature.[93]

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89 Clausdieter Schott, «Fremde Richter – fremde Gerichte» Tradition oder Missverständnis? (fn 45), 25.

90 See ATF 134 I 16 consideration 4.2.

91 See, e.g., Arthur Meier-Hayoz, Article 1 CC, paragraphs 184 ff., in Berner Kommentar: Kommentar zum Schweizerischen Privatrecht, Vol. I, Berne 1966. Further aspects mentioned are, in particular, the legal facts, legal history and comparative law, and the constitution.

92 Meier-Hayoz (fn 91), Article 1 CC, paragraph 295; Hans Merz, Article 2 CC, paragraphs 22, 24, in Berner Kommentar: Kommentar zum Schweizerischen Privatrecht, Vol. I, Berne 1966. Instead of giving reasons for their approach, the two authors just referred to each other.

93 See, in particular, Hans Georg Hinderling, Rechtsnorm und Verstehen, Berne 1971; Roger Zäch, Tendenzen der juristischen Auslegungslehre, ZSR NF 96 (1977) II 313 ff.; Carl Baudenbacher, Some Remarks on the Method of Civil Law, 34 Tex. Int'l L.J. 333 ff.; Walter R. Schluep, Einladung zur Rechtstheorie, Berne 2006.

Topics and law considers a legal question from a problem-oriented perspective rather than by means of logical deduction. Legal thinking is said to take place in such a way that points of view («topoi»), which may be the solution to a problem, are listed and discussed. The topoi can be collected in catalogs, but the catalogs must remain open. According to **modern hermeneutics**, the judges' preconception and understanding of the law determine above all the choice of method. Preconception is formed, in particular, by the specific legal knowledge and by the general knowledge of circumstances outside the law, such as aspects of social or economic policy. Preunderstanding constitutes the starting point of every interpretation. Like every interpreter, a judge may understand a text only if approaching it with a certain purposive expectation of the meaning. This provisional meaning is then continuously corrected by the knowledge acquired by the interpreter in the course of the further penetration of the meaning. Pre-understanding or preconception cannot be equated with prejudice. The influence of preconception cannot, however, be totally eliminated. The interpreter is examining his or her own preconception against the text of the norm in the so-called «hermeneutic circle». He or she thereby projects an understanding for the whole of the text and understands each part in the light of that projection, revising the interpretation step by step while further penetrating the text. The traditional methods of interpretation serve to «justify» the already established solution.

Still, attempts in the literature to restrict the courts' discretion by formulating methodological guidelines have sometimes taken on strange forms. The main focus of methodological writing is still on the elements of interpretation. This also manifests itself in the discussion of the construction of autonomously implemented European Union law.[94] Although nobody denies the fact that the Federal Supreme Court follows the maxim of «lack of principle» by choosing the interpretation method which warrants the desired result, the Court in high profile cases has a tendency to give the impression that legal interpretation is a process which is guided by objectiveness and not by predetermined goals.[95] Such considerations are nothing other than an attempt to **camouflage** the true valuations.[96]

It is striking that despite the open acknowledgement of gaps in Article 1 CC, Swiss courts have in economic law matters been nowhere near as activist as, for example, their German counterparts. By and large, in core areas of economic law such as competition law, unfair competition law, corporate law, or the law of the general conditions of trade, the Federal Supreme Court has, when considered in the longer term, essentially met the expectations of the **parliamentary**

94 Infra, F V. 4 …

95 See in economic law most recently ATF 137 II 199 *Swisscom*; infra, F V. 4. d.

96 See in that respect already Josef Esser, Vorverständnis und Methodenwahl in der Rechtsfindung, Frankfurt am Main 1970.

majority. One could therefore say that the majoritarian impulse has prevailed. Unlike in other countries, the Federal Supreme Court does hardly pursue its own agenda in these matters.[97]

It is safe to say that the rather cautious attitude of the Federal Supreme Court is a consequence of the Swiss framework conditions of judging, in particular of the lack of life appointment and the **political control** over the judiciary. In recent times, the Federal Supreme Court has even taken on the role of the brakesman, in particular when it came to interpreting statutes which were enacted or amended under foreign influence. In competition law, the court has not really followed the legislature's intent to align Swiss law with EU law, but has preferred to stick to traditional solutions.[98] In the case of the Single Market Act – a prime example of a Europeanized statute – it allowed cantonal sovereignty to prevail over free movement.[99] Moreover, the norms on criminalizing insider-trading, which had been forced on Switzerland by the U.S., were interpreted according to the letter of the law, with the consequence that they remained largely ineffective.[100] The willingness, and the possibilities, of courts of last resort to rewrite the law are less determined by methodological rules or the open acknowledgment of the incompleteness of a code than by **institutional circumstances**. The fact that the Federal Supreme Court has been more determined to rewrite the law in other fields such as family law or the law of naturalization is no proof of the opposite.

VII. Negotiation goes before adjudication

1. Aversion to litigation

While in the U.S. and to a great extent also in the EU Member States (as well as in the EEA/EFTA States), litigation is seen as an adequate mechanism of dispute resolution, Swiss economic law has always been reluctant to open the floodgates. One may speak of an aversion to judicial conflict resolution. Large economic actors prefer to be free and to dispose of conflicts on the basis of good will. That means that they are prepared to exercise grace on a case-by-case basis. Giving access to the courts has occasionally even been called an

97 In Germany, it was the *Reichsgericht* and, after World War II, the Federal Supreme Court which started to subject general conditions of trade to open control of their content; see LUDWIG RAISER, Das Recht der Allgemeinen Geschäftsbedingungen, Bad Homburg v.d.H 1961, passim. The legislature codified and strengthened the protection of the weaker party in the AGB-Gesetz. In company law, the Federal Supreme Court held in the seminal *Holzmüller* judgment of 25 February 1982 that the outsourcing of the most valuable part of a corporation to a subsidiary – in the case at hand a sea port – could only be decided with the participation of the general assembly although there was a formal competence of the board of directors which was confirmed by the articles of association (BGHZ 83, 122).

98 Infra, F V. 4. d.

99 Infra, F V. 3., 4. d.

100 Infra, F IV. 3. b.

evil.[101] **Negotiation** and **friendly settlement** are not only the mechanisms that determine legislation, but also the preferred means of conflict resolution.

It is probably no coincidence that one of Switzerland's leading private law professors, EUGEN BUCHER, has criticized RUDOLF VON IHERING'S famous work *«Der Kampf um's Recht»* («The Fight for the Law») which was based on a lecture delivered on 11 March 1872 before the Vienna Law Society.[102] VON IHERING'S claim that the aim of the law is to create peace, but that the means to achieve it is through fight, is, in Bucher's view, nonsensical. Bucher believes in the **self-realization** of private law and in reconciliation. The ultimate goal in the field of private law, he asserts, is not the enforcement of existing claims or the realization of «just law», but peace under the law.[103] The problem is, however, that Bucher's own thesis, i.e. that the existence of a clear, manifest, self-evident and uncontestable legal situation constitutes the pre-condition of the order to fight, is flawed. Whether a legal situation is clear can, in many cases, only be assessed through court proceedings and thus through fight. Whether and to what extent litigation should be encouraged by special measures or not is another question.

2. *The «fear of foreign judges»*

As noted above, after 1848 a somewhat artificial myth was imposed on Switzerland by placing its historical base back to Late Middle Ages.[104] During the preparatory phase of the accession to the **European Human Rights Convention** in 1974, opponents sought to capitalize on the so-called Swiss fear of foreign judges. They went so far as to invoke the «Federal Charter» of 1291 between the people of the valley of Uri, the democracy of the valley of Schwyz, and the community of the Lower Valley of Unterwalden, which included the obligation to recognize only local judges,[105] and referred to the fighting of the Swiss Confederates to get rid of the jurisdiction of the *Reichskammergericht* at the end of the 15th century. The dispatch of the Federal Council called these references deceptive. It stated, *inter alia*, that the judgments of the Court of Human Rights and the decisions of the Committee of Ministers are binding, but that they have no effect of cassation and are not directly enforceable. The dispatch also pointed to the fact that Switzerland recognized the compulsory jurisdiction of

101 See also infra, C. VII.

102 RUDOLF VON IHERING, Der Kampf um's Recht, 11th ed., Wien 1894.

103 EUGEN BUCHER, Gegen Jehring's «Kampf um's Recht», in: Pierre Tercier/Marc Amstutz/Alfred Koller/Jörg Schmid/Hubert Stöckli (eds.), Gauchs Welt: Recht, Vertragsrecht und Baurecht – Festschrift für Peter Gauch zum 65. Geburtstag, Zurich 2004, 45 ff., 55.

104 See also MARCEL SENN, Methode und Recht. Ein Beitrag zur geschichtlichen Entwicklung des juristischen Methodenbewussteseins in der Schweiz, in: Peter Forstmoser/Hans Caspar von der Crone/Rolf H. Weber/Dieter Zobl (eds.), Der Einfluss des europäischen Rechts auf die Schweiz, Festschrift für Prof. Roger Zäch, Zurich 1999, 103, 106 fn 5.

105 <http://www.admin.ch/org/polit/00056/index.html?lang=en> visited 4 March 2012.

the International Court of Justice and that it had concluded a large number of treaties containing a mandatory arbitration clause. Thus, the country was already obliged to accept international decisions. The dispatch finally emphasized that the European Court of Human Rights was established by a convention that Switzerland would ratify voluntarily and a **Swiss member** would sit on the Court's bench. This internationalization of the protection of human rights, the Federal Council concluded, could in no way be regarded as a submission to foreign judges.[106]

The fear of foreign judges was also fueled in 1992 during the campaign against the accession to the **EEA**. CLAUSDIETER SCHOTT made it, however, clear that the function of modern Swiss judges cannot be compared to medieval judges. Whereas the task of today's judge is to adjudicate, i.e. to hear and decide cases, the medieval judge was excluded from the decision-making. Only the college of jurymen *(Schöffen)* was empowered to adjudicate. The judge's role was restricted to conducting the procedure. Unlike the judge, the jurymen were always members of the same folk-community *(Dinggenossenschaft)* as the parties. It follows that a foreign judge **could never have been an issue**. As far as the tradition of the foreign judges formula is concerned, Schott argues that the passage in question in the 1291 Federal Charter had been totally forgotten for centuries and had been re-discovered for political purposes in 1891 on the occasion of the 600 years celebration of the Confederation which was marked by nationalist pathos,[107] and again in the first half of the 20th century. In substance, the foreign judges formula was not specifically Swiss. It simply set out the plaintiff's obligation to bring its lawsuit before the court of the defendant's domicile and not before a «foreign» court. In other words, the formula described the development of a **general rule of jurisdiction**.[108] The current use of the foreign judges' formula in the 1291 Federal Charter is therefore nothing other than a historical misrepresentation. This has not hindered the Swiss People's Party to make reference to the foreign judges' formula of the 1291 Federal Charter in its program for 2011–2015.[109]

If one wanted to use the formula today, one could call an international court a foreign court if Switzerland would be subject to its jurisdiction without having the **right to nominate a judge**. The European Court of Human Rights is therefore not a foreign court nor would the EFTA Court have been had Switzer-

106 Botschaft des Bundesrates an die Bundesversammlung über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten of 4 March 1974, BBl 1974 I 1035, 1054 f.

107 On the impact of the nationalist movement on the political rights of women see REGINA WECKER, The Oldest Democracy and Woman's Suffrage: The History of a Swiss Paradox, in: Joy Charnley/Malcolm Pender/Andrew Wilkins (eds.), 27 years of emancipation? Women in Switzerland 1971–1996, Berne 1997, 25, 28 ff.; further infra, E. VI. 2.

108 CLAUSDIETER SCHOTT, «Fremde Richter – fremde Gerichte» Tradition oder Missverständnis? (fn 45).

109 <http://www.svp.ch/display.cfm/id/101396> visited 12 January 2012.

land ratified the EEA Agreement in 1992, because there would have been a judge nominated by Switzerland. Interestingly, the foreign judges formula was not invoked in the context of Switzerland's accession to the WTO although the chances that Switzerland will ever be in a position to nominate a member to the WTO Appellate Body are rather slim. It seems that the dispute settlement mechanism of the WTO was too complex to be used for the purposes of a political campaign.

VIII. Important results: Economic success and sense of quality

The absence of a strong central government and of an excessive bureaucracy, the business-friendly attitude of Parliament and of the Federal Supreme Court, the solid education system and the existence of an active civil society have, together with other factors, created an environment which leaves room for economic activities and **innovation** and has produced **economic success**. Switzerland has for decades been one of the best performers in all sorts of respective rankings. For several years, the country has also been a world leader in innovation.[110] Moreover, there is a strong commitment to **preventive measures** to avoid adverse events, e.g., in the field of health, and to the protection of the **environment**. Proof of the latter is, not least, the existence of an efficient public transport system. Swiss people are usually sensitive to **quality** which means that price is not the only parameter which is taken into account. Swiss goods and services enjoy a good reputation around the world. When speaking about commitment to quality, one may mention the implementation of the WTO Government Procurement Agreement in Switzerland. Its Article XIII(4) gives the WTO members the choice between two criteria for the award of a contract: «either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous».[111] The Swiss legislature has clearly opted for the second solution. Article 21 of the Federal **Act on Public Procurement** of 16 December 1994 states under the heading «Award Criteria»:

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110 <http://www.swissinfo.ch/eng/science_technology/Switzerland_still_Europe_s_innovation_leader.html?cid=32083236> visited 15 March 2012.

111 See also Article 53 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (O.J. L 134/114 of 30/04/2004): «[…] the criteria on which the contracting authorities shall base the award of public contracts shall be either: (a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion», or «the lowest price only».

> «(1) Contracts will be awarded for the most commercially advantageous bid. In seeking the most commercially advantageous bid, a number of criteria will be taken into account, particularly deadlines, quality, price, profitability, operating costs, customer service, expediency of the service, aesthetics, environmental sustainability and technical value.
> (2) Award criteria must be listed in the tender documentation according to their degree of relevance.
> (3) Contracts for broadly standardised goods may also be awarded solely on the basis of the lowest price criterion.»

The Federal Council explained in the second GATT dispatch that the economic benefits of a tender must not only measured by the price, but also by the relevant criteria as defined by the purchaser. To award the contract solely on the basis of the lowest price is, in practice, only common in the procurement of bulk products. The dispatch elaborates on the **notion of quality** which can be understood as a generic term for aspects of usability, safety, availability, reliability, cost-effectiveness and ecology.[112]

C. Traditional Cornerstones of Swiss Economic Law

I. Historical development

Swiss economic law by tradition has been heavily influenced by liberal thinking. Some say that the European **liberal revolution of 1848** began in Switzerland. «In the highlands the first shot rang» German poet *Ferdinand Freiligraht* wrote on 25 February 1848 referring to the *Sonderbund War.*[113] Under the Constitution, the Federal Supreme Court was established, but not on a permanent basis.[114] The Court had limited powers and primarily had to settle disputes between the cantons. The Constitution was revised in 1874. The competences of the Federal Government were strengthened and the permanent Federal Supreme Court was established. The popular referendum was introduced; the popular initiative followed in 1891. In 1881, the Code of Obligations (CO) was enacted, in 1912 the Civil Code (CC). The CC was the most modern codification of its time. The Federal Debt Enforcement and Bankruptcy Law was enacted on 11

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112 Botschaft zu den für die Ratifizierung der GATT/WTO-Übereinkommen (Uruguay-Runde) notwendigen Rechtsanpassungen (GATT-Botschaft 2), BBl 1994 IV 950 ff., 1192 f.; see with regard to the importance of quality as a relevant criterion also Marc Steiner, Die umweltfreundliche Beschaffung – vergaberechtliche Möglichkeiten und Grenzen. Vergaberechtliche Studie erstellt im Auftrag der Beschaffungskommission des Bundes (BKB), 2006, 79 f.; id., Sekundärziele im öffentlichen Beschaffungswesen: In welche Richtung schwingt das rechtspolitische Pendel? Ein Blick nach Europa und zurück in die Schweiz, ELR 2011, 380 ff., 381.

113 See Frederic Ewen/Jeffrey L. Wollock, A half-century of greatness: the creative imagination of Europe, 1848–1884, New York 2007, 347 ff., 350.

114 <http://www.bger.ch/index/federal/federal-inherit-template/federal-status/federal-geschichte.htm> visited 12 April 2012.

April 1889 and entered into force on 1 January 1892. However, the Federal Civil Procedure Act of 2008 entered into force only on 1 January 2011, a remarkable 139 years after the legislature had first envisaged the unification of civil procedural law.[115] On the same day the Federal Criminal Procedure Act came into effect as well.[116]

In World War I and during the inter-war years, the ideas of liberalism and of free trade were largely abandoned. The **protectionist measures** which were introduced in order to fight the Great Depression of the 1930s (bilateral trade restrictions, the depreciation race and foreign exchange control) were counterproductive. They discouraged investors and increased unemployment.[117] **Economic martial law** was based on interventionism and planning. Private property, the freedom of contract and the freedom of employment were not abolished, but highly regulated. The population and the army were supplied by way of a bureaucratic system of allocation and distribution.[118] The economic martial law enacted in World War I was to a large extent based on improvisation. The Historical Dictionary of Switzerland has called it a thorough failure. Since a part of the population was no longer able to feed itself at the end of the War, the social tensions culminated in a general strike.[119] However, in World War II, Switzerland was well prepared and economic martial law functioned properly.[120] It formed the basis for later **interventionist legislation**, e.g. in the fields of old age insurance and consumer protection law.

II. Constitutional foundations

Like every modern economy, the Swiss economy is mixed. As a rule, actors are private businesses. The government owns large enterprises, in particular in the infrastructure and armament sectors, but the share of government owned actors

115 SR 272; see Sandrine Giroud, The Unified Swiss Code of Civil Procedure: A Copernican Revolution for the Swiss Litigation System, <http://www.terralex.org/publication/90e753c4b9> visited 31 December 2011.

116 SR 312.0.

117 See, e.g., Botschaft zur Genehmigung der GATT/WTO-Übereinkommen (Uruguay-Runde) (GATT-Botschaft 1), BBl 1994 IV 1, 7.

118 See Bernhard Degen, Kriegswirtschaft, Historisches Lexikon der Schweiz, <http://www.hls-dhs-dss.ch/textes/d/D13781.php> visited 15 March 2012.

119 Bernhard Degen, Kriegswirtschaft, Historisches Lexikon der Schweiz, <http://www.hls-dhs-dss.ch/textes/d/D13781.php> visited 15 March 2012.

120 This law was described by University of Zurich legal historian Julius G. Lautner in a monumental work: Julius G. Lautner, System des Schweizerischen Kriegswirtschaftsrechts, Lieferung 1–2, Zurich 1942; see also Andreas Kley, Julius G. Lautner – Tragischer Monumentaljurist und systematischer Entomologe, SJZ 107 (2011), 569 ff.; Marcel Jakob/Adriano Maissen/Philippe Schwarz, Kriegswirtschaftsrecht des Zweiten Weltkriegs, in: Lukas Gschwend/Martin Löhnig (eds.), Wirtschaft und Recht im Spannungsfeld der Modernisierung. Beiträge zur Wirtschaftsrechtsgeschichte des 19. und 20. Jahrhunderts, St. Gall 2010, 87 ff.

is lower than in most other countries. The freedom of trade and industry, the backbone of a market economy, was guaranteed for the first time in Article 31 of the Federal Constitution FC of 1874. Since the 1999 revision, it is embedded in Article 27 FC under the title **«economic freedom»**. However, no substantial changes to it have taken place. Restrictions are regulated in a general manner in Articles 36 and 94(4) FC. Economic freedom is understood broadly, covering private business activity, occupational freedom, the freedom of establishment of economic operators,[121] and the freedom of advertising.[122] Whether the different types of companies are only covered by the economic freedom or also by the freedom of assembly, a freedom of the first hour which dates back to 1848 and is now guaranteed in Article 23 FC, is not clear, but of minor importance.[123] The economic freedom is **three-dimensional**. It has an individual component, an institutional component (in relation to the economic system), and a federal single market component.[124] According to the Federal Supreme Court, the economic freedom protects the **freedom of competition**, but only against state measures which distort competition.[125] There is, however, no comprehensive positive guarantee of competition, which means that restrictions of competition by private conduct are basically protected under Article 27 FC. According to the prevailing view in legal literature, the room for maneuver of the federal legislature is considerable.[126]

Industrial relations are governed by **collective bargaining**, i.e. negotiations between business associations and trade unions. Article 28 FC guarantees the right of groups to organize, to negotiate and to conclude collective agreements. The right to organize comprises the right to strike and the right to lockout, which are both guaranteed under narrowly-defined conditions. According to the second paragraph of Article 28 FC, disputes must – wherever possible – be resolved through **negotiation** or **mediation**.

The freedom of **foreign trade** was always deemed to be part of the freedom of trade and industry. It is now guaranteed by the economic freedom.[127] There is freedom of **foreign investment** in Switzerland in that the state refrains from exercising control on inward investment as well as disinvestment and the repatriation of profits. Private corporations may, however, restrict foreign direct investment by restricting the transfer of shares in their articles of incorporation.[128]

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121 Giovanni Biaggini, Bundesverfassung der Schweizerischen Eidgenossenschaft, Zurich 2007, Article 27 para 3.

122 ATF 128 I 295; consideration 4; ATF 118 Ib 356 consideration 4c.

123 Giovanni Biaggini (fn 121), Article 23, paragraph 8 f

124 Giovanni Biaggini (fn 121), Article 27, paragraph 22.

125 ATF 125 I 417 consideration 4.a.; Giovanni Biaggini (fn 121), Article 27, paragraph 6.

126 Giovanni Biaggini (fn 121), Article 27 paragraph 6 with further references.

127 See ATF 126 III 129 *Kodak* consideration 6.a.

128 See Articles 685–685g CO.

III. Internal market law

After the entry into force of the Federal Constitution in 1848, the first foundations for the Swiss internal market were laid. The problems that arise in a federalist legal order which is characterized by **two levels of law** have been aptly described in the Federal Council's dispatch on the 1995 Single Market Act. According to that document, it is essential that the free movement of goods, persons, and services and the freedom of establishment are not restricted by cantonal regulations in an unjustifiable way.[129]

After 1848, the power to levy customs duties was transferred from the cantons to the Confederation. The postal services were centralized. Between 1901 and 1909, the five largest private railway companies were transferred into the Swiss Federal Railways.[130] In 1850, the **Swiss franc** was introduced against the fierce resistance of the cantons of eastern Switzerland which maintained close economic relations with Southern Germany and feared disadvantages.[131] In 1875, Switzerland concluded, together with 17 other countries, the Meter Convention. In the same year, the Federal Law on Weights and Measures was enacted which introduced the meter, liter and gram as per January 1877. While the free movement of capital was established early on,[132] the free movement of goods, services and workers was only implemented in 1995 when the Single Market Law was adopted under European influence.[133] Most importantly, the competence to regulate foreign trade was given to the Confederation.

IV. Freedom of contract

1. General

The 1881 **Code of Obligations** was a clone of German legal thinking. It was designed on the template of the so-called «Dresden draft» (Draft of a general German law of obligations) which had been published in 1866, but never entered into force. The Dresden draft which was inspired by liberal ideas also

129 Botschaft zu einem Bundesgesetz über den Binnenmarkt (Binnenmarktgesetz, BGBM), BBl 1995 I 1225 f.

130 See Hans-Peter Bärtschi/Anne-Marie Dubler, Eisenbahnen, Historisches Lexikon der Schweiz <http://www.hls-dhs-dss.ch/textes/d/D7961.php> visited 12 March 2012.

131 See the speech of Federal Councillor Hans-Rudolf Merz of 10 June 2005 «Bundesrat Munzinger – Der Vater des Schweizerfrankens», <http://www.efd.admin.ch/dokumentation/reden/2005/01190/index.html?lang=de functional interpretation &msg-id=130> visited 15 February 2012.

132 Botschaft zu einem Bundesgesetz über den Binnenmarkt (Binnenmarktgesetz, BGBM), BBl 1995 I 1213, 1228.

133 Infra, F. V. 3., 4.d..

had considerable influence on the German Civil Code.[134] Still, Swiss jurists take pride in reading German comparatist FRANZ WIEACKER's praise that the CO was the ripest fruit of the German-speaking jurisprudence of the 19th century.[135] In 1911, the CO was integrated into the newly enacted CC, but in substance it remained largely unchanged.[136]

An important feature of the Swiss CC is the principle of the ***code unique***. Unlike France and Germany, Switzerland opted for a monist approach without a separate commercial code, the reason being that a special legal status for merchants was deemed to be undesirable in a democratic society. Also, unlike in most foreign legal orders, employment law and rental law have not been outsourced into special legislation, although the freedom of contract has been limited in these fields. Commentators regularly point to a certain elasticity and flexibility of the CO which is said to be visible in the provisions giving the judge discretion.[137] Like the German Civil Code, the CO makes use of **general clauses** and indefinite legal notions. From a comparative point of view, it is striking that the Swiss courts have only sparingly exercised the power conferred on them by such open-textured norms compared to, for example, their German counterparts.[138]

2. *General conditions of trade*

The freedom of contract, which in Swiss law is guaranteed by Article 19(1) CO, has rightly been called the «lubricant of the market economy».[139] According to the liberal model, contracts will be **fair** if the parties are above age and have been able to form their will in a free and undistorted manner. Liberal contract theory is therefore characterized by a **formal** approach. In reality, contractual freedom will, however, only lead to the conclusion of fair contracts if there is competition. In the field of general conditions of trade, the legislature and the courts have until very recently continued to adhere to the liberal model of contract law although the basis for its application – the existence of competition – had long been absent in economic reality. In B-to-C relations, there is a take-it-or-leave-it situation; consumers find themselves in a position of structural inferiority. Switzerland for decades has been trailing behind the rest of Europe with regard to the control of **unfair general conditions of trade**. Academic litera-

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134 See HEINRICH HONSELL, 100 Jahre Schweizerisches Obligationenrecht, ZSR 130 (2011) II, 9 f.

135 Privatrechtsgeschichte der Neuzeit, 2nd ed., Göttingen 1967, 491.

136 For details see HEINRICH HONSELL, 100 Jahre Schweizerisches Obligationenrecht (fn 134), 13 ff.

137 See HANS MERZ, Das schweizerische Obligationenrecht von 1881. Übernommenes und Eigenständiges, in: Peter/Stark/Tercier (eds.), Hundert Jahre Obligationenrecht – Le Centenaire du Code des Obligations, Fribourg 1982, 3 ff.

138 See also supra, B. VI. 2.

139 See LORENA MIRANDA SANTOS, Vertragsfreiheit: Das Schmiermittel unserer Wirtschaft <http://www.breakfastpaper.de/2012/01/15/vertragsfreiheit-das-schmiermittel-unserer-wirtschaft/> visited 25 February 2012.

ture has long urged the courts to carry out an open control of the content of such conditions. The German *AGB-Gesetz* of 1976 raised awareness for this.[140] A number of general clauses such as Article 2(1) CC (good faith), Article 1(2) (prohibition of abuse of the law), Article 20(1) CO (good morals), Article 21 CO (unfair advantage) or Article 71(2) CO (just consideration) could have served as a legal basis.[141] The most natural legal foundation would have been the notion of **public policy** in Article 19(2) CO, which constitutes a directly applicable restriction of contractual freedom.[142]

However, the Federal Supreme Court did not follow this virtually unanimous advice. Instead, it contented itself with acknowledging two special rules, the first one stating that **unusual provisions** of general conditions of trade fail to become part of a contract.[143] This provided little help because the seller of goods or provider of services could remedy the unusual nature of a clause simply by highlighting it. Secondly, **ambiguous clauses** have to be interpreted against the party that imposed their inclusion in the contract, i.e. against the seller or service provider.[144] The ambiguity rule which stems from Roman law does not, however, apply if the clause is clear, but one-sided. In individual cases, the Federal Supreme Court has been prepared to regard a usual clause as unusual or an unambiguous term as ambiguous. However, that leaves the problem, as such, unresolved. All this confirms that policy decisions of the courts of last resort in politically sensitive matters do not so much depend on the written law, but on the judges' willingness to be courageous and, of course, on the **institutional framework conditions** of judging.[145] In conclusion, the fact that, unlike the German Civil Code, the Swiss Code explicitly mentions public policy as a limit to the freedom of contract has not had any significant consequences.

3. Unfair advantage

It is interesting that when dealing with the question of whether one party has obtained an unfair advantage (outside the sphere of general conditions of trade), the Federal Supreme Court addressed the issue of **structural inferiority**. Article 21(1) CO states:

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140 Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen vom 9. Dezember 1976 (BGBl. I 2217).

141 See the citations in Carl Baudenbacher, Wirtschafts-, schuld- und verfahrensrechtliche Grundprobleme der Allgemeinen Geschäftsbedingungen, Habil., Zurich 1983, 265 ff.

142 Carl Baudenbacher, Wirtschafts-, schuld- und verfahrensrechtliche Grundprobleme der Allgemeinen Geschäftsbedingungen (fn 141), 292 f., and further authors cited; also Ernst A. Kramer, Berner Kommentar Bd. VI, Das Obligationenrecht, Berne 1991, Art. 19–20 paragraph 155 ff.

143 ATF 135 III 1; 119 II 443, consideration 1a; 109 II 213.

144 ATF 120 V 445, consideration 5.a.; 117 II 609, consideration 6.c.; 115 II 268, consideration 5a.

145 See supra, B. VI.

> «Where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness, the injured party may declare within one year that it will not honor the contract and demand restitution of any performance already made.»

In ATF 92 II 168, the Federal Supreme Court (First Civil Division) held that the requirement of **inexperience** does not imply a general inability to properly assess a particular transaction; it is sufficient that the party concerned is not able to grasp the scope of the proposed transaction. Total lack of experience is in other words not required. The Court went on to state that this broad definition of the term inexperience imposes itself even more when considering that technical problems, also in day-to-day life, become ever more varied and complicated. As a result, the individual is increasingly forced to rely on specialists. This approach was said to merely be the logical consequence of the finding that with continuous scientific and technological progress, the area of an individual's general knowledge is ever narrower.[146]

V. Tort law

In tort law, the liberal maxim was that the owner bears the loss *(casum sentit dominus)*. As in other modern legal systems, this principle has, however, for some time been replaced by numerous constructions which all tend to extend liability towards **strict liability**. This was achieved by both acknowledging new types of liability and extending the scope of liability. Unlike in the case of general conditions of trade, the Federal Supreme Court has acted in lockstep with high courts in other countries. This progressive attitude has certainly been influenced by the fact that tort law is (also) about the life and health of humans, but it has been greatly facilitated by the existence of **insurance coverage**.[147]

VI. Competition law

1. General

In a market economy, the protection of competition against **distortion** and **restriction** is of particular significance. Economic operators must be able to make their decisions without being deceived or coerced, and they must, as a matter of principle, have a choice between several alternatives. As in Germany and in Austria, there are two separate statutes in Switzerland, an Unfair Competition Act and a Cartel Act.[148] The dogmatic starting point of the courts was,

146 Consideration 5.

147 See Heinrich Honsell, 100 Jahre Schweizerisches Obligationenrecht (fn 134), 9 f., 81 ff.

148 See Jochen Glöckner, Europäisches Lauterkeitsrecht, Munich 2006, 205 ff.

however, essentially the same in the two areas of the law. Initially the courts based their judgments on the general clauses of the Civil Code (Articles 50 old CO and 41 CO, Article 28 CC) both in unfair competition and in antitrust cases.[149] The first special norms on unfair competition were created in 1911 (Article 48 CO) and in the 1943 Unfair Competition Act with the first Cartel Act following in 1962. Between 1911 and 1962, the provisions against unfair competition also served as a basis to tackle restrictions of competition, the main example being **sale below cost**. After having ruled repeatedly that sale below cost was lawful because it was simply a result of competition,[150] the Federal Supreme Court held in 1959 that sale below cost was unlawful if it aimed at **eliminating competitors** in order to enjoy a dominant position *(predatory pricing)*.[151] When both competition statutes were amended in the 1980s, there was the opportunity to merge them into one market act. Such plans did not, however, materialize.[152] Today, the Cartel Act is much more important from an economic policy point of view. This is due to the fact that its enforcement lies largely in the hands of an administrative body, the **Competition Commission**.

2. *Unfair competition law*

a. *Protected good*

In the early years, the Federal Supreme Court construed the notion of unlawfulness in Article 50 old CO to the effect that the provision aimed at safeguarding the personal absolute **subjective right** of competitors to recognition and esteem in business life. What was needed, was a protection against violation of the standards of **decency** in business. This was based on the liberal assumption that businesses would compete on an equal footing without economic might being a factor. All that had to be secured was the ability of consumers and industrial customers to make up their minds without being deceived or coerced. One of the leading scholars in the field, German Professor Josef Kohler, praised the Federal Supreme Court as «the most outstanding court of the continent», not least since he was the main proponent of the subjective right theory.[153]

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149 ATF 21, 1181, 1188; 22, 175, 176; for comparison see, e.g., the (in)famous judgment of the German *Reichsgericht* in the *Saxon Wood Pulp Cartel* case, RGZ 38, 155.

150 ATF 52 II 381; 57 II 340; 71 II 233.

151 ATF 85 II 443; see for comparison already the judgment of the German *Reichsgericht* of 18 December 1931 in the *Benrath Gas Station* case; RGZ 134, 342.

152 Carl Baudenbacher, Schwerpunkte der Schweizerischen UWG-Reform, in: Carl Baudenbacher (ed.), Das UWG auf neuer Grundlage, Berne/Stuttgart 1989, 15 ff.

153 ATF 21, 1181, 1188; Josef Kohler, Der unlautere Wettbewerb. Darstellung des Wettbewerbsrechts, Berlin/Leipzig 1914, preface.

The 1943 Unfair Competition Act introduced a general clause which was followed by a catalogue of special prohibitions. The reform was based on a so-called **social law concept**. According to that theory, the law sought to protect competitors, consumers and the general public. Again, the German influence was considerable.[154] However, the prevailing doctrine of the time continued to adhere to the old approach. The Unfair Competition Act only applied if there was a **competitive relationship** between the parties.[155] After 1962, sales below cost were dealt with solely under the Cartel Act in spite (or because) of the fact that the latter was largely ineffective.[156] In 1986, the Unfair Competition Act was amended. The new Act was based on a **spectacular paradigm-shift** focusing on competitors, consumers and the general public (three-dimensionality). According to the dispatch of the Federal Council, the law has a dual purpose: it aims at not only protecting the good morals in competition, but also the existence and the good functioning of competition. In cases of conflict, the functional approach, which gives preference to the interpretation that protects the existence and the functioning of **competition itself**, must prevail. The dispatch made express reference to the **present day-functional approach** which ought to govern this important field of economic law.[157] The functional approach in unfair competition law had been promoted by authors belonging to the St. Gallen School of economic law who were inspired by German scholarship and by case law of the German Federal Supreme Court.[158] The general clause technique was retained and the catalog of special prohibitions was extended. Enforcement remained largely private.

The intellectual and legislative effort has, however, hardly produced far-reaching results. The most significant practical consequence of the reform was the abolition of the requirement of a competitive relationship between the parties for the Unfair Competition Act to apply.[159] This **sobering outcome** is not untypical of Swiss legal policy. On the other hand, the 1986 Unfair Competi-

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154 See, in particular, EUGEN ULMER, Sinnzusammenhänge im modernen Wettbewerbsrecht, Berlin 1932; ID., Wandlungen und Aufgaben im Wettbewerbsrecht, GRUR 1937, 769 ff.

155 See, e.g., ATF 98 II 57 consideration 2.

156 ATF 107 II 277 – *Veledes*; see with regard to the 1962 Competition Act infra, C. VI. 3.

157 Botschaft zu einem Bundesgesetz gegen den unlauteren Wettbewerb (UWG) of 18 May 1983, BBl 1983 II, 1009, 1037, 1042 ff.

158 See WALTER R. SCHLUEP, Vom lauteren zum freien Wettbewerb, GRUR Int. 1973, 446, 449 ff.; CARL BAUDENBACHER, Suggestivwerbung und Lauterkeitsrecht, Diss., Berne 1978, 134 ff.; ID., Zur funktionalen Anwendung von § 1 des deutschen und Art. 1 des schweizerischen UWG, ZHR 1980, 145 ff.; ERNST A. KRAMER, Konsumentenschutz als neue Dimension des Privat- und Wettbewerbsrechts, ZSR Bd. 98, 1979 I, 61 f.; HANS RAINER KÜNZLE, Die vergleichende Werbung im schweizerischen Wettbewerbsrecht – de lege lata und de lege ferenda, WuR 1982, 1963 ff.; WALTER STICHER, Die Kontrolle Allgemeiner Geschäftsbedingungen als wettbewerbsrechtliches Problem, Diss. St. Gall 1981, 115 ff. The leading German authors at the time were professors ROLF SACK, JOSEPH STRAUS, MICHAEL LEHMANN and GERHARD SCHRICKER.

159 ATF 117 IV 193 *Bernina*; 120 II 76 *Hertel*.

tion Act inspired the German Unfair Competition Act of 2004.[160] In 2011, the Unfair Competition Act was again amended by creating additional special prohibitions which aim at protecting consumers. The professor of economic law at the University of Zurich ROLF H. WEBER has correctly noted that the legislature is thereby departing further from the functional approach.[161]

b. Comparative advertising

In contrast to the legal situation in most other countries, the Federal Supreme Court has tolerated comparative advertising since 1895.[162] The rationale was obviously that this form of marketing contributes to enhancing market transparency.

c. Model of the informed consumer

The liberal approach also manifests itself in the definition of the relevant consumer in misleading advertising cases. Unlike the courts in Germany and in other European countries, the Federal Supreme Court always referred to a **commonly talented average consumer** using the care required in daily business.[163] This notion of consumer meanwhile also underpins the case law of the ECJ. The ECJ speaks of an average consumer who is reasonably well informed and reasonably observant and circumspect.[164] The traditional Swiss approach must be seen against the background of the absence of a Commercial Code. Hence, ordinary citizens are basically expected to be as attentive as business people.

d. General conditions of trade

In 1983, the Federal Council unexpectedly proposed the inclusion of a new Article 8 into the Federal Unfair Competition Act with the intention of empowering the courts to exercise an **open control** of the content of contracts concluded on the basis of general conditions of trade.[165] As mentioned, academic literature had for decades called for the enactment of a regulation against unfair general conditions of trade in the framework of the CO. The reasoning behind the Government's approach was that the use of such conditions would take consumers

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160 See §§ 1, 3(1) German Unfair Competition Act.

161 Welches Lauterkeitsrecht braucht die Schweiz?, sic! 4/2012, 231, 235 f.

162 ATF 21 1188; 22 1174; 43 II 51; 55 II 181.

163 CARL BAUDENBACHER, Lauterkeitsrecht. Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG), Basel/Geneva/Munich/St. Gall/Berlin 2001, Art. 1 paragraphs 61–63.

164 See Case C-210/96 *Gut Springenheide* and *Tuski* [1998] ECR I-4657, paragraph 31, and the case law cited. The same standard applies in the EEA/EFTA, see EFTA Court E-1/05 *EFTA Surveillance Authority v Norway* [2005] EFTA Court Report, 234, paragraph 41.

165 Botschaft zu einem Bundesgesetz gegen den unlauteren Wettbewerb (UWG) of 18 May 1983, BBl 1983 II 1094.

by surprise. This was said to constitute a typical act of unfair competition.[166] Article 8 would have read as follows:

> «Shall be deemed to have committed an act of unfair competition, anyone who, in particular, makes use of pre-formulated general conditions that, to the detriment of a contracting party, (a) depart considerably from the statutory provisions that apply either directly or by analogy, or (b) prescribe a distribution of rights and obligations in serious contradiction with the nature of the contract.»

However, the Swiss militia system foiled the Federal Council's plans. A member of the State Council who sat on the board of the St. Gallen Cantonal Bank submitted to the preparatory committee that since the Unfair Competition Act was about banning misleading behavior, it was appropriate to insert the **element of deceit** into the norm.[167] As spurious as that argument was, it prevailed. Consequently, Article 8 of the Unfair Competition Act 1986 under the heading «Use of Abusive Conditions of Business» reads:

> «Shall be deemed to have committed an act of unfair competition, anyone who, in particular, makes use of pre-formulated general conditions that, to the detriment of a contracting party, *misleadingly*, (a) depart considerably from the statutory provisions that apply either directly or by analogy, or (b) prescribe a distribution of rights and obligations in serious contradiction with the nature of the contract.»[168]

With this **cheap trick**, an open judicial control of the contracts' content was rendered impossible. In fact, there is not a single case in which a court has exercised such control. It was not before 2011 that Parliament deigned to change Article 8. It did so under the influence of the relevant EU Directive.[169]

3. Antitrust law

The first Cartel Act of 1962 was essentially an example of **symbolic legislation**.[170] An alliance of all sorts of lobbies prevented competition law from developing any teeth, the most efficient mechanism being the representation of the large industrial associations, farmers, labor unions and consumers in the former Cartel Commission, the predecessor of the present Competition Commission (ComCo). For decades, the Swiss competition authority did not have any decision-making power, but was rather a sociopolitical and economic discussion forum. Even today, the remnants of that model can be seen as 5 of the 12 Competition Commission members are representatives of industry, farmers,

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166 Botschaft zu einem Bundesgesetz gegen den unlauteren Wettbewerb (UWG) of 18 May 1983, BBl 1983 II 1053.

167 See Carl Baudenbacher, Lauterkeitsrecht. Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG) (fn 163), Art. 8 paragraph 25.

168 Emphasis added.

169 See infra, F V. 3. a.

170 Concerning the notion of symbolic legislation see Peter Noll, Symbolische Gesetzgebung, ZSR (N.F.) 100, 347 ff. (1981).

consumers and labor associations.[171] The idea of having an efficient competition policy conflicted with deep-rooted cooperative and corporatist convictions. Unlike in the case of unfair competition law, the legislature refused to be inspired by German legal thinking. In 1957, Germany enacted a Law Against Restraints of Competition which was based on a cartel prohibition and a prohibition to abuse a dominant position.[172] The Swiss Cartel Act's official objective was to protect the **«possibility to compete»** *(möglicher Wettbewerb)*. Cartels were therefore tolerated as long as this possibility was still open to outsiders.

In practice, not even this minimalist approach was implemented. Under the ***«Saldotheorie»***, any restriction of competition could be justified by positive effects even in non-economic areas such as public health, cultural or security policy. The elimination of competition was dealt with as one aspect among many.[173] The Cartel Commission's only enforcement competence was the right to issue **recommendations**. If these were not accepted by the addressees, the Department of Economic Affairs of the Federal Government could bring a so-called administrative law action before the Federal Supreme Court, something which never occurred. In private law actions, the Federal Supreme Court adopted the same stance by holding that collective (horizontal and vertical) market orders which eliminated any competition could be justified by a series of economic and non-economic advantages. Private enforcement thereby became illusionary.[174] Anticompetitive activities were further facilitated by the fact that the Federal Supreme Court made the legal form of an **association** available to cartels by holding that associations may pursue an economic goal as long as they do not run a commercial enterprise[175]. The 1985 amendment of the Cartel Act was characterized by a **bizarre fight** over the question of whether the application of the *Saldotheorie*, with its ample possibilities of justification, should be excluded in cases in which effective competition was eliminated.[176] Enforcement was slightly improved by providing the Department of

171 See also infra, F. V. 3. a.

172 BGBl I 1081.

173 The «Saldotheorie» was invented by a Professor of economics at the University of Berne, Hugo Sieber, who was a member of the Cartel Commission. See Hugo Sieber, Über die Kriterien der volkswirtschaftlichen und sozialen Schädlichkeit von Kartellwirkungen, WuR 1973, 48 ff.

174 See ATF 98 II 365: Justification of a market order that was based on collective resale price maintenance on the grounds that it contributed to the protection of a dense net of sales outlets and thereby ensured that the whole population could be provided equally and at equal prices with Swiss beer. This, the Court held, was in the general interest. In ATF 109 II 260, the horizontal-vertical market order for Swiss cigarettes was justified along the same lines. This time, the argument was that the collective resale price maintenance was a means to secure the survival of kiosks which contributed to a considerable extent to the maintenance and dissemination of a diversified press by making publicly available a large selection of the respective products.

175 ATF 90 II 333; see Paul Piotet, La loi sur les cartels et sa notion de l'association, JdT 111 I 226 ff. (1963); Piera Beretta, Wirtschaftliche Vereine in der Schweiz, Diss. Basel 2001, 33 ff.

176 See Walter R. Schluep, Wirksamer Wettbewerb: Schlüsselbegriff des neuen schweizerischen Wettbewerbsrechts, Berne 1987.

Economic Affairs with the competence to issue decisions. However, in the 1985 Act's ten years lifespan, the Department issued only two decisions.[177] Only in 1995 was a Competition Act adopted which was worthy of its name. The reform was essentially inspired by EU law and in substance amounted to a **paradigm change** both in terms of substantive law and with regard to enforcement.

VII. Governance model of corporations

The first Swiss corporate law was enacted in 1881 as part of the Code of Obligations. It was amended in 1936 and 1991. Currently, a further reform is pending in Parliament. The limited liability company was introduced in Switzerland in 1936, and the respective law was amended some time ago.[178] With regard to the governance model for corporations and the balance between capital and labor, Switzerland has to a large extent bucked the international trend. In 1881, the legislature implemented a **liberal, individualistic-capitalist model** which was based on the assumption that shareholders were entrepreneurs. The corporation was meant to consist of a manageable number of shareholders, an association of likeminded investors with equal influence who jointly conducted the business or chose one of their number as a manager.[179] The assumption was that such a corporation could be steered by the market. This first Swiss codification was largely influenced by the German corporate law of 1870.[180] Economic reality was, however, soon characterized by a power imbalance between the majority shareholders and the board of directors on the one side and the minority shareholders on the other. The German theory of the **firm itself as an institution** (*«Unternehmen an sich»*) had considerable influence on Swiss corporate law.[181] During World War I and the Weimar Republic, an influential movement in German academic literature led by Walter Rathenau sought to restrain the influence of shareholders on the business conduct of the firm and to protect the management board from greedy shareholders and from changing majorities. One of its main postulates was that management should be at liberty to accumulate **hidden re-**

177 VKKP 1989, 89 – Property insurance; 1991, 161 – Banks.

178 See, e.g., Carl Baudenbacher/Klaus Banke, Die GmbH gestern, heute und morgen, SZW 1996 49 ff.; the contributions of Peter Böckli, Peter Forstmoser, Lukas Handschin, Herbert Wohlmann, Peter Behrens, Andreas Kellerhals und Michael Gwelessiani in: Peter Böckli/Peter Forstmoser (eds.), Das neue schweizerische GmbH-Recht, Zurich 2006.

179 See Doris Baudenbacher-Tandler, Schutz vor neuen Anlegerrisiken, Zurich 1988, 82 f. with references.

180 See August Welti, Die Organisation der Aktiengesellschaft nach dem Bundesgesetz über das Obligationenrecht, mit spezieller Berücksichtigung der deutschen Handelsgesetzgebung, Zurich 1890; Georg Cohn, Geschichte der Aktiengesellschaft und des Aktienrechts, Zurich 1921, 58 ff.; Doris Baudenbacher-Tandler, Schutz vor neuen Anlegerrisiken, St. Gall/Berlin 1988, 82 f.

181 See Fritz Haussmann, Die Aktiengesellschaft als ‹Unternehmen an sich›, JW 1927, 2953 ff.; id, Vom Aktienwesen und vom Aktienrecht, Mannheim/Berlin/Leipzig 1928, Chapters IV and V.

serves in order to help the firm overcome hard times.[182] A little later, the American professors ADOLF A. BERLE and GARDINER MEANS published their critical book on corporate America entitled «The Modern Corporation and Private Property» in which they showed that in the U.S. economy, the means of production were concentrated in the hands of the 200 largest corporations. A large part of these companies were not controlled by the shareholders, but, by managers. The shareholders ownership was therefore only a formality. BERLE and MEANS argued that corporate leadership must fulfill responsibilities not only toward shareholders, but also toward society, so that the law of corporations might «be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship».[183] German law restricted the accumulation of hidden reserves in 1965[184] and introduced co-determination in 1952[185] and 1976.[186] The history of German corporate law has therefore been called the history of its amendments.[187]

In contrast, Swiss corporate law remained **largely unchanged** over the decades. In a landmark judgment of 5 October 1925, the Federal Supreme Court held that the trend of modern corporate law was not only to protect the interests of shareholders and creditors, but also to protect the **company itself** so as to facilitate its incorporation, secure its existence, guarantee its freedom of movement and its existence during difficult times by enabling it to preserve or regain its efficiency.[188] All this was based on the idea that if the firm itself prospers, the interests of the members will be safeguarded best. These considerations have essentially retained their relevance until today. When the Federal Supreme Court in 1950 refused to recognize a right of shareholders to challenge decisions of the board of management, it also made reference to the 1937 German Corporate Act which had implemented the «leader principle'.[189] It took the federal legislature 34 years, from 1957 to 1991, to amend the chapter of the Code

182 See WALTER RATHENAU, Vom Aktienwesen: Eine geschäftliche Betrachtung (1917); OSKAR NETTER, Zur aktienrechtlichen Theorie des «Unternehmens an sich», in: Festschrift für Albert Pinner, Berlin 1932, 507.

183 ADOLF A. BERLE/GARDINER C. MEANS, The Modern Corporation & Private Property, with a new introduction by Murray Weidenbaum & Mark Jensen, New Brunswick/London 1991, originally published in 1932, 313.

184 BRUNO KROPFF, Reformbestrebungen im Nachkriegsdeutschland und die Aktienrechtsreform von 1965, in: Walter Bayer/Mathias Habersack (ed.), Aktienrecht im Wandel, Vol. I: Entwicklung des Aktienrechts, Tübingen 2007, paragraphs 68 ff., 494 ff.

185 See MATHIAS HABERSACK, in: Wulf Goette/Mathias Habersack (eds.), Münchener Kommentar zum Aktiengesetz, Vol. 2, 3rd ed., Munich 2008, Einleitung, paragraph 24.

186 See MATHIAS HABERSACK (fn 185), Einleitung, paragraph 41.

187 RUDOLF WIETHÖLTER, Interessen und Organisation der Aktiengesellschaft im amerikanischen und deutschen Recht, Karlsruhe 1961, V.

188 ATF 51 II 412, 427; likewise ATF 53 II 231.

189 ATF 76 II 51. This jurisprudence was confirmed many times; see CARL BAUDENBACHER, Grundzüge des Gesellschaftsrechts, 4. ed., St. Gall/Berlin 1999, 178 ff.; with regard to the leader principle see § 70(1) of the 1937 German Corporate Act.

of Obligations on corporations. The essential bone of contention was the struggle over the **hidden reserves** and over **publicity**.[190]

There are other elements of traditional Swiss corporate law that tend to favor the management over the minority shareholders. **Treasury stock** is not only recognized if tied to a specific purpose.[191] In 1991, this business-friendly orientation led the Federal Supreme Court (First Civil Division) to accept the use of treasury stock by the board of directors «for purposes in the interest of the company».[192] Moreover, **proxy voting** which allows proxy agents to cast votes on behalf of shareholders is permitted under Swiss law. In comparison to Germany, proxy voting is less strictly regulated. According to Article 689d[1] CO, the proxy agent is obliged to ask the shareholders for voting instructions prior to every general meeting. Where such instructions cannot be obtained in good time, the proxy agent exercises his voting rights in accordance with his general instructions. In the absence of general instructions, the votes must be cast in favor of the motions proposed by the board of directors (Article 689d[2] CO).

The power of the board of directors was and is further strenghtened by the case law of the Federal Supreme Court on the calculation of the **amount in dispute** in both shareholders actions contesting the validity of a decision of the shareholders meeting under Article 706 CO, and in shareholders actions to enforce corporate rights against board members under Article 754 ff. CO. Since by tradition, the amount in dispute is in both cases calculated on the basis of the financial interest of the corporation, and the amount in dispute is relevant for fixing the costs, the two remedies became largely illusionary.[193] In 1991, the legislature sought to facilitate shareholder actions by introducing two special provisions (Articles 706a[3] and 756[2] CO). These gave the judge discretion to split the plaintiff's costs of the proceedings between the parties provided he had reasonable grounds to bring the lawsuit (so-called splitting of the amount in dispute). Both amendments, which were inspired by German law,[194] have since been repealed and subsumed into the Federal Civil Procedure Act (CPA).[195] According to Article 107(1)(b) CPA, the court may deviate from the general principles of allocation and allocate the costs at its own discretion if a party was caused to litigate in good faith. It does not appear, however, that the

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190 See, e.g., Carl Baudenbacher, Grundzüge des Gesellschaftsrechts (fn 189), 172 ff.

191 See Gaudenz G. Zindel/Peter R. Isler, in: Heinrich Honsell/Nedim P. Vogt/Rolf Watter (Hrsg.), Kommentar zum Obligationenrecht II (Art. 530–964 OR), 4th ed., Basle 2012, Art. 651 paragraphs 12 ff.

192 ATF 117 II 290 Canes/Nestlé.

193 See with regard to the action for contestation annulment of a decision of the shareholders meeting ATF 92 II 243 consideration 1b, 246; 75 II 149 consideration 1; concerning the action to enforce corporate rights against board members Peter Forstmoser/Arthur Meier-Hayoz/Peter Nobel, Schweizerisches Aktienrecht, Berne 1996, § 36 paragraph 120 ff.

194 See with regard to German law Lutz Englisch, in: Wolfgang Hölters, Aktiengesetz, Munich 2011, § 247, paragraphs 25–28.

195 Annex 1 No II 5 to that act.

situation of minority shareholders has substantially improved.[196] **Access to justice** is therefore severely impaired. Speaking with ALBERT O. HIRSCHMAN,[197] the option for shareholders to raise their **voice** is restricted. According to Article 685 CO, the restriction on the transferability of shares which are listed on a stock exchange is, however, only possible under certain circumstances. That means that the **exit** option is, to a certain extent, guaranteed.

The current governance model of corporations has been the subject of critique in academic literature. But some of the most influential corporate law professors who naturally also supervise doctoral students are at the same time practicing attorneys and members of the board of important corporations. Still, **continuity** in itself constitutes an advantage for Switzerland because it creates a high degree of legal certainty. Other factors such as the skilled workforce, peaceful industrial relations, the stable political system, relatively low taxes and the citizen-friendly public administration are obviously so attractive that Swiss corporations can afford to grant rather limited rights to shareholders.

VIII. Labor law

1. Industrial law

A consequence of the democracy established in 1848 was the adoption of modern factory laws which were among the **most progressive** ones on the Continent in the second half of the 19th century. The leading legislation was enacted in the **Canton of Glarus**, a major site of textile production. On 10 August 1864, the Popular Assembly approved a law which limited the daily working hours to 12, banned night work from 20.00 h to 05.00 h and labor for children under 12 years of age. Women were given 6 weeks of post-natal recovery time.[198] In 1872, the maximum working time was further lowered to 11 hours a day. Other cantons followed Glarus' example which also became the model for the 1877 Federal Factory Law which was enacted after the 1874 reform of the Constitution. The Federal Factory Law set the maximum daily working time at 11 hours (on Saturday 10 hours), banned labor for children under 14 years of age and introduced employer liability for workplace accidents and industrial diseases.[199] For com-

196 See Supreme Federal Court (First Civil Division) of 27.6.2000, 4C.88/2000, consideration 4c; of 7.2.2002, 4C.324/2001, consideration 5; of 11.7.2007, 4A.43/2007, consideration 7; of 15.9.2008, 4A_331/2008, consideration 5.

197 ALBERT O. HIRSCHMAN, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States, Cambridge, MA 1970.

198 NZZ No 146 of 22 May 1864, 1.

199 See ERICH GRUNER, Die Arbeiter in der Schweiz im 19. Jahrhundert, Berne 1968; REGINA WECKER, Equality for Men? Factory Laws, Protective Legislation for Women in Switzerland, and the Swiss Effort for International Protection, in: Ulla Wikander/Alice Kessler-Harris/Jane Lewis, Protecting Women. Labor Legislation in Europe, the United States, and Australia, 1880–1920, Urbana and Chicago 1997, 66 ff.

parison, it may be noted that in the U.S., child labor was an issue even after World War I.[200]

Under the Glarus law, men and women were treated equally with regard to working hours and the prohibition of night work. Gender studies have, however, revealed that the 1877 Federal Factory Law and later initiatives under the guise of protecting women ultimately led to «the creation of women as a special class of workers and the construction of **gender differences**».[201] It appears that at the time, (male) Swiss politicians made considerable efforts to export this approach to other countries.[202]

2. *Employment contracts*

Swiss employment contract law is characterized by its liberal orientation. Individual and collective employment law was amended in 1971 and has remained essentially unchanged since. Although certain social protection mechanisms were introduced, its basic principle is still the **freedom to dismiss**.[203] Under Article 335c CO, the employment relationship may be terminated with one month's notice during the first year of service, with two months' notice from the second to ninth years of service and with three months' notice thereafter. These notice periods may be varied by written individual, standard or collective employment contract. However, they may be reduced to less than one month only by collective employment contract and only for the first year of service. The party giving notice of termination must state its reasons in writing only if the other party so requests (Article 335[2] CO). According to Article 336 CO, notice of termination is unlawful in certain, narrowly defined circumstances. If a termination is found to be unlawful, compensation must be paid. However, reinstatement is not possible.[204] Although the Federal Supreme Court has become stricter in its recent practice, it has always adhered to the freedom to dismiss.[205] When deciding whether a notice of dismissal with the option of re-employment on altered conditions is lawful, the Court even uses a market-oriented **func-**

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200 See *Bailey v. Drexel Furniture Company*, 259 U.S. 20.

201 Regina Wecker, Equality for Men?, (fn 199), 72, emphasis added.

202 Regina Wecker, Equality for Men?, (fn 199), 73 ff.

203 Pierre Antoine Triponez, Ungleiche Kündigungsfristen und einseitige Kündigungsbeschränkungen, Diss. Berne 1975, 63; Martin Vonplon, Kündigungsschutz im Arbeitsrecht. Rechtsvergleich (Schweiz, BRD, Frankreich, IAO) und Diskussionsvorschläge zur Verbesserung des schweizerischen Kündigungsschutzes, Berne/Frankfurt Main/New York 1986, 88. – The provisions on dismissal were amended in 1989 and in 1993.

204 See Erläuternder Bericht und Vorentwurf vom September 2010 zur Teilrevision des Obligationenrechtes (Sanktionen bei missbräuchlicher oder ungerechtfertigter Kündigung), 6 f. <http://www.ejpd.admin.ch/content/dam/data/wirtschaft/gesetzgebung/whistleblowing/vn-veber-d.pdf> visited 11 June 2012.

205 See the overview by Denis G. Humbert, Die missbräuliche Kündigung im Spannungsfeld zwischen Kündigungsfreiheit, Generalklsausel von Art. 336 OR und Fürsorgepflicht des Arbeitgebers, AJP 2–11, 1471 ff.

tional test. Such a dismissal is in principle lawful. However, if the employer aims to unfairly worsen the employee's situation, the notice is only legally valid if it is based on business- or market-related factors.[206]

3. Collective bargaining

As in most European countries, industrial relations in Switzerland are to a considerable extent governed by collective agreements which are negotiated and concluded by employers and employees. In such agreements, the parties define certain **minimum conditions** concerning the conclusion, nature, and termination of relationships between the employers and individual employees with individual employment contracts not permitted to be less favorable (Article 356 [1] CO). According to Article 357a(1) CO, the Contracting Parties are obliged to ensure compliance with the collective employment agreement. They must exert their influence on their members and, where required, have recourse to the means placed at their disposal by their articles of association and the law. Article 357a(2) CO states that each contracting party has a duty to maintain harmonius industrial relations, and in particular, to refrain from any hostile action in matters regulated by the collective employment contract. Such duty applies without restriction only where expressly so agreed.

This determination to solve conflicts in an amicable way dates back to the **Peace of Work Agreement** which was concluded in 1937 in the machine and metal work industry.[207] The Peace Agreement has become a hallmark of Swiss industrial relations. Industrial action is rare and lockouts do not occur in practice. The cases in which the Federal Supreme Court dealt with strikes in the past 20 years can be counted on the fingers of one hand. With regard to industrial peace, the 2010–2011 World Economic Forum Global Competitiveness Report ranked Switzerland second after Singapore with 6.2 points, 1 meaning total confrontation and 7 total cooperation. The average is 4.4 points.[208]

4. The Swiss labor market

The Swiss labor market is characterized by high employment rates, low unemployment and high wage rates. One of the driving factors is a high degree of labor

206 See ATF 123 III 246, consideration 3. b.; Roger Rudolph, Aktuelle Fragen im Arbeitsrecht: Neuere Entwicklungen zum sachlichen Kündigungsschutz, TREX 2009, 152, 154.

207 See Bernhard Degen, Sonderfall Schweiz im Bereich der Arbeitswelt? 50 Jahre Friedensabkommen als nationales Jubiläum, in: Studien und Quellen. Zeitschrift des Schweizerischen Bundesarchivs 24, 1998, 171–192; Damien Broussolle, The Peace Of Work Agreement: The Emergence And Enforcement Of A Swiss Labor Market Institution, Paper provided by Laboratoire de Recherche en Gestion et Economie, Université de Strasbourg 2006.

208 Klaus Schwab, The Global Competitiveness Report 2010–2011, World Economic Forum, Geneva <20 http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf 10, 444> visited 14 March 2012.

market **flexibility** with a relatively little employment protection regulation as its backbone.[209] Moreover, the flexible and **decentralized** Swiss wage bargaining system has resulted in the lowest annual strike rates of all OECD countries.[210]

The degree of **organization of workers** in Switzerland is with approximately 33% within the European average. The majority of collective agreements are agreements concluded by firms, rather than by associations. In 2007, 406 out of 615 collective agreements were firm contracts.However, they only concerned 304,000 employment relationships whereas 1,682,900 employment relationships were covered by association agreements. At the relevant time, there were about 3.8 million working contracts in total. In other words, roughly 52% of the working relationships were covered by a collective agreement, but the share of the corporate contracts was only 7.9%.[211] On 1 May 2009, 397 out of 614 collective agreements were agreements concluded by firms and only 217 were association agreements.[212]

Wages are to a large extent fixed at the level of the individual firm which is free to negotiate them with its own workforce. There are no regional collective agreements. Wages may even differ within one and the same firm.[213] Decentralization has also had an impact on mediation and industrial action which occur first and foremost in the individual firm. This explains the fact that labor unions are less influential than in neighboring countries.[214] Many collective agreements do not contain rules on minimum wages, but leave the respective regulation to the **individual firms**. The professor of Labor Law at the University of St. Gallen, Thomas Geiser, has recently stated in that respect that two thirds of the firm agreements set minimum wages, which can only be said about approximately half of the association agreements. Firm agreements are often very comprehensive and regulate a whole wage system that will hardly be deviated from in practice.[215] That, together with the freedom to dismiss, contributes to the high degree of responsiveness of the Swiss labor market.

The scope for the **state's wage policy** is, on the other hand, limited. Firstly, the federal and the cantonal government may declare a collective agreement universally applicable. If this is done, the respective agreement will also apply

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209 Nicola Duell et al, OECD Social, Activation Policies in Switzerland, Employment and Migration Working Papers No. 112, 2010, 15, paragraph 1. <http://www.oecd.org/els/workingpapers> visited 15 April 2012.

210 Ibid., 41, paragraph 97.

211 See Myriam Fumagalli-Senn, Erhebung der Gesamtarbeitsverträge in der Schweiz 2007, Federal Office of Statistics, ed., Neuchâtel 2009.

212 <www.bfs.admin.ch/bfs/portal/de/index/themen/03/05/blank/key/gesamtarbeitsvertraede0/struktur.html> visited 12 April 2012.

213 Thomas Straubhaar/Heinz Werner, Arbeitsmarkt Schweiz – ein Erfolgsmodell?, MittAB 1/2003, 60 ff.

214 Thomas Straubhaar/Heinz Werner (fn 213), 71.

215 Thomas Geiser, Paper for a conference to be held in Freiberg, Germany, on file with the author.

to working relationships where neither party is a member of an association.[216] Secondly, if a collective agreement has been declared universally applicable, it is also binding on foreign firms active in Switzerland.[217] Thirdly, public contracts may be awarded on condition that the firms respect certain minimum requirements that have been agreed on in a collective agreement which does not apply to them.[218]

State minimum wages are traditionally unknown in Switzerland. According to Art. 360a CO, which was introduced as part of the flanking measures to the Free Movement of Persons Agreement concluded with the EU, minimum wages may be set under fairly strict conditions provided that there is no provision in a collective agreement that may be declared universally binding.

IX. Intellectual property law

1. General

Unlike unfair competition law, intellectual property law has from the beginning been outsourced from the CC into special acts. Trademarks are an essential element of a market economy. The most concise statement was made, in that regard, by the ECJ in the second *HAG* case. In paragraph 13 of that judgment, the Court held:

> «Trade mark rights are … an essential element in the system of **undistorted competition** which the Treaty seeks to establish and maintain. Under such a system, an undertaking must be in a position to keep its customers by virtue of the quality of its products and services, something which is possible only if there are distinctive marks which enable customers to identify those products and services.»[219]

The first Swiss Federal **Trade Mark Law** came into force on 16 April 1880.[220] Industrial circles had called for a federal law since various trademark laws had already been adopted on a cantonal level and Switzerland had concluded bilateral agreements with *inter alia* Germany, France and Italy protecting trademarks of nationals of these countries in Switzerland. This left Swiss nationals with less legal protection.[221] A major revision of the Trade Mark Law took

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216 Article 1 of the Federal Act on the Declaration of General Applicability of Collective Agreements, SR 221.215.311. Agreements

217 Article 2 of the Posted Workers Act, SR 823.20.

218 Thomas Geiser (fn 215).

219 C-10/89, *HAG II*, [1990] ECR I-3711, paragraph 13, emphasis added; see already Schluep, Das Markenrecht als subjektives Recht, Basel 1964; most recently Philipp Speitler, Rechtsverletzende Benutzung: Die dynamische Auslegung des markenrechtlichen Benutzungsbegriffs durch den Gerichtshof der Europäischen Union, Baden-Baden/Basel 2012, 12 ff.

220 AS 5, 35 ff.

221 See Botschaft aMSchG, BBl 1879 III 718 ff.

place in 1891.[222] During the next few decades, the law was partially revised four times.[223] The current Trademark Act and its corresponding Ordinance entered into force on 1 April 1993.

Patent and copyright laws, on the other hand, are not indispensable elements of an economic system that is based on free competition. In both areas, Switzerland was forced to introduce legislation due to foreign pressure.[224]

2. *The history of patent law in particular*

In patent law, Switzerland went its own way for quite a long time. The history of Swiss patent law is interesting in the present context because it shows that (1) Switzerland has a history of going it alone, and (2) if foreign pressure becomes strong enough, it may be compelled to give in.

Switzerland was, together with the Netherlands, the only European country which passed through almost the whole 19th century **without patent legislation**, the reason being, in particular, the resistance of the Swiss industry. The following arguments were put forward against the protection of patents: that the contribution of the inventor was negligible and did not deserve protection; that Swiss industry was flourishing despite the absence of patent protection; that it was doubtful whether patent protection was an incentive for innovation; that patents were incompatible with the economic freedom; and that monopolies would lead to increased prices. But apart from these arguments, there were also obvious **economic interests** which prompted Swiss industry to oppose the enactment of patent law. In fact, Swiss firms were able to lawfully use foreign innovations for free. The absence of a patent act in a world which (with the exception of the Netherlands) was characterized by a commitment to patent protection amounted to a **regulatory competitive advantage**.[225] It has been argued that the country's size played a part in this strategy: «[B]ecause the Swiss economy was small, the incentive that Swiss industry received from patented exports was arguably greater than the incentive that dominating the domestic Swiss economy via patenting might have supplied.»[226]

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222 AS 12, 67 ff.

223 Florent Thouvenin et al., Markenschutzgesetz (MSchG), Stämpflis Handkommentar, Berne 2009, Einleitung, paragraph 11.

224 See Alois Troller, Immaterialgüterrecht I, 3rd ed., Basel/Frankfurt 1983, 43.

225 See Hans Bracher, Entstehung und Bedeutung des schweizerischen Patentwesens, Diss. Berne 1923, 14 f.; R. Carl Moy, The History of the Patent Harmonization Treaty: Economic Self-Interest as an Influence, 26 J. Marshall L. Rev. 457, 486 f.; Gilles Brugger/Taro Haefeli, Die Geschichte des Patentrechts nach 1800, in: Lukas Gschwend/Martin Löhnig (eds.), Wirtschaft und Recht im Spannungsfeld der Modernisierung. Beiträge zur Wirtschaftsrechtsgeschichte des 19. und 20. Jahrhunderts, St. Gall 2010, 37 ff., 42 ff.

226 Carl Moy (fn 225), 486.

The **chemical industry**, whose origins lie in the dyestuffs industry, played a particularly important part in the war against patent protection. In 1859, an Alsatian (French) firm had invented an improved method for the production of aniline red, a dyestuff, which it wanted to sell under the name *Azalein*. Another French firm which owned an older French product patent for aniline red that was marketed under the name *Fuchsin* successfully opposed the sale of *Azalein* under French law. The Alsatian firm therefore moved its production to Basle where it lawfully produced aniline red under the name *Fuchsin* at half of the French price. More firms established themselves in Basel at that time and the basis for today's world-famous **pharmaceutical industry** was laid. It has been said that the Basel firms systematically imitated foreign, and in particular, German products. Rather outspokenly, they expressed the wish that «the cup of suffering of patent protection» may be taken away from them.[227] Commentators concluded that the introduction of patent protection was delayed for so many years out of **economic opportunism**.[228] Protests of foreign countries and of foreign business operators did not lead to a change of attitude. Under the 1883 Paris Convention, which was based on the principle of national treatment, Switzerland was not obliged to grant protection to foreign patents.

However, there was increasing **international pressure**. A first Patent Act which was passed in 1888 established that only inventions which were able to be exhibited in the form of a design model could be patented. This corresponded to the existing constitutional basis. Under the pressure of the chemical industry, Parliament had inserted the model requirement into the Constitution which was unknown in other countries. Inventions of the chemical and pharmaceutical industry, but also of many other industrial sectors were therefore excluded from patent protection.[229] In 1904, the bilateral trade agreement with Germany was renewed and Switzerland had to accept an obligation to introduce patent protection for aniline dyestuffs and similar products. In case of a breach, Germany would have been entitled to levy **protective tariffs**. In 1907, a second Patent Act was adopted which granted protection to (almost) all new industrially applicable inventions. German industrial circles had called Switzerland a «pirate state», the lack of patent protection a «parasitic system» and accused the Swiss chemical industry of behaving like «robber barons.»[230] Seen in the present context, one could call that an antecedent of the modern cherry picker blame.

To be sure, Switzerland's policy was defensible under principles of a liberal economy,[231] but given the fact that the other industrialized countries had en-

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227 Alois Troller (fn 224), 43; Gilles Brugger/Taro Haefeli (fn 225), 46, with further references.

228 Peter Kurz, Weltgeschichte des Erfindungsschutzes, Köln/Berlin/Bonn/Munich 2000, 393 ff.

229 Brugger/Haefeli, 58 ff.

230 See Walther Stuber, Die Patentierbarkeit chemischer Erfindungen, Berne 1907, 32, 35.

231 See Fritz Machlup, An Economic Review of the Patent System. Study commission by the Subcommitttee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, US

acted patent legislation, the Swiss attitude did in fact amount to **cherry picking**: Swiss inventors were able to have their inventions patented in other countries whereas at the same time they retained the right to freely use foreign inventions in their own country.[232]

Two remarks may be added at the end of this section. Firstly, there are striking **parallels** between the behavior of Switzerland in the 19th century and the patent policy of countries like **India** or **China** today. This shows that whether a country is inclined to introduce patent protection depends less on considerations of just rewarding or giving incentives for innovation than on its state of development. After the Revolutionary War, the U.S. had the reputation of being a patent thief. Today, America is a fierce defender of patent law, but is reluctant to agree to the protection of geographic indications simply because it makes use of almost no such indications.[233] Secondly, during the TRIPS agreement negotiations, Switzerland with its meanwhile highly developed industry has been a firm part of the **first world** group which did everything to convince the countries of the developing world to agree to higher standards of patent protection.[234]

3. International exhaustion of IP rights

In the *Chanel*[235] and *Nintendo*[236] cases, the Federal Supreme Court (First Civil Division) opted in favor of international exhaustion in trademark and copyright law. Parallel imports cannot, therefore, be blocked by the owner of trademarks and of copyright. This liberal approach also led the Court to hold in both cases that a parallel importer who profits from the breach of contract of an authorized dealer does not, in principle, commit an act of unfair competition. In patent law, the First Civil Divisionrejected international exhaustion by 3 to 2 votes in the *Kodak* case.[237] After a long debate, Parliament decided on 19 December 2008 to unilaterally introduce the principle of regional exhaustion in relation to the 30 Contracting Parties of the EEA. The respective amendment of the Patent Act entered into force on 1 July 2009.[238] The legislation does not lead to reciprocal treatment by the Contracting Parties of the EEA.[239]

Senate, 85th Congress, second session. Washington, D.C.: US Government Printing Office, 1958, <http://library.mises.org//books/Fritz%20Machlup/An%20Economic%20Review%20of%20the%20Patent%20System_Vol_3.pdf> visited 16 March 2012.

232 Christian Zeller, Globalisierungsstrategien – Der Weg von Novartis, Berlin u.a. 2001, 108.

233 Andrea E. Flury, Grundprobleme des Rechts der geografischen Herkunftsbezeichnungen, Berne 2003.

234 See Botschaft zu den für die Ratifizierung der GATT/WTO-Übereinkommen (Uruguay-Runde) notwendigen Rechtsanpassungen (GATT-Botschaft 2), BBl 1994 IV 950, 955 ff.

235 BGE 122 III 469.

236 BGE 124 III 321.

237 BGE 126 III 129.

238 SR 232.14, Article 9a.

239 See also infra, F. V. 2.

X. Equal rights for women

1. General

A field in which Switzerland has been an **extreme latecomer** since the turn of the 19th century is equal rights for women. For a long time, there was, and still remains, a deeply rooted idea of gender role in Switzerland. **Women's suffrage** was only granted in 1971 on the federal level: one of the reasons being that without this constitutional amendment the country would not have been able to join the European Human Rights Convention. Professor of Gender History at the University of Basel, REGINA WECKER, aptly wrote in 1997 that women were, compared to other countries, always well educated, but that this was done according to the **traditional gender roles**.[240] In the Canton of St. Gallen, for example, girls had to take mandatory lessons in needlework whereas boys would work with wood and metal until the turn of the millennium.

2. Access to universities

These days, it may be hard to believe, but in the second part of the 19th century Switzerland was a European leader in **admitting women to universities**. Professor WECKER has shown that it was **reverse discrimination** which improved the situation for Swiss women. For a number of reasons, Russian women were admitted to Swiss universities, in particular Zurich, in the 1860 s. Other foreigners followed, and a large number of professors were foreign refugees who had left their countries after the failed liberal revolution of 1848. Swiss applicants then took the view that they could not be denied what had been permitted to foreigners.[241] However, in the legal field this hardly had any impact on Swiss women's opportunities on the labor market, since they were prevented from becoming an attorney or a judge as suffrage was a precondition. They were thus only able to use their university education in private life. In a judgment of 29 January 1887, the Federal Supreme Court held that *Emilie Kempin* who had studied law at the University of Zurich was prevented from representing her husband in a civil claim case. The Zurich District Court had rejected her request because under cantonal law only persons who were entitled to vote could represent third parties in court. The Federal Supreme Court confirmed this decision and held that Ms. Kempin could not rely on Article 4 FC of 1874 which stated that all Swiss were equal before the law. Article 4 had to be interpreted according to its historic meaning.[242]

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240 REGINA WECKER, The Oldest Democracy and Woman's Suffrage (fn 107), 34.

241 REGINA WECKER, Die Schweiz, das europäische Land des Frauenstudiums, in: Ilse Nagelschmidt (ed.), 100 Jahre Frauenstudium an der Alma Mater Lipsiensis, Leipzig 2007, 235–252.

242 ATF 13, 1; see REGINA WECKER, The Oldest Democracy and Woman's Suffrage (fn 107), 34; BEATRICE WEBER-DÜRLER, Auf dem Rechtsweg zur Gleichberechtigung – vom Fall Kempin bis heute, VSH-Bulletin Nr 1, April 2008, 1 ff.

3. Gender equality law

The principle of equality of the spouses was only introduced in the Civil Code in 1985/1988. Until then, Article 160 old CC stated: «[T]he husband is the head of the conjugal community. He decides on the conjugal domicile and must take due care of the welfare of his wife and children.»[243] Professor WECKER has aptly remarked that «on an economic level, the ideas of the man as the breadwinner and the woman's wage as a supplementary gained credence». She sees a relation between the old CC and the special regulations for women in the 1877 Federal Factory Act.[244]

The Swiss Gender Equality Act of 24 March 1995 entered into force on 1 July 1996. It was largely inspired by EU law.[245]

4. Maternity protection

The provisions of the Glarus Factory Law of 1864 and the Federal Factory Law of 1877 have already been mentioned. The development after World War II is less a reason for pride. Although there was a constitutional mandate since 1945, it was not before 3 October 2003 that Parliament passed an amendment to the Compensation for Loss of Earning Act which introduced a modern maternity protection regulation. This reform too was greatly facilitated by a **European directive**.[246]

D. The Impact of International and European Law on Swiss Economic Law

I. Notion of international law

When it comes to defining legal rules which transcend the territory of a nation state, a **variety of terms** are currently being used: International law, public international law, private international law, international uniform law, transnational law, comparative law, global law, supranational law. For the purposes of the report at hand, the following is stated with regard to this terminology: Under the ‹notion public international law› a body of rules (mostly conventional) is understood which regulate the relations of sovereign states and international

243 Author's translation. The text is obviously inspired by Ephesians 5:23.

244 REGINA WECKER, Equality for men? (fn 199), 72; see with regard to the 1877 Factory Act supra, C. VIII. 1.

245 See Botschaft zum Bundesgesetz über die Gleichstellung von Frau und Mann (Gleichstellungsgesetz) und zum Bundesbeschluss über die Genehmigung einer Änderung der Verordnung über die Zuweisung der Ämter an die Departemente und der Dienste an die Bundeskanzlei vom 24. Februar 1993, BBl 1993 I 1246, 1248, 1249.

246 Infra, F. V. 3. a. ii.

organizations. It is, however, more and more recognized that individuals and NGOs are also relevant actors in this field of the law. ‹International law› is often used as a synonym for public international law. The term may, however signal, that not only states are subjects of the law, but also private actors. ‹Private international law› is part of the domestic law of individual states; it determines which national law applies in cases with a «foreign» element. Under the term ‹international uniform law›, as set of rules is understood which aim at governing relations between individuals (natural persons and businesses) in different countries. ‹Transnational law› is said to regulate facts which transcend national boundaries. It involves states, citizens and business operators, and NGOs. International law with a global reach may be referred to as ‹global law›.[247] Finally, ‹comparative law› deals with the comparison of solutions (legal or non-legal) to identical or similar problems in different jurisdictions. ‹Supranational law› (other than public international law) is based on the transfer of rights of sovereign states and organizations to superordinate organs. A common feature of virtually all emanations of international law is that **soft law** is on the rise.

From a business law perspective,[248] a special reference must be made to the *lex mercatoria*, which has been defined as «a collection of transnational legal principles, which derive from international contract practice and are especially suited to meet the needs of international commercial transactions.»[249] Most influential is the International Chamber of Commerce (ICC), which refers to itself as «The world business organization».[250] It is active both in the creation and the enforcement of business law.

II. Notion of European law

1. General

When writing about European law, some Swiss authors start with the European Human Rights Convention.[251] This parlance is not generally accepted. European law is first and foremost the law of the **European Union**, which consists of 27 Member States. EU law has originated from international law, but it is **supranational** in nature; Member States have limited their sovereign rights in key

247 See with regard to notion of international law and its emanations for example Pierrick Le Goff, Global Law: A Legal Phenomenon Emerging From the Process of Globalization, Symposium: Globalization of the Legal Profession, Indiana University School of Law – Bloomington, April 6, 2006, 14 Ind. J. Global Legal Stud., 119 ff.

248 See with regard to the notion of business law supra, A. I. 2.

249 Pierrick Le Goff (fn 247), 125, with reference to Bertold Goldman, La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives, 106 Journal Du Droit International [J.D.I.] 475, 475 (1979).

250 <http://www.iccwbo.org/> visited 2 June 2012.

251 Exemplary Rainer J. Schweizer, Die schweizerischen Gerichte und das europäische Recht, ‹ZSR NF 1993 II 570, 641 ff.

policy areas in favor of European institutions. European supranationalism has an executive, a legislative, and a judicial dimension. There cannot be any doubt that EU law has emancipated itself from international law and constitutes a new legal order of international law.[252] Close to EU law is the law of the **European Economic Area**. The EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own. Its depth of integration is less far-reaching than under EU law, but its scope and the objective go beyond what is usual for an agreement under public international law.[253] In contrast, the law of the **European Human Rights Convention** according to general understanding is part of public international law.[254] The sectoral **bilateral agreements** concluded between Switzerland and the European Union are generally seen as public international law treaties. However, as will be shown, the EU has a tendency to subject them to the same interpretation rules that apply in Union law.[255]

2. *EU law*

The first President of the European Commission, WALTER HALLSTEIN, has famously called the **EEC a community of law**.[256] Today, it is said that this character manifests itself in three respects: (1) The fact that the Member States have transferred part of their sovereignty to the Union so that the Union's organs fulfill their tasks in the framework of clearly defined areas; (2) the fact that the Member States share the same values and have undertaken to respect fundamental rights, in particular freedom, democracy, and pluralism; (3) the fact that the Union is based on solidarity.[257] From an economic law perspective, the core of EU law is the **single or internal market**. The main elements of single market law are the general prohibition to discriminate, the free movement of goods, workers, services, capital and payment as well as the freedom of establishment, competition and state aid law, and the (full or partial) harmonization of essential areas of economic law through the enactment of directives and regulations.

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252 ECJ 26–62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 1963 ECR 3, II. B.; see, for example, OLIVIER JACOT-GUILLARMOD, Le juge Suisse face au droit européen, ZSR N.F. 112, 1993 II, 225 ff.

253 EFTA Court E-9/97 *Erla María Sveinbjörnsdóttir v Iceland* [1998] EFTA Court Report, 95, paragraph 59.

254 See, for instance, LUZIUS WILDHABER, The European Convention on Human Rights and International Law, I.C.L.Q. 2007, 217, 220 ff.

255 Infra, E. VI. 7. b. With regard to the 1972 Free Trade Agreement see already WALDEMAR HUMMER, Vollziehung im Rahmen der Freihandelsverträge – dargestellt am Beispiel Österreichs, in: Michael Schweitzer (ed.), Europäisches Verwaltungsrecht, Vienna 1991, 293, 336.

256 WALTER HALLSTEIN, Die Europäische Gemeinschaft, Düsseldorf 1979.

257 <http://www.bundesregierung.de/Content/DE/Lexikon/EUGlossar/E/2005-11-16-europaeische-union-eu-.html> visited on 17 December 2011.

European integration has often been described as **«integration through law»**.[258] Law enforcement is therefore crucial, and the role of the ECJ can hardly be overestimated. The most important types of **court procedure** are the infringement procedure (Articles 258 ff. TFEU), the preliminary ruling procedure (Article 267 TFEU), the nullity procedure (Articles 263 f., 277 TFEU), and the failure to act procedure (Article 265 TFEU). Courts of last resort of the EU Member States are, as a matter of principle, legally obliged to refer questions of EU law to the ECJ under Article 267(3) TFEU.[259] Further details do not matter in the given context. The ECJ has stated in its landmark ruling in Case C-50/00 P *Unión de Pequeños Agricultores v Council* that «the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community (sc. now: Union) Courts.[260]»

The goal of fostering integration has an impact on the **methods of interpretation**. The ECJ does not interpret EU law according to Articles 31 and 32 of the Vienna Convention on the Law of Treaties. It will consider the text of the norm, the telos (purpose) and the scheme, in the case of secondary law (but not in the case of primary law), also the history, its own previous rulings, the opinion of the Advocate General, the submissions of the Commission and of the Member States, and, as the case may be, the jurisprudence of other courts, such as the ECtHR, the EFTA Court or the U.S. Supreme Court.[261] In cases of doubt, the ECJ has a tendency to give preference to **teleological** interpretation, the *telos* being the deepening of integration. In other words, the *effet utile* of a norm is of particular importance. There are clear parallels to **functional** interpretation as developed in German, Austrian and Swiss economic law.[262] Particularly in the early decades of integration, the ECJ has heavily relied on a **dynamic** approach. It has thereby implicitly assumed that the EU Treaties contain *lacunae praeter legem*. The most distinctive features of EU law in action – the constitutional principles of direct effect, primacy, and state liability – have been developed by the ECJ itself based on a free law attitude.[263] Although there has been some criticism, the general assumption is that the governments and the high courts of the EU Member States have accepted these judgments. Other essential concepts of EU law have been recognized by way of dynamic interpretation. Due to the open-textured nature of many provisions, there are also *lacunae intra legem*. Economic law examples include the concept of measures having equivalent effect. In its *Dassonville* judgment, the ECJ held that all national

258 See already DIETER H. SCHEUNIG, Integration by Law: The Case of the European Community, 11 Tex. Int'l L. J. 549 (1976).
259 For the details see Case 283/81, *CILFIT* [1982] ECR 3415.
260 [2002] ECR, I-6677, paragraph 40.
261 Infra, D. IV. 5.
262 Supra, A. II.
263 Infra, D. III. 2. b.

trading rules capable of hindering **intra-Community trade** are to be considered measures having an effect equivalent to quantitative restrictions.[264] The Court used a very similar formula when giving broad interpretation to the notion of «effect on trade between Member States» in the **competition law** provisions (Articles 101 and 102 TFEU).[265] A dynamic approach also prevailed in the development of the concept of regional **exhaustion of intellectual property rights**, including the jurisprudence concerning repackaging of pharmaceuticals.[266] When construing provisions of secondary economic law, the ECJ tends to give preference to an interpretation which safeguards the good functioning of the internal market and avoids distortion of competition between operators established in different Member States.[267]

Since the European Union relies on the law as a means of integration and abstains from using force, it is rather thin-skinned when it comes to protecting the **autonomy of its legal order**. This holds particularly true of the ECJ, and it has become manifest whenever the Union tried to conclude international agreements which provided for the establishment of a new European court.[268] University of Regensburg International Law Professor Robert Uerpmann has aptly stated in that respect:

> «It seems odd that the European Community, which has never been regarded as a sovereign state, should have greater difficulty in subjecting itself to international obligations. Perhaps however an explanatory approach lies just here. Nation states such as Germany or France do not seriously jeopardise their identity if they subject themselves to international obligations and revoke their claim to autonomous legislation and application of the law. The situation is different with the EC. The EC is a relatively

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264 Case 8/74, *Pdu Roi v Dassonville* [1974] ECR, 837, paragraph 5.

265 See, e.g., Cases 8/72 *Cementhandelaren v Commission* [1972] ECR 977, paragraphs 26 ff.; case 42/84 *Remia BV v. Commission* [1985] ECR 2545, paragraph 22.

266 See, for instance, Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb v Paranova* [1996] ECR, I-3457, and case law cited in paragraph 31; C-348/04 *Boehringer Ingelheim* [2007] ECR, I-3391, with reference to E-3/02 *Paranova v Merck* [2003] EFTA Court Report, 101.

267 See, for example, Cases C-355/96 *Silhouette* [1998] ECR, I-4799, paragraph 23 (rejection of international exhaustion of trademark rights under Directive 89/104/EEC); C-160/00 *Simone Leitner* [2002] ECR, I-2631, paragraphs 20 ff. (recognition of a right of travelers to compensation for non-material damage under Council Directive 90/314/EEC).

268 See the ECJ's Opinions 1/09 on a Draft Agreement Between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area ([1991] ECR 1991, I-6079), 1/00 on a proposed Agreement Between the European Community and non-Member States on the Establishment of a European Common Aviation Area ([2002] ECR I-3493) and 1/09 on a Draft Agreement on the Creation of a European and Community Patents Court (not yet reported); Carl Baudenbacher, The EFTA Court remains the only Non-EU-Member States Court – Observations on Opinion 1/09 – (Opinion delivered pursuant to Article 218[11] TFEU on the Agreement on the European and Community Patents Court, ECJ [Full Court], 1/09), European Law Reporter 2011 No. 7/8, 236 ff.; with regard to Opinion 1/91 Sven Norberg, Justice in the European Economic Area – The Role of the EFTA Court, in: EFTA Court (ed.), Judicial Protection in the European Economic Area, Stuttgart 2012, 29, 40 ff., 44 ff.

young construction [...]. If Community law loses its autonomy, this could endanger the Community's identity.»[269]

3. EEA law

Under the Agreement on the European Economic Area (EEA), EU single market law has been and is continuously being extended to the three EFTA States Iceland, Liechtenstein, and Norway. The agreement does **not**, however, cover the **common policies**, in particular concerning agriculture, fisheries, foreign trade and currency. Structurally, the EEA is based on a two pillar model with an EU and an EFTA pillar. The law is essentially identical in substance in both pillars, but the legal orders are separate. The quintessence of the EEA Agreement is that with the EFTA Surveillance Authority (ESA) and the EFTA Court, **institutions** along the lines of the European Commission and the ECJ have been created.[270]

Since a single market can only function if there is a level playing field for its operators, the overriding principle of EEA law is **homogeneity**. On the legislative level, homogeneity is secured by the EEA Joint Committee which takes over new EEA relevant EU legislation. When such legislation is drafted, the EFTA States have participatory rights («decision shaping», Article 99 ff. EEA). They may refuse to take over new EU law provided that they speak with one voice («collective opting out», Articles 93, 102 EEA). On the judicial level, homogeneity is secured by the two EEA courts, the ECJ and the EFTA Court. EEA law is an integral part of EU law.[271] As far as its application in the EFTA pillar is concerned, the EFTA Court under Article 6 EEA is bound to **follow** old ECJ case law, i.e. case law rendered before the date of signature of the Agreement (2 May 1992). According to Article 3(2) SCA, it shall **take into account** new ECJ case law. In practice, the EFTA Court has qualified this politically important distinction. On the other hand, there is no written rule which would oblige the ECJ to take account of EFTA Court case law. But the ECJ and its Advocates General as well as the General Court are making an active contribution to judicial homogeneity by **referencing EFTA Court case law** if the latter has been breaking new ground. ECJ President Vassilios Skouris has summarized the ECJ's attitude in this respect with the following words:

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269 Robert Uerpmann, International Law as an Element of European Constitutional Law, International Supplementary Constitutions, Jean Monnet Working Paper 9/03, 45, <http://centers.law.nyu.edu/jeanmonnet/archive/papers/03/030901–02.pdf> visited 25 June 2012.

270 See the speech of the first president of ESA, Knut Almestad, at the inaugural session of the EFTA Court on 4 January 1994, [1994–95] EFTA Court Report, 177; and most recently the presentation of Gianluca Grippa, Head of the EFTA Desk in the European External Action Service, The EEA institutional framework: Special case or possible model?, EFTA Court 2012 Spring Conference of 14 June 2012, on file with the author.

271 See the General Court's judgment in Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997] ECR, II-39, paragraph 49.

> «[I]gnoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA agreement which is homogeneity.»[272]

The **types of court procedure** in the EFTA pillar largely correspond to the ones in the EU pillar, the most important ones being the infringement procedure, the preliminary ruling procedure and the nullity procedure.[273] EEA law is much closer to supranational EU law than to public international law. This manifests itself not least in the fact that the EFTA Court uses essentially the same **methods of interpretation** as the ECJ. They include, as the case may be, dynamic interpretation. Dynamic interpretation is not limited to cases in which the EFTA Court has to fill a gap in order to live up to the homogeneity principle.[274] The EFTA Court may also feel prompted to use an evolutive approach if confronted with a novel legal question which has not been dealt with by its EU sister court.[275]

III. Current trends in international and European law

1. Judicialization

a. General

aa. Disputes under international agreements may concern **public and/or private actors**.[276] They arise from disagreement concerning a matter of fact, law

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272 Vassilios Skouris, The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions, in: Carl Baudenbacher/Per Tresselt/Thorgeir Örlygsson (eds.), The EFTA Court Ten Years On, Oxford and Portland Oregon 2005, 123, 125. See with regard to the «unique nature» of this dialogue most recently Opinion of Advocate-General *Verica Trstenjak* of 5 July 2012 in Case C-300/10 *Vítor Hugo Marques Almeida v Companhia de Seguros Fidelidade-Mundial SA*, nyr.

273 See Articles 108(2) EEA and 31 ff. of the Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA Court Agreement).

274 See in this respect Case E-4/04 *Pedicel AS v Sosial- og helsedirektoratet* [2005] EFTA Court Report 2005, 1, paragraph 28.

275 See, e.g., Case E-3/00 *ESA v Norway* («Kellogg's») [2000–2001], 73 ff.; concerning the EFTA Court's methods of interpretation in general Carl Baudenbacher, Zur Auslegung des EWR-Rechts durch den EFTA-Gerichtshof, in: Gerda Müller/Eilert Osterloch/Torsten Stein (eds.), Festschrift für Günter Hirsch zum 65. Geburtstag, München 2008, 27 ff.; with regard to functional interpretation the Order of the President in Case E-16/10 *ESA v Iceland* («Icesave») of 23 April 2012, not yet reported, paragraph 33.

276 See with regard to the following UN Office of Legal Affairs Codification Division, Handbook on the Peaceful Settlement of Disputes between States, New York 1992 (OLA/COD/2394); John G. Merrills, International Dispute Settlement, 3rd ed., Cambridge 1998; Charles Manga Fombad, Consultation and negotiation in the pacific settlement of international disputes, African Journal of International Comparative Law, 1(4) Dec. 1989, 707, 708; Rainer J. Schweizer, Die schweizerischen Gerichte und das europäische Recht (fn 251), 655 ff.; Anne Peters, International Dispute Settlement: A Network of Cooperation Duties, 14 EJIL, 1 ff. (2004); the contributions of Ruth MacKenzie, Wilhelmina Thomassen, Ernst-Ulrich Petersmann, Eric A. Posner, Merit E. Janow, Georg Ress, Peter Jann, Frank Montag, Marco Bronckers, Jean-Paul Costa, C.B., Giorgio Sacerdoti,

or policy in which a claim or assertion of one party is met with refusal, counterclaim or denial by another. States or state entities, intergovernmental organizations, natural and legal persons, and NGOs may be involved. The tools available for the resolution of international disputes are commonly divided into two groups:

bb. On the one hand, there are **diplomatic** and **political means** such as negotiation, mediation and conciliation. Negotiation is the process by which governments discuss, adjust and settle their differences in the exercise of their power to define their relations with one another.[277] Consultation describes the formal or informal, ad hoc or permanent, bilateral or multilateral discussions between states. Conciliation is defined as a means that settles disputes through an organ that enjoys the confidence of the parties and possesses no (political) authority of its own. It examines the relevant aspects of the dispute and proposes non-binding terms of settlement.

Diplomatic dispute resolution is often explicitly provided for by **international treaties**. In cases of conflict, an ad hoc joint committee is convened. In other words, such committees are formed in a case whose facts have occurred; there are no pre-existing rules on evidence and on law; bodies are acting behind closed doors in order to secure confidentiality; they are under no obligation to decide and under no obligation to state reasons; there is no doctrine of precedent whatsoever; there is little legal certainty; there is a lack of guarantees of procedural rights. The players are, as a matter of principle, governments, but some associations may have access to the talks; there is a strong element of consensus, but also of political and economic might. Enforcement in most cases is secured by force or economic power (safeguard measures, retaliation).

Diplomacy was the classic dispute resolution mechanism in times when only states were deemed to be subjects of public international law. Diplomats are **state agents**; they act upon instruction. In the *Mavrommatis Palestine Concessions* case, the Permanent International Court of Justice held that «the question of the importance and chances of success of diplomatic negotiations is essentially a relative one … No general and absolute rule can be laid down in this respect.»[278]

Allan Rosas, Miguel Poiares Maduro, Hjalte Rasmussen, Christiaan Timmermans, Ian S. Forrester, J. Clifford Wallace in: Carl Baudenbacher/Erhard Busek (eds.), The Role of International Courts, Stuttgart 2008; Didier Pfirter, Diplomatic Conflict Resolution, in: Carl Baudenbacher (ed.), Dispute Resolution, Stuttgart 2009, 21 ff.; Sven Norberg, Disputes in Intergovernmental Economic Relations of a Traditional Character and those with Supranational Mechanisms, Respectively, in: Carl Baudenbacher, Dispute Resolution, Stuttgart 2009, 43 ff.; Christian Etter, Precedent in International Trade Negotiations, in: Carl Baudenbacher/Simon Planzer (eds.), International Dispute Resolution Vol. 3, Stuttgart 2011, 85 ff.

277 John G. Merrills (fn 276), 8.

278 Sr. A, 1924, No. 2, 13.

cc. The other means to resolve international disputes are arbitration and court adjudication.[279] These mechanisms are chosen when the parties are looking for a binding decision. In both cases, they lose control of the course of the proceedings. **Arbitration** is less formalised than court adjudication. It takes place *ad hoc*, i.e. after the facts of a case have occurred. The parties are equally represented (parity). The goal is not primarily to reach a decision finding in favor of one party and thereby against the other party, but settlement, i.e. creating peace. This means that the losing party will, as a matter of principle, be able to save its face to a greater extent than in court adjudication. In the late 18th and 19th century, states increasingly reverted to arbitration as a dispute resolution mechanism. In arbitration, each state appoints an agent. The agents decide on a tie-breaking chairperson. The panel decides after hearing the pleas of the states' attorneys. Rulings by arbitration tribunals are in the same way **binding** as decisions of courts. It is therefore correct to speak of adjudication by arbitrators. Parties have decisive influence on the composition of the tribunal, on the procedure, and on the applicable law. Difficulties may arise in three-person panels when the so-called party arbitrators believe that they are some sort of representatives of those who have nominated them. This places a special burden on the third arbitrator, commonly referred to as chairperson or umpire. Arbitration tribunals have no permanent character. Experience shows, however, that they may be replaced by a permanent international court at a later stage of development or that a permanent court of appeal may be established before which awards of the arbitration tribunals may be challenged. See infra, D. III. 2. a gg.

Today, one must distinguish several types of arbitration depending on the parties involved: (1) The modern era of **state – state arbitration** is usually dated to the arbitrations between Great Britain and the United States under the 1794 Jay Treaty of Amity, Commerce and Navigation. They concerned, in particular, territorial disputes unresolved by the Revolutionary War. Article 5 of the Jay Treaty stated that one arbitrator shall be named by His Majesty and one by the President of the United States, and the said two commissioners shall agree on the choice of a third. State-state arbitration reached its peak in the 19th and early 20th century. Arbitral commissions and sole arbitrators resolved tens of thousands of international law cases arising due to wars, insurrections, revolutions etc. In the second half of the 20th century, inter-state arbitration has declined. At the same time, numerous international courts were established.[280] (2) The most important example of the second type of arbitration, **state-private party (mixed) arbitration**, is international investment arbitration. Unlike trade

279 For the sake of completeness, it may be added that disputes arising from international treaties may also be resolved by force.

280 See Carl Baudenbacher/Frank Bremer, Arbitration in Public International Law Disputes, in: Carl Baudenbacher (ed.), Dispute Resolution, Stuttgart 2009, 265 ff.

which consists in an exchange of goods, investment is a long term phenomenon. Investors are therefore more vulnerable than traders, which is why international agreements aim at protecting them. Investment arbitration has several advantages: Investors can avoid proceedings before the domestic courts of the host country which is unpopular because of the *Calvo* doctrine. According to this doctrine, which is named after the 19th century Argentinian jurist CARLOS CALVO, investors are required to waive protection by their home government and to exclusively rely on remedies available in the courts of the state of investment. This amounts to national treatment.[281] It is also said that investment arbitration is in the interest of host countries because it creates an improved investment climate. There are bilateral and multilateral investment treaties. The most important forum for international investment arbitration is provided by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (**ICSID Convention**). Currently, there are 158 signatory states, 148 of which have also deposited their instruments of ratification, acceptance or approval. Switzerland became a member on 14 June 1968.[282] ICSID arbitration tribunals are competent to rule on disputes between a Member State and a national of another Member State originating from an international investment.[283]
(3) **Private-private (commercial) arbitration** aims at deciding conflicts between private parties based on a private agreement. Arbitrators act as an alternative to state courts. It is assumed that in international cases, arbitration tribunals are beneficial to the parties due to the following features: confidentiality, special knowledge of the arbitrators, neutrality (as opposed to a national court), finality of the award, flexibility of the procedure, and enforcement in foreign countries under the 1958 New York Convention.[284]

dd. With regard to **court adjudication**, the following remarks may be made: International economic law may first of all be applied by national courts of the Contracting Parties (Member States) to international (supranational) agreements. Whether national courts have jurisdiction depends on whether the provisions of the agreement in question produce direct effect in the legal order of the country concerned. In the European Union, direct effect follows from EU law if certain conditions are fulfilled.[285] What is more interesting in the present context is that in the 20th century, there has been what is called a **proliferation of**

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281 See, for example, CÉSAR AUGUSTO BUNGE/DIEGO CÉSAR BUNGE, The San Jose de Costa Rica Pact and the Calvo Doctrine, 16 Int'l Am. L. Rev. 13, 25 (1984).

282 <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main> visited 12 June 2012.

283 See CHRISTOPH H. SCHREUER, The ICSID Convention. A Commentary, 2nd ed., Cambridge 2009; ANNE VAN AAKEN, Primary and secondary remedies in international investment law and national state liability: A functional and comparative view, in Stephan Schill, ed. International Investment Law and Comparative Public Law, Oxford 2010, 721 ff.

284 See with regard to commercial arbitration, for example, MARC BLESSING, Introduction to Arbitration – Swiss and International Perspectives, Basel/Frankfurt am Main 1999.

285 Infra, D. III. 2. b.

international courts.[286] In an ever increasing number of areas, it was felt that national courts were not independent enough to deal with the conflicts arising from treaties in a satisfactory way. International courts (for the present purposes, the notion includes the supranational and quasi-supranational courts of the EU and the EEA/EFTA) were created after the three big revolutions in the 20th century: The collapse of the old world order in 1918, the end of World War II in 1945 and the end of the Cold War in 1989. The first international court was the Permanent Court of International Justice (PCIJ), a world court established in 1922. After World War II, the PCIJ was succeeded by the International Court of Justice (ICJ). The ICJ is not an economic law court, but its legal framework was taken into account when other international (and European) courts were set up. Meanwhile, there are other global courts such as the WTO Appellate Body, the International Tribunal for the Law of the Sea (ITLOS), and (outside the sphere of economic law) the International Criminal Court (ICC). Common courts of Contracting States have become even more widespread in the context of regional integration, whereby **Europe** constitutes the most important example with the courts of the European Union and of the EEA/EFTA in Luxembourg on the one hand and the European Court of Human Rights (ECtHR) in Strasbourg on the other.

International and supranational courts are established before the facts of a case have occurred, i.e. on a **permanent** basis and not *ad hoc*; they decide under pre-existing rules concerning evidence and law; they are under an obligation to decide and under an obligation to state the reasons; in most cases there is transparency which means that the forum is open to criticism by scholars and the public. International and supranational courts tend to treat their own case law as (some sort of) **precedent** which enhances legal certainty. It does not follow from this that courts are usually not prepared to overrule their earlier case law. Overruling will or should, however, require careful reasoning.[287] In international and supranational courts, judges cannot be removed during their term of office. Furthermore, these courts operate under special procedural guarantees («due process»), and their doors are, in principle, open to the public.

ee. Some international agreements are highly judicialized, while others are less or not at all judicialized. There are also courts which are highly legalized and others which are rather politicized. One may speak of a continuum. In

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286 See, in particular, Cesare Romano, NYU Journal of International Law and Politics 1998/1999, 709 ff.; Philippe Sands/Ruth Mackenzie/Yuval Shany (eds.), Manual on International Courts and Tribunals, London 1999.

287 See the contributions of Franz Werro, Markus Müller-Chen, Sir Richard Plender, Ilka Klöckner, Lawrence Sager, Daniel Hochstrasser, Alan Rau, Susan Franck, Paul Mahoney, Lucius Caflisch, Christine Kaddous, John Temple Lang, Michael Waibel, Rachel Brewster, Akio Shimizu, Edwin Vermust and Juhi Sud, in: Carl Baudenbacher/Simon Planzer (eds.), The Role of Precedent, International Dispute Resolution Vol. 3, Stuttgart 2011.

a highly legalized international court, judges enjoy a relatively high degree of **independence**; they are neither arbitrators nor are they government representatives. Further elements of legalization are access of private parties to the court, direct effect of the respective treaty provisions and of the court judgments in the legal orders of the Contracting Parties, participation rights of individuals and organizations in the court proceedings and the binding effect of decisions. The more private parties have access to international and supranational courts, the less they are dependent on diplomatic protection.

ff. The activity of international and supranational courts may conflict with the **sovereignty claims** of the Contracting States. More legalized courts means more transfer of sovereignty by states to the respective international or regional organization. This shift of sovereignty is often an ongoing process. Once a common court is firmly established, it tends to take more competences.

gg. In practice, diplomacy, ad hoc arbitration and adjudication by a common court of the Contracting States may be combined, the most important example being the **WTO** dispute settlement mechanism.[288] The WTO model with an ad hoc panel rendering a first instance opinion and a permanent judicial institution hearing appeals has been taken over in the **Mercosur** with the creation of the Permanent Review Tribunal.[289] *Ad hoc* arbitration is also available under **NAFTA**[290] and **WIPO** rules.[291] Finally, there is a proposal to establish a permanent appeals tribunal for **ICSID** disputes.[292]

b. EU/EEA law in particular

The most legalized international/supranational court in the world is the **ECJ**. Its judges enjoy a relatively high degree of independence. Citizens and economic operators have broad access to justice as a consequence of a comprehensive system of legal remedies. The ECJ's rulings are legally binding. Due process and transparency are guaranteed to a high degree. There is an appeal system in nullity actions with the General Court as a first instance court and the ECJ as the second instance (Article 256 TFEU). The ECJ has developed its own **rules of interpre-**

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288 Infra, E. VI. 3 b. and c.

289 See with regard to the Mercosur Permanent Review Tribunal Raúl Emilio Vinuesa, Enforcement of Mercosur Arbitration Awards Within the Domestic Legal Orders of Member States, 40 Tex. Int'l L.J. 425, 438 ff.

290 See, for example, Patricia Isela Hansen, Judicialization and Globalization in the North American Free Trade Agreement, 38 Tex. Int'l L.J. 489.

291 <http://www.wipo.int/freepublications/en/arbitration/919/wipo_pub_919.pdf> visited 10 June 2012.

292 See Christian J. Tams, An Appealing Option? The Debate about an ICSID Appellate Structure, Essays in Transnational Economic Law, No. 57/June 2006, Martin-Luther-University Halle <http://www.telc.uni-halle.de/sites/default/files/altbestand/Heft57.pdf> visited 2 June 2012; Donald McRae, The WTO Appellate Body: A Model for an ICSID Appeals Facility?, J Int. Disp. 2010, 371 ff.

tation and it follows some sort of doctrine of precedent. However, no dissenting opinions may be made public. Moreover, the ECJ (as the ECtHR).

The **EFTA Court** has been modeled on the template of the ECJ and is a highly legalized court, too.

2. *Privatization*

a. *General*

Traditionally, **Nation States** and **international organizations** are deemed to be the subjects of international law. Important economic law examples are the World Trade Organization WTO and the North American Free Trade Agreement NAFTA. Provisions of these multilateral treaties cannot be invoked by citizens and business operators in the courts of the Contracting States.[293] However, as mentioned above,[294] non-state actors play a role in modern international and European law. With regard to international law, University of Virginia international law professor PAUL B. STEPHAN has recently stated:

> «The old understanding of international law as something created solely by and for sovereigns is defunct. Today the production and enforcement of international law increasingly depends on private actors, not traditional political authorities. As with other public services that we used to take for granted [...] privatization has come to international law.»[295]

This means that private operators, business and labor associations and NGOs which have been founded by private individuals have access to both the **creation** and the **enforcement** of international law. As Professor STEPHAN explains, privatization does not mean that the state is no more in demand as an actor. First of all, states are centrally involved in the making of international law. But also enforcement of most rules, even of those created by private entities and those enacted with the participation of business operators and NGOs, is still to a considerable extent in the hands of (domestic or international) judicial bodies. It must therefore be concluded that states still seem to have the most complete sets of rights and obligations. Private parties, however, must ever more be taken into consideration, in particular when it comes to international dispute resolution.

b. *EU/EEA law in particular*

The community of law nature of European integration also conveys a special role to citizens and economic operators who, together with the competent or-

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293 See with regard to the WTO infra, E. VI. 3. c. ee.; with regard to NAFTA *Alan C. Swan*, NAFTA Chapter 11- «Direct Effect» and Interpretive Method: Lessons from Methanex v. United States, 64 U. Miami L. Rev. 21 ff. (2009).

294 Supra, D. I., II.

295 PAUL B. STEPHAN, Privatizing International Law, 97 Va. L. Rev. 1573 (2011).

gans of the Union, act as **law enforcers**. An individual plaintiff takes a case to court in order to defend his or her private interest, but by doing so he or she at the same time benefits the *bonum commune*.[296] The number of EU law enforcers thereby rises beyond measure. EU law is in fact the most **judicialized** body of international law and the ECJ is the most **legalized** international (supranational) court in the world.

As a **two level legal order**, the EU legal order is particularly vulnerable. Member States may violate their obligations under the Treaties, in particular the fundamental freedoms, they may not or not correctly implement directives or may not comply with the state aid rules. It may also happen that courts of last resort do not live up to their obligation to refer cases to the ECJ under the third paragraph of Article 267 TFEU. The uniqueness of the EU manifests itself in the **system of remedies** which aim at securing compliance and thereby the effectiveness of EU law. Not only the European Commission acts as a law enforcer, but also citizens and economic operators. By defending their rights flowing from EU law, they at the same time protect the public interest. In a broad sense, one can call them private attorneys general. Consequently, there is rather broad access to justice for individuals and economic operators. They may lodge a complaint with the **Commission** hoping that the latter will bring an infringement action against the Member State concerned under Article 258 TFEU, or bring a lawsuit in a national court and eventually ask the judge to **make a reference** to the ECJ under the preliminary ruling procedure (Art. 267 TFEU). Obviously, they may also combine the two options. The preliminary ruling procedure is a particularly strong enforcement tool because the ECJ has acknowledged direct effect and primacy of EU law as well as state liability. These principles, aiming at securing compliance with EU law, follow from EU law itself. Whether a Member State adheres to a dualist or a monist approach in its internal law is, from the perspective of the Union, irrelevant. In practice, it depends, however, on the Member States and their courts whether and to what extent provisions of European law are being enforced. Unlike in the US, there is no EU judiciary in the Member States. National courts are at the same time European courts and they are expected to act accordingly.[297]

The preliminary ruling procedure is a particularly effective tool for citizens and businesses to defend their rights flowing from EU law, since the ECJ has acknowledged that provisions of EU primary law, of regulations and of directives may produce **direct effect** in the legal orders of the Member States if they are unconditional and sufficiently precise.[298] For provisions of directives to

296 See with regard to the theoretical aspects of this phenomenon supra, B. VII. 1.

297 See on that point the ECJ's Opinion 1/09 on the Agreement on the European and Community Patents Courtof 8 March 2011, nyr,, paragraphs 66, 72, 79 ff.

298 Cases 26/62 *Van Gend & Loos*, [1963] ECR 1; 34/73 *Variola v Amministrazione delle Finanze* [1973] ECR 98; 71/74 *Van Duyn* [1974] ECR 1337; 8/81 *Becker* [1982] ECR 53.

have direct effect, the period for implementation must have expired and the norm in question must deal with a vertical situation between a Member State and an individual or economic operator.[299] Directly effective provisions of EU law take **precedence** over conflicting rules of the law of the Member States.[300] This means that private operators may invoke provisions of EU law in the courts of the Member States. The ECJ has thereby built a bridge to the citizens and market operators and has to a certain extent outsmarted the Member States' governments. Member States who have violated EU law are moreover obliged to make good the loss of individuals and economic operators if three conditions are fulfilled: (1) The violated provision must confer rights on individuals. (2) The breach must be sufficiently serious. (3) There must be a causal link between the breach and the damage sustained.[301] The principle of **state liability** applies not only to legislative and administrative wrong-doing, but (in principle) also to breaches of EU law by national courts.[302] National courts are furthermore obliged to interpret national law in conformity with EU law as far as possible.[303]

By acknowledging said principles, the ECJ has built a **bridge to citizens and economic operators**. In the framework of the preliminary ruling procedure, it has thereby to a certain extent outsmarted the Member States' governments. The focus is not on state sovereignty, but on the sovereignty of the market actors. The **national courts** are important actors of enforcement of EU law. The ECJ stated in its Opinion 1/09 on the draft agreement on the European and Community Patents Court that «it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law.»[304]

The ECJ has moreover acknowledged that **fundamental rights** are part of EU law, starting with its judgment in Case 29–69 *Stauder v. City of Ulm*.[305] Under the Treaty of Nice, fundamental rights were recognized in a Charter which was, however, deemed to be not legally binding. The Treaty of Lisbon, which took effect on 1 December 2009, incorporated the Charter into primary EU

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299 Cases 152/84 *Marshall* [1986] ECR 723; C-91/92 *Faccini Dori* [1994] ECR I-3325.

300 Case 6/64 *Costa v ENEL* [1964] ECR 585.

301 Cases C-6 and 9/90 *Francovich* and *Bonifaci v. Italy*, [1991] ECR I-5357; C-46/93 and C-48/93 *Brasserie du Pêcheur v. German and Factortame*, [1996] ECR I-1029.

302 ECJ C-224/01 *Köbler v Austria* [2003] ECR, I-10239.

303 ECJ C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*, [1990] ECR, I-4135, paragraphs 8 f.;Katrine Sawyer, The Principle of ‹*interprétation conforme*': How Far Can or Should National Courts Go when Interpreting National Legislation Consistently with European Community Law? <http://slr.oxfordjournals.org/content/28/3/165.extract> visited 2 June 2012.

304 ECJ Opinion 1/09 on the Agreement on the European and Community Patents Courtof 8 March 2011, (fn 297), paragraph 68.

305 [1969] ECR 419.

law. This development has accentuated the privatization of European law. Fundamental rights are moreover increasingly interfering with economic law.[306]

Under the EEA Agreement, the Commission is responsible to monitor compliance of the EU States whereas the EFTA Surveillance Authority has the same task vis-à-vis the EEA/EFTA States, The General Court of the European Union held in its landmark judgment in Case T-115/94 *Opel Austria* that provisions of **EEA law** are capable of producing direct effect in the EU pillar.[307] The EFTA Court has for its part recognized quasi-direct effect and quasi-primacy. Quasi-direct effect means that citizens and businesses may invoke in national courts provisions of EEA law which have been implemented into the national legal orders. Such provisions take precedence over conflicting national law (quasi-primacy).[308] National courts are furthermore obliged to construe national law as far as possible in compliance with EEA law.[309] Most importantly, the EFTA Court held that **state liability** is part of EEA law in Case E-9/97 *Sveinbjörnsdóttir* and the ECJ endorsed this finding in an *obiter dictum* in Case C-140/97 *Rechberger*.[310] These principles follow from EEA law, not from the domestic legal orders of the EEA/EFTA States. According to settled case law, the provisions of the EEA Agreement are to be interpreted in the light of **fundamental rights**. The provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights.[311]

306 Infra, E. V. 9. a.

307 Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997] ECR, II-39, paragraph 102.

308 Cases E-1/94 *Restamark*, [1994–1995] EFTA Court Report, 15; E-1/01 *Einarsson*, [2002] EFTA Court Report, 1. See HANS PETTER GRAVER, The Effects of EFTA Court Jurisprudence on the Legal Orders of the EEA/EFTA States, in: Carl Baudenbacher/Per Tresselt/Thorgeir Örlygsson (eds.), The EFTA Court Ten Years On (fn 272), 79, 96 ff.; ID., Supranationality and National Legal Autonomy in the EEA-Agreement, ARENA Working Papers WP 00/23 <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/workingpapers2000/wp00_23.htm> visited 12 June 2012, 3; ERNST-ULRICH PETERSMANN, De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement, 6 Loy. U. Chi. Int'l L. Rev. 209, 226 f.

309 Cases E-4/01 *Karlsson* [2002] EFTA Court Report, 240; E-1/07, *Criminal proceedings against A*, [2007] EFTA Court Report, 246.

310 See Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland* [1998] EFTA Court Report, 95, paragraphs 44 ff., 60; Case C-140/97 *Rechberger* ECR [1999], I-3499, paragraph 39; concerning EEA state liability for judicial wrongdoing in particular E-2/10 *Þór Kolbeinsson v the Icelandic State* [2009–2010] EFTA Court Report, 234, paragraph 77.

311 Cases E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 23; E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49; E-15/10 *Posten Norge v EFTA Surveillance Authority*, judgment of 18 April 2012, paragraphs 85 ff.

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.»[312] 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.[313] 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.[314] Financial service providers from third countries lack a **European passport** which is based on the license in the country of origin.[315] 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.[316]

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.»[317] 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

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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> visited 12 June 2012.

316 <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.»[318] 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.»[319] 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).[320] 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.[321]

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.»[322] 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.»[323] Section 301 Trade Act was the basis for these actions.[324] At the same time, the WTO dispute settlement system has **limited the leeway** for US unilateral action.[325]

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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 19th century.[326] 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.»[327] 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.»[328]

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

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> 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.

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.»[329]

International **comity** should guide states and in particular judges in using restraint when asserting jurisdiction.[330] 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.[331] It may be addded 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.[332] 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.[333] 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.[334] 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*,[335] that «[t]

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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.»[336]

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.»[337]

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.[338] 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.[339]

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

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336 10 U.S. 443, 463 (1994).

337 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.

338 Infra, E. V. 3.

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

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.[340]

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.[341] 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-

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340 Matthias Oesch, Die Europäisierung des schweizerischen Rechts, nccr trade regulation, Working Paper No 2011/05| October 2011/70 <http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3873/e4378/e6749/oesch_europaeisierung_nov-11_ger.pdf> visited 2 May 2012, 10 f., and the sources cited in fn 28.

341 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.[342] 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,[343] and the very idea of enacting special rules for corporations that are listed on a stock exchange is of American origin.[344] 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 clamed 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.[345] 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.[346] Kahn-Freud believed that law cannot be separated from the purpose or the circumstances in which it has been created.[347] 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.[348]

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.[349] 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> 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

presentatives 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.»[350]

The ECJ does not make reference to the U.S. Supreme Court, but its **Advocates General** do.[351] 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.»[352] Advocate General RUIZ-JARABO COLOMER had referred to the judgment of the Supreme Court, but advised the ECJ not to follow it.[353] 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.[354] 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).

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

351 See PETER HERZOG, United States Supreme Court Cases in the Court of Justice of the Euro pean 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.

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

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

354 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.[355] 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.»[356]

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

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

356 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.[357] 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.[358] 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.[359] 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.[360] 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.[361] 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.[362] 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.[363]

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.[364] 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.[365] 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.[366] Republican members of the House of Representatives called for the **impeachment** of judges who «substitute foreign law for American law or the American Constitution».[367] 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.[368] 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.[369] 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.[370] 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.[371] 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.»[372]

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.[373] 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.[374] 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-

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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.[375]

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.

E. Switzerland as a Party of Treaties with Economic Law Relevance

I. Introduction

According to Article 54(1) of the Federal Constitution (FC) foreign relations are the responsibility of the Confederation. The instruments of foreign policy are, in particular, international (bilateral or multilateral) treaties, the tools of diplomacy and internal acts with foreign relevance.[376] The responsibility for foreign relations lies, as a matter of principle, with the **Federal Council**, but the Federal Assembly has the right to participate in shaping foreign policy and supervise the maintenance of foreign relations. International negotiations are conducted by the Federal Council. The Federal Assembly has to approve inter-

375 Carl Baudenbacher, Judicial Globalization (fn 352), 523 f.

376 See Bernhard Ehrenzeller, in Bernhard Ehrenzeller/Philippe Mastronardi/Rainer J. Schweizer/Klaus A. Vallender (eds.), Die Schweizerische Bundesverfassung, Kommentar, 2nd ed., Zurich/St. Gall 2008, Article 54; Giovanni Biaggini (fn 121), Article 54, paragraphs 12 ff.

national treaties.[377] As compared to the governments of other states, the Federal Council is, for a number of reasons, weak.[378] It must, in particular, observe Articles 140 and 141 FC. The former requires a **mandatory referendum** for the accession to supranational communities, while the latter subjects international treaties that are of unlimited duration and may not be terminated or provide for accession to an international organization or contain important legislative provisions or whose implementation requires the enactment of federal legislation to an **optional referendum**.[379]

II. Status of treaties in domestic legal orders

1. General

There are two doctrines about the relationship of international law and domestic law and thereby about the status of international law in the domestic legal orders of nation states and international organizations. According to **monism**, international law and domestic law form one legal order. An international treaty becomes part of domestic law with its ratification. No incorporation by a special act of parliament is needed. Whether a norm of international law takes precedence over domestic law is for the domestic legal order to decide. An international law provision may be invoked in domestic courts provided it is self-executing. In such a case the provision has direct effect.[380] Where conflicts arise, international law takes precedence over domestic law. **Dualism**, on the other hand, perceives international law and domestic law as two separate bodies of law. International law is not seen as being able to produce by itself any effect in the municipal legal orders. International law may be invoked in domestic courts if it has been incorporated into domestic law. In short, «[m]onism looks outward to the structure and content of international law; dualism looks inward to domestic standards and processes.»[381] It is for the legal order of the munici-

377 Articles 184 and 166 FC.

378 Supra, B. IV.

379 On 17 June 2012, the Swiss people have rejected a popular initiative which aimed at extending the mandatory referendum to international treaties in «important fields» and to international treaties which entail certain expenditures (<http://mobile.nzz.ch/aktuell/schweiz/schweiz-abstimmung-eidgenoessische-1.17249182>) visited 5 July 2012.

380 See, e.g., Helen Keller, Rezeption des Völkerrechts. Eine rechtsvergleichende Studie zur Praxis des U.S. Supreme Court, des Gerichtshofes der Europäischen Gemeinschaften und des schweizerischen Bundesgerichts in ausgewählten Bereichen, Berlin/Heidelberg/New York/Barcelona/Hong Kong/London/Mailand/Paris/Tokio 2003, 341 ff.

381 Curtis A. Bradley, *Breard*, Our Dualist Constitution, and the Internationalist Conception, 51 Stan. L. Rev. 529 (1999); see also Melissa A. Waters, Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties, 107 Colum. L. Rev. 628, 639 (2007); John H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 Am. J. Int'l L. 310, 320 (1992) (United States is a hybrid monist-dualist system); John F. Coyle, Incorporative Statutes and the Borrowed Treaty Rule, 50 VAJIL 655 (2010); Christine Amrhein-Hofmann, Monismus und Dualismus in den Völkerrechtslehren, Berlin 2003.

pal system and for its actors to decide whether there is internal effect. Few countries are said to be monist: Argentina, France, The Netherlands, Switzerland and Liechtenstein. The vast majority of countries, in particular Germany, the UK and the other Commonwealth countries as well as the Nordic countries adhere to dualism. However, the courts may use constructions like the principle of treaty-friendly interpretation or the principle that the domestic law is presumed to be in conformity with international law, which make provisions of international law effective in the domestic legal order. To give an example: Norwegian courts will interpret domestic law as far as possible in a way as to conform with treaties even if they have not been incorporated into the Norwegian legal order by the legislature.[382]

In reality, things may, however, be rather intricate. The U.S. is a good example. Article VI. Clause 2 of its Constitution states that

> « ... all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.»

One could deduce from this that the U.S. adheres to monism, and in fact many commentators have done that.[383] Others have claimed that from an originalist point of view, the Constitution does not permit international treaties to directly regulate the conduct of private operators without implementation by the legislature.[384] Irrespective of this doctrinal dispute, one must acknowledge that **recent American practice** has little or nothing to do with monism. In order to remove any doubts, Congress has, since 1985, included in the legislation implementing any trade agreement a provision that bars private enforcement.[385] It is therefore fair to state that the prevailing view since World War II has been that the U.S. is a dualist country, probably with some monist elements.[386] The statement «that all or most treaties categorically or presumptively lack the force of domestic law and thus, unless implemented by statute, can be disregarded by citizens, the courts, and other officials responsible for enforcing domestic law»[387] may be controversial, but it comes pretty close to describing reality. Professor Carlos Manuel Vázquez has sarcastically called this attitude «laughing at treaties.»[388]

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382 See ECtHR Case of *E. v. Norway* (12/1989/172/228).

383 Carlos Manuel Vázquez, Laughing at Treaties, 99 Colum. L. Rev. 2154, 2169 ff. (1999) and sources cited.

384 John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955 (1999).

385 See the list put together by Paul B. Stephan, Privatizing International Law, 97 Va. L. Rev. 1573, 1651 (2011), fn 186.

386 See Curtis A. Bradley (fn 381), 531, with references.

387 That is how Professor Carlos Manuel Vázquez has summarized the content of an article by Professor Yoo (Laughing at Treaties [fn 383]).

388 Carlos Manuel Vázquez (fn 383).

2. *The Swiss approach*

Article 5(4) FC states under the heading «[r]ule of law»: «The Confederation and the Cantons shall respect international law.» Switzerland has always been deemed a **monist country**.[389] This means firstly that no incorporation of international law is needed. It does not, however, imply that citizens and economic operators can invoke any norm of international law before Swiss courts and authorities. Whether a provision has direct effect depends on whether its content is **sufficiently precise and clear** to form the basis of a decision in an individual case, in other words whether it is justiciable.[390] As far as the **rank** of international law in the Swiss legal order is concerned, the Federal Constitution is not entirely clear. The Federal Supreme Court held in a number of cases that international law takes precedence over federal law. However, there are also cases in which the *lex posterior* rule was applied. It seems that the European Human Rights Convention enjoys a special status, but there is no absolute legal certainty.[391] In order to avoid the hierarchical problems and thereby conflicts between domestic law and international law, the principle of **conform interpretation** has been developed. It is based on the assumption that the legislature did not want to pass legislation contrary to international law. A common practice is interpretation in light of the case law of the European Court of Human Rights.[392]

With regard to the question of **direct effect**, early case law appears to have been quite liberal.[393] But before World War I and during the interwar period, there were cases in which a dualist view prevailed. It has rightly been said that this fallback can only be explained by the *Zeitgeist*.[394] After World War II, the Federal Supreme Court usually applied international norms directly without thoroughly examining their exact texture.[395] Provisions of double taxation

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389 See, e.g., Nicolas Michel, L'imprégnation du droit étatique par l'ordre juridique international, in: Daniel Thürer/Jean-François Aubert/Jörg Paul Müller (eds.), Verfassungsrecht der Schweiz, Zurich 2001, § 4 paragraphs 12 ff.; Helen Keller, Rezeption des Völkerrechts (fn 380), 344 ff.; Juliane Kokott, Die Schweiz und Europa – unter besonderer Berücksichtigung der Personenfreizügigkeit, in: Hans-Joachim Cremer/Thomas Giegerich/Dagmar Richter/Andreas Zimmermann (eds.), Tradition und Weltoffenheit des Rechts, Festschrift Helmut Steinberger, Berlin/Heidelberg/New York/Barcelona/Hongkong/London/Mailand/Paris/Tokio 2002, 771, 779 ff.; with regard to the Federal Constitution of 1874 Dietrich Schindler, Die Schweiz und das Völkerrecht, in: Alois Riklin/Hans Haug/Raymond Probst (eds.), Neues Handbuch der schweizerischen Aussenpolitik, Berne/Stuttgart/Vienna 1992, S. 99 ff.

390 See, e.g., Giovanni Biaggini (fn 121), Article 5 paragraph 28; Rainer J. Schweizer, Die schweizerischen Gerichte und das europäische Recht (fn 251), 623 f.

391 See Helen Keller, Rezeption des Völkerrechts (fn 380), 356 ff.; Giovanni Biaggini (fn 121), Article 5 paragraphs 30 f.

392 See, e.g., Helen Keller, Rezeption des Völkerrechts (fn 380), 365 ff.

393 Infra, E. III.

394 Helen Keller, Rezeption des Völkerrechts (fn 380), 347, with reference to ATF 49 I 188; 59 II 331.

395 ATF 98 Ib 385, 387.

agreements were deemed to be self-executing.[396] The Second Public Law Division of the Supreme Court further accepted direct effect of Article 15 of the Chicago Convention on international civil aviation.[397] The United Nations Convention on Contracts for the International Sale of Goods (CISG) which was prepared by the United Nations Commission on International Trade Law (UNCITRAL)[398] may also be invoked in Swiss courts provided that the parties to a contract have not excluded its application (Article 6).[399]

A momentous deviation from the primacy principle was the 1973 landmark ruling in ***Schubert***. The Austrian national Ernst Schubert who was domiciled in Vienna had been denied the permit to acquire a piece of land in Switzerland based on the Federal Order on the Acquisition of Land by Persons Abroad. He argued that the decision was in violation of the equal treatment obligation under the Swiss-Austrian Residence Treaty of 1875. The Federal Supreme Court held that in the case at hand the Swiss statutory law constituted **lex posterior** which took precedence over the international treaty because the legislature had been aware of the conflict with international law and had eventually approved this conflict. Based on Article 113(3) (now 190) FC, the Federal Supreme Court found itself bound by the clear intention of the legislature.[400] The judgment has been heavily criticized.[401] In fact, the Schubert case law can hardly be reconciled with the primacy of international law. In the meantime, the problem has been resolved with regard to the Member States of the European Union and the other EFTA States. But the Schubert approach cannot be deemed overruled. The second fall from grace occurred when the Federal Supreme Court as the first high court of all the Contracting Parties was called to rule upon the question whether provisions of the 1972 **Free Trade Agreement** (FTA) Switzerland-EEC were able to produce direct effect. The court denied the question in the cases *Stanley Adams* and *Omo*. Both judgments will be extensively dealt with in the section on the FTAs.[402]

University of Zurich Professor HELEN KELLER analyzed the case law and found that it was not the clarity and unconditionality which was decisive for directly applying a norm of international law.[403] What counts is often the result to

396 ATF 84 I 77, 80; 88 I 125, 127 ff.; see furthermore HELEN KELLER, Rezeption des Völkerrechts (fn 380), 348 ff.

397 ATF 125 I 182, 191 *Association du Transport Aérien International*.

398 SR 0.221.211.1.

399 See Article 1(1)(a) CISG.

400 ATF 99 Ib 39, 45. – For the sake of completeness, it may be added that similar constructions have been used by supreme courts of other jurisdictions. See with regard to the U.S. Supreme Court's clear-statement rule HELEN KELLER, Rezeption des Völkerrechts (fn 380), 743.

401 ULRICH HÄFELIN/WALTER HALLER/HELEN KELLER, Schweizerisches Bundesstaatsrecht, 7th ed., Zurich 2008, N 1926; JÖRG PAUL MÜLLER, Wie wird sich das Bundesgericht mit dem Minarettverbot der BV auseinandersetzen?, Jusletter 1. März 2010, 3, 5.

402 Infra, E. V. 7.

403 HELEN KELLER, Rezeption des Völkerrechts (fn 380), 350.

be achieved. In the *Courtet* case, decided by the Federal Social Security Court in 1985,[404] the question arose whether the provisions of an **ILO Agreement** and of the European Order of Social Security were directly applicable. Academic literature was in favor of direct effect of the norms in question. The court denied it. It held that *Schubert* did not apply because there was no evidence that the legislature had deliberately wanted to deviate from the international norm. However, the *travaux preparatoires* showed that Switzerland had not wanted to assume additional obligations. The legislature had not adapted Swiss law after the entry into force of the international obligations. Based on these considerations, the court gave **precedence to the domestic law** over international law which provided for a reduction of the claims in case of negligent causation of invalidity. Firstly, the court denied the question whether the relevant provisions were self-executing and then secondly it held that in a case of conflict between a provision of domestic law and a norm of an international treaty it is for the legislature to draw the necessary consequences in particular in view of the fact that a fundamental principle of Swiss social security law was at stake.[405] After having been criticized, the court overruled its judgment in a later case.[406] The *Courtet* case shows that by denying the self-executing character of an international norm, an open conflict between domestic law and international law can be **concealed**.[407] On balance, it is questionable whether the Swiss legal order can indeed be called a monist order.[408] But then, the distinction between monism and dualism is an academic one. In practice, it is of limited use, also in other jurisdictions.

III. Early treaties

After 1848, Switzerland profited from the free trade movement. **Bilateral trade agreements** were concluded with the major trading partners, the United States in 1850, France in 1864, Austria-Hungary in 1868 and Germany in 1881. The liberal attitude was also visible in the field of free movement of persons. Residence agreements were entered into with Italy in 1868, the United Kingdom in 1855, Austria in 1975, Germany in 1876, France in 1882, and Belgium in 1887.[409] All this had positive effects on the industrialization of the country.[410]

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404 ATF 111 V 201.
405 ATF 111 V 201, 205.
406 ATF 119 V 171, 176 f.
407 Helen Keller, Rezeption des Völkerrechts (fn 380), 352.
408 See also Helen Keller, Rezeption des Völkerrechts (fn 380), 347; Giovanni Biaggini (fn 121), Article 5 paragraph 29.
409 See Helen Keller, Rezeption des Völkerrechts (fn 380), 289 f.; concerning the Residence Treaty with Germany ATF 30 II 574, 578 *(Basler Gesangverein)*.
410 Ulrich Im Hof (fn 36), 115.

Switzerland was also a forerunner of **multilateral activities**. In 1868, the International Telegraph Union chose Berne as its headquarter. So did the Universal Postal Union in 1874 and the Central Office for International Carriage by Rail in 1890. In 1883 and 1886, the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works were adopted. Switzerland was one of the 14 original Member States of the Paris Convention and one of the 8 founding Member States of the Berne Union. These two first modern multilateral IP law conventions provided for the establishment of a secretariat, the so-called «International Bureau». Switzerland was also among the founders of the 1891 Madrid Agreement Concerning the International Registration of Marks and of the 1989 Madrid Protocol. It may be noted in this context that those years are sometimes referred to as the first wave of globalization.[411] For the sake of completeness, it may be mentioned that in 1970, these agreements were subject to the Convention establishing the World Intellectual Property Organization (WIPO)..

In 1882, the Swiss Federal Supreme Court held that the provisions of the **Treaty on Residence** concluded between Switzerland and the German Empire on 27 April 1876 have been elevated to norms of the Swiss legal order. In this context, the court made reference to an 1878 circular *(Kreisschreiben)* of the Federal Council which had reached the same conclusion.[412] Twenty-two years later, the Federal Supreme Court found that the private law provisions of international treaties concluded by Switzerland constituted, according to Swiss understanding, an integral part of the federal civil law. The case concerned the **Berne Convention** for the Protection of Literary and Artistic Works of 9 September 1886.[413, 414] Monism seems to have been an obvious choice for the legal order of a country which saw itself as cosmopolitan.[415] The other international IP treaties, too, were held to be part of Swiss law and applied without much ado.[416]

IV. First half of the 20th century

Switzerland was a founding member of the **League of Nations**. In order to join the League of Nations and to obtain Geneva as a seat, the country made remark-

411 See, e.g., Cornelius Torp, Die Herausforderung der Globalisierung. Wirtschaft und Politik in Deutschland 1860–1914, Berlin 2005, 27 ff.

412 ATF 8 436, 443.

413 ATF 30 II 574, 578 *(Basler Gesangverein)*.

414 See regarding the Berne Convention further ATF 96 II 409, consideration 3 *(The Gold Rush)*, 107 II 57, consideration 2 ff.

415 Helen Keller, Rezeption des Völkerrechts (fn 380), 344, with references.

416 See regarding the Paris Convention ATF 90 II 51, consideration 2; 90 II 316, consideration 2; 98 Ib 180, considerations 1 f.; regarding the regarding the Madrid Agreement ATF 98 Ib 180, consideration 1; 130 III 371, considerations 1.1. and 1.2.; regarding the Madrid Protocol ATF 130 III 371, consideration 1.2.

able concessions. It accepted the Versailles Peace Treaty and introduced a distinction between economic and military sanctions. On 16 May 1920, accession was approved in an obligatory referendum by 56,3% of the votes, but only a majority of 11 ½ against 10 ½ cantons. The French-speaking cantons and Ticino overwhelmingly endorsed the project.[417] After the breakout of the Spanish Civil War, Switzerland returned to full neutrality, a step which was accepted by the Council of the League of Nations in 1938.[418] As a consequence of its membership in the League of Nations, Switzerland also became a member of the **International Labor Organization *ILO***. It even appears that Swiss activities concerning the internationalization of factory legislation and in particular of protective measures for women had an impact on the founding of the International Labor Office in Basel in 1901 whose ideas were incorporated into the International Labor Organization ILO in 1919.[419]

Switzerland was also a founding member of the Geneva Conventions providing a Uniform Law for **Bills of Exchange** and Promissory Notes of 7 June 1930 and a Uniform Law for **Cheques** of 19 March 1931.[420] When interpreting the Conventions, the Federal Supreme Court takes into account case law of high courts and academic literature of other Contracting States.[421]

V. Post World War II

1. General

After World War II, Switzerland was caught in the belief that **neutrality** and the **reduit concept**, «according to which the Swiss Army would have retreated into the alps relatively soon if attacked, but would have kept up resistance based on some sort of guerilla tactics from there»[422] had saved it from a German invasion. Consequently, these maxims formed the basis of foreign and foreign economic policy. **Spiritual national defense** *(geistige Landesverteidigung)* which had been preached before and during the War also continued to have an effect. All this resulted in patterns of thought like the *Petitpierre* doctrine, according to which neutrality excluded membership in any «political» international organisation. Max Petitpierre was the Swiss Foreign Minister of the years

417 <http://www.admin.ch/ch/d/pore/va/19200516/can83.html> visited 2 January 2012.

418 See Dietrich Schindler, Die schweizerische Neutralität 1920–1938, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht Bd. VIII, 1938, 413 ff.; Helen Keller, Rezeption des Völkerrechts (fn 380), 292 ff.

419 Regina Wecker, Equality for men? (fn 199), 75; <http://www.ilo.org/global/about-the-ilo/history/lang–en/index.htm> visited 25 February 2012.

420 SR 0.221.554.1; SR 0.221.555.1; see Walter A. Stoffel, Enlightened Decision Making, Centennial World Congress on Comparative Law, 75 Tul. L. Rev. 1195, 1200 (2001).

421 ATF 90 II 121, consideration 3; 91 II 362, consideration 9.

422 <http://history-switzerland.geschichte-schweiz.ch/switzerland-second-world-war-ii.html> visited 15 March 2012.

1945–1961.[423] The most important maxims of adhering to international agreements were: Preservation of neutrality and sovereignty, inter-governmental character, no supranational decision-making structures, requirement of Swiss consent for amendments, terminability, no centralized surveillance, no judicial mechanism, no free movement of persons, protection of the Swiss agriculture. At the end of the day, this amounted to a *Denkverbot* whose consequences can be felt until today. Due to these constrictions, Switzerland's foreign policy was to a large extent foreign trade policy. The central element was and is Switzerland's strive to secure its industry free access to foreign markets and, if necessary, even to integrate its industry internationally as long as there is no political involvement. Commentators speak of **depolitization** and **economization** of foreign policy.[424] University of St. Gall political scientist ALOIS RIKLIN has called this attitude «economic integration without political participation».[425] This policy has been successful for a long time, even if it had its price. More recently, it has contributed to the reputation of the Swiss being cherry pickers. In fact, in international and European economic law, the Swiss attitude has mostly boiled down to letting others bearing the risk of innovation.

2. *No UN membership*

Due to its policy of neutrality, Switzerland had neither declared war on Germany before 1 March 1945 nor signed the declaration of the United Nations of 1 January 1942. The country therefore did not receive an invitation to participate in the founding conference of the United Nations. It also did not make any effort to join the United Nations for considerations of neutrality. However, the Federal Council tried to compensate Switzerland's aloofness by joining a number of **special organizations** of the United Nations.[426] The World Intellectual Property Organization (WIPO) is one of them. It was established in Stockholm on 14 July 1967 by a convention which entered into force in 1970, and has its seat in Geneva.[427] In 1974, WIPO became a specialized agency in the United Nations system of organizations. As mentioned, WIPO took over the administration of several international IP treaties from the International Bureau.[428]

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423 See GÉRARD DE PUYMÈGE, Europarat, Historisches Lexikon der Schweiz <http://www.hls-dhs-dss.ch/textes/d/D26470.php> visited 12 March 2012.

424 DANIEL MÖCKLI, Neutralität, Solidarität, Sonderfall. Die Konzeptionierung der schweizerischen Aussenpolitik der Nachkriegszeit, 1943–1947, Zurich 2000, 274 ff., with further references.

425 Cited by DANIEL MÖCKLI (fn 424), 274.

426 See FRANÇOIS CHARLES PICTET, La participation de la Suisse aux Organes et aux Institutions spécialisées des Nations Unies, in: Alois Riklin/Hans Haug/Hans Christoph Binswanger (eds.), Handbuch der schweizerischen Aussenpolitik, Berne/Stuttgart 1975, 543 ff.

427 See ANDREAS R. ZIEGLER, Wirtschaftsvölkerrecht der Schweiz. Eine Einführung unter Einschluss des Aussenwirtschaftsrechts, Berne 2010, paragraphs 561 ff.

428 Supra, E. III.

In 1996, WIPO entered into a cooperation agreement with the World Trade Organization (WTO). To give another example, Switzerland has also been a member of the ILO since 1919.[429]

Since its foundation in 1946 and despite the fact that Switzerland was not a member, Geneva has from the beginning been the most important **European UN seat**. Swiss UN membership was rejected in 1986, but a second attempt in 2002 was successful.[430]

3. From OEEC to OECD

European integration was greatly helped by the positive attitude of the U.S. which in 1947 led to the creation of the European Recovery Plan («**Marshall Plan**») and in 1948 to the establishment of the Organization for European Economic Co-operation (OEEC).[431] Switzerland was one of the 18 participants of the OEEC whose first objective was to prepare the recovery with the involvement of the Marshall Aid.[432] Swiss membership was facilitated by the fact that the OEEC was an **intergovernmental organization** without supranational structures.[433]

In 1961, the OEEC was succeeded by the Organization for Economic Co-operation and Development OECD. The United States and Canada became OECD members. The organization whose secretariat is located in Paris has currently 34 Member States, most of them from the industrialized world. Decisions may be taken in a legally binding form, but they are often rendered as guidelines or recommendations. OECD uses further types of soft law such as best practices analysis and theoretical studies.[434] Switzerland was able to participate

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429 See Helen U. Kneubühler, Die Schweiz als Mitglied der Internationalen Arbeitsorganisation, ihre unbefriedigende Ratifikationspolitik als Ergebnis strukturell erneuerungshemmender innerstaatlicher Entscheidungsprozesse, Berne 1982; Christine Breining-Kaufmann, Die Schweiz und die Internationale Arbeitsorganisation (ILO), in: Richard Senti/Andreas R. Ziegler (eds.), Die Schweiz und die internationalen Organisationen, Zurich/Basel/Geneva 2005, 137 ff. Also supra, C. IV.

430 Infra, E. VI. 4.

431 See Holger Schröder, Jean Monnet und die amerikanische Unterstützung für die europäische Integration 1950–1957, Frankfurt am Main/Berlin/Berne/New York/Paris/Vienna 1994, 73 ff.; Irwin Wall, Jean Monnet, The United States and the French Economic Plan, in: Douglas Brinkley/Clifford Hacket (eds.), Jean Monnet: The Path to European Unity, London 1991, 86, 103 ff.

432 See <http://www.oecd.org/document/48/0,3746,en_2649_201185_1876912_1_1_1_1,00.html> visited 10 February 2012; also Daniel Möckli (fn 424), 267 ff.

433 Robert Hall, International Economic Co-operation After 1945, 33 History Today 12, 14 (1983), <http://www.historytoday.com/lord-roberthall/international-economic-co-operation-after-1945> visited 9 January 2012.

434 Marino Baldi/Lukas Beglinger, Die Schweiz und die Organisation für wirtschaftliche Zusammenarbeit und Entwicklung (OECD), in: Richard Senti/Andreas R. Ziegler (eds.), Die Schweiz und die internationalen Wirtschaftsorganisationen, Zurich/Basel/Geneva 2005, 27, 33 f.; Andreas R. Ziegler (fn 427), paragraph 145; see with regard to Switzerland, e.g., The

in one of the most important international multilateral fora without any supranational traits. Decisions and recommendations can only be taken by **unanimity**. If a Member abstains from voting, the abstention shall not invalidate the decision or recommendation which shall be applicable to the other Members, but not to the abstaining Member (Article 6 OECD Convention). The organization was therefore pretty much to the Swiss liking. The Federal Council stated in its dispatch of 5 May 1961: «OECD is like OEEC an organization of sovereign states with equal status, which dispose of the veto right, the right of abstention and the right to withdraw. Switzerland thus retains its full ability to act.»[435] Still, the Federal Council felt compelled to make a neutrality reservation.[436]

In reality, things are, however, not that simple anymore. Two recent incidents may be mentioned in this respect. On the one hand, the OECD has some time ago taken the liberty of drawing up **grey lists** of «non-cooperative jurisdictions», e.g. with regard to an internationally agreed tax standard. In fact, Switzerland was put on that list in the spring of 2009, a measure endorsed by the G 20 London summit of 2 April 2009. Allegedly, the G 20 had instructed the OECD to make such a list.[437] This modus operandi prompted Federal Councilor PASCAL COUCHEPIN to state that the G 20 had degraded the OECD to a rating agency wherea it was not the OECD's task to play «Gault Millau» for good and bad countries.[438] On the other hand, it has become clear to the Federal Council that there may be situations where Switzerland cannot afford to make use of its veto right but **must give in** to the pressure of the other members. A recent example is the adoption of the Federal Tax Administrative Assistance Act. During the respective debate in the National Council, the question was discussed whether Switzerland should create a legal basis for **group requests** in cases of suspected tax offences, i.e. requests concerning more than one person, in view of the fact that the OECD will adopt such a standard shortly. Upon a question from her predecessor as Head of the Federal Department of Justice and Police – who after his failure to be re-elected to the Federal Council was again elected to Parliament – Federal Councilor EVELINE WIDMER-SCHLUMPF – who is also the current President of the Confederation – answered that Switzerland would have the right to veto the decision of the OECD, but that this would harm the interests of Swiss firms, in particular of those who do business abroad. The National Council rejected the proposal of the Federal Council to create such a le-

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Role of Competition Policy in Regulatory Reform, OECD Reviews of Regulatory Reform, Regulatory Reform in Switzerland, OECD 2006.

435 BBl 1961 I 945, 965, author's translation.

436 BBl 1961 I 945, 966. Such a declaration was also made when Switzerland joined the OEEC; BBl 1947 I 1183.

437 <http://www.swissinfo.ch/eng/politics/foreign_affairs/Switzerland_officially_off_OECD_tax_grey_list.html?cid=4302> visited 15 March 2012.

438 <http://www.tagesanzeiger.ch/schweiz/standard/Couchepin-vergleicht-OECD-mit-Gastrofuehrer/story/15574458/print.html> visited 20 March 2012. *Gault Millau* is a leading restaurant and hotel guide, <http://www.gaultmillau.fr/> visited 20 March 2012.

gal basis, but the State Council accepted it. On 17 July 2012 Switzerland voted in favor of the new version of Article 26 in the OECD Council.[439] As to the rest, one is reminded of the situation of the EEA/EFTA States under the EEA Agreement. They have the right to veto the adoption of a new EEA relevant EU law act, but have so far largely refrained from doing that.[440]

In 1974, the Federal Supreme Court had to decide on whether a provision of OECD law was able to produce direct effect in the Swiss legal order. The norm in question obliged the authorities of the OECD Member States to grant workers who had been employed in the country for at least five years a working permit provided that no compelling reasons to the contrary existed. Switzerland had, however, lodged a reservation which was deemed not to be sufficiently precise. The court therefore held that the provision was **not directly effective**.[441]

4. GATT

Since Switzerland stood on the sidelines when a new world order was created after World War II, it did not participate in the **General Agreement on Tariffs and Trade** (GATT) which was signed by 23 nations at the Palais des Nations in Geneva on 30 October 1947 and entered into force on 1 January 1948. Founding members were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom and the United States of America. The *ad hoc* secretariat was located in Geneva. The fundamental principles of the GATT were the most favored nation clause, the principle of national treatment and the prohibition of quantitative trade restrictions. Switzerland signed the GATT only on 1 August 1966. Since 22 November 1958, Switzerland had been a provisional member. The Federal Council stated in its dispatch that as a provisional member Switzerland would be excluded from voting, but that since the General Assembly almost never voted, this was not of major importance.[442]

The country's absence corresponded with its general approach to foreign policy. But there were also **economic concerns**. The Federal Council summarized them in the following way in its 1959 GATT dispatch:

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439 <http://www.news.admin.ch/message/index.html?lang=de&msg-id=45405> visited 29 July 2012.

440 See Knut Almestad, Reflections on the Postal Services Directive and the EEA Review, forthcoming in: EFTA Court (ed.), Judicial Protection in the European Economic Area, Stuttgart 2012.

441 ATF 100 Ib 226, 230 f.

442 Botschaft des Bundesrates zur Zolltarifrevision und den dazugehörigen internationalen Vereinbarungen, BBl 1959 I, 625, 659.

> «Switzerland as a hard currency country which had been spared World War II and has been prospering economically and financially would be exposed to continuous discrimination on the part of the weak currency countries which, relying on their uneven balance of payments, could restrict or totally ban the import of various Swiss goods whereas we could not in any way defend ourselves against such disadvantages due to our unlimited obligation to liberalize.»[443]

The statement was as presumptuous as it was embarrassing. When becoming a provisional GATT Member, Switzerland successfully negotiated exceptions from the prohibition of quantitative import restrictions in Article XI GATT in the areas of agriculture, alcohol and grains as well as in monetary policy.[444]

The decision to become a full GATT member must be seen against the background of the transformation of the OEEC into the OECD. In its dispatch of 10 May 1966, the Federal Council pointed to the lack of a **voting right** under the provisional membership and argued that full membership should be sought because Switzerland had cooperated actively and in a constructive way in the proceedings of the GATT. Furthermore, there was a change of attitude regarding the import protection for agricultural products.[445] Accession to the GATT in 1966 was seen as a **diplomatic masterstroke**. The Swiss chief negotiator later stated that the GATT membership had cost Switzerland practically nothing.[446] Switzerland played an active part in the Kennedy, Tokyo and Uruguay rounds. Olivier Long and Arthur Dunkel – two Swiss citizens – acted as directors general.

As far as the issue of direct effect is concerned, the Federal Supreme Court in 1986 held that the GATT concerned only the **relations between states**, meaning that individuals could not rely on its provisions.[447] This was in line with the approach of the Supreme Courts of other GATT Members.[448]

5. *From the attempt to create a large European Free Trade Zone to the EFTA Convention*

The entry into force of the European Coal and Steel Community (ECSC) Treaty concluded by the «founding six» – France, Germany, Italy and the three BENELUX States – on 24 July 1952 did not cause major problems for the Swiss

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443 Botschaft des Bundesrates zur Zolltarifrevision und den dazugehörigen internationalen Vereinbarungen, BBl 1959 I, 625, 647 (author's translation); see also Botschaft des Bundesrates über den Beitritt der Schweiz zum Allgemeinen Zoll- und Handelsabkommen (GATT), BBl 1966 I, 713, 715.

444 Botschaft des Bundesrates zur Zolltarifrevision und den dazugehörigen internationalen Vereinbarungen, BBl 1959 I, 625, 650 f.

445 Botschaft des Bundesrates über den Beitritt der Schweiz zum Allgemeinen Zoll- und Handelsabkommen (GATT), BBl 1966 I, 713, 715.

446 Albert Weitnauer, Rechenschaft – Vierzig Jahre im Dienst des schweizerischen Staates, Zurich/Munich 1981, 166.

447 ATF 112 Ib 183, 189 *Maison G. Sprl.*

448 See, e.g., Joined Cases 21–24/72 *International Fruit Co.* [1972] ECR, 1219.

economy. This changed when the EEC was about to be founded. Switzerland was concerned that its industry could suffer massive discrimination with regard to customs for industrial products as a consequence of the establishment of the Community.[449] From 1956 on, Switzerland, together with the U.K., tried to avoid a division of Western Europe by promoting the idea of a wide Free Trade Zone within the OEEC. These efforts were reinforced after the conclusion of the **EEC Treaty** on 25 March 1957. However, the negotiations broke down due to French resistance and Switzerland took some comfort from becoming a **provisional GATT member** on 22 November 1958.[450]

On 4 January 1960, Switzerland signed, together with Austria, Denmark, Norway, Portugal, Sweden and the United Kingdom, the multilateral EFTA Convention in Stockholm. EFTA's goals were much more modest than the ones of the EEC. EFTA was (and is) a **free trade area** which has eliminated customs duties on industrial products. But each EFTA State retained its foreign trade sovereignty and therefore has its own customs duty regime vis-à-vis third countries. EFTA membership was easily compatible with neutrality. The association has no competence to enact legislation, there is no common surveillance and no common court, and membership can easily be terminated (Article 57 EFTA-C). The Federal Council's dispatch of 5 February 1960 put special emphasis on the **lack of supranationality**.[451] That the EFTA Convention did not provide for free movement of persons and contained an exception for agriculture further facilitated membership. Accession to EFTA was not subject to the facultative referendum under then Article 89 paragraph 4 FC. EFTA was an immediate economic success. Its members were referred to as the «Outer seven» as opposed to the «Inner six» EEC States. But EFTA from the beginning had limited political sex appeal in particular for the United Kingdom.

EFTA underwent frequent changes in membership.[452] A fundamental realignment became necessary after 1994 when the association was downsized to four Member States. Three of them, namely Iceland, Liechtenstein and Norway, were (and are) linked to the European Union by way of the comprehensive multilateral EEA Agreement, whereas the fourth EFTA State, Switzerland, has concluded countless sectoral bilateral agreements with the EU. An **updated EFTA Convention** was signed on 21 June 2001 in Vaduz and entered into force on 1 June 2002. The most important novelty was the integration of the rules and principles of the EEA Agreement and of the bilateral agreements between the EU and Swit-

449 See Botschaft des Bundesrates an die Bundesversammlung über die Beteiligung der Schweiz an der Europäischen Freihandels-Assoziation, BBl 1960 I EFTA, 841, 848 ff.

450 See Martin Zbinden, Die schweizerische Integrationspolitik von der Gründung der OEEC 1948 bis zum Freihandelsabkommen 1972, in: Michael Gehler/Rolf Steininger (eds.), Die Neutralen und die Europäische Integration 1945–1995 – The Neutrals and the European Integration 1945–1995, Vienna/Cologne/Weimar 2000, 394 f.

451 BBl 1960 I 841, 854.

452 See EFTA 1960–2010, Reykjavík 2010.

zerland into the EFTA Convention. The benefits of the privileged relationship which the three EEA/EFTA States on the one hand and Switzerland on the other obtained vis-à-vis the European Union were thereby transposed to their own internal relations. At the same time, the revised Convention provides for an enhanced platform for EFTA to develop their trade relations with non-EU States. The EFTA Council updates the Vaduz Convention on a regular basis in order to implement new developments under the EEA Agreement and under the Swiss-EU treaties.[453] Today, Switzerland, in its capacity as an EFTA State, is part of a worldwide system of bilateral FTAs. In many cases, EFTA has been able to conclude such agreements before the European Union. On certain occasions, where the four EFTA States Switzerland, Norway, Iceland and Liechtenstein had diverging interests, Switzerland concluded such agreements outside of EFTA. The most important example of this «going it alone» is the FTA with Japan.[454]

In the *Banque de Crédit international* case, the Federal Supreme Court (Second Public Law Division) held on 13 October 1972 that the general prohibition to discriminate in Article 16(1) EFTA Convention was **directly applicable**.[455] It may be noted that roughly three months before, on 22 July 1972, Switzerland concluded, together with the other EFTA States, the FTAs with the EEC and the ECSC.[456] Article 16(1) EFTA Convention is not very clear. It states under the heading «Establishment»:

> «Member States recognize that restrictions on the establishment and operation of economic enterprises in their territories by nationals of other Member States should not be applied, through accord to such nationals of treatment which is less favorable than that accorded to their own nationals in such matters, in such a way as to frustrate the benefits expected from the removal or the absence of duties and quantitative restrictions on trade between Member States.»

A British national who was supposed to work for a bank in Geneva had been denied a residence permit. In line with its well-established case law, the court held that international treaties which have been approved by the Federal Assembly become part of federal law, and the legal norms created by them are binding on the authorities (reference was made to Articles 113[3] and 114bis [3] of the Constitution) and the citizens, provided that they are directly applicable.[457] The Court held that an individual can invoke a treaty before the administration and the courts if it contains legal norms which are **sufficiently precise** in order to be applied in a given case and to form the foundation of a concrete decision.[458] This is not the case if a provision announces a program or fixes

453 See <http://www.efta.int/legal-texts/efta-convention/detailed-overview-of-the-efta-convention.aspx> visited 12 January 2012.
454 SR 0.946.294.632.
455 ATF 98 Ib 385.
456 See infra, E. V. 7.
457 ATF 88 I 90/91; 94 I 672.
458 On this point, the Court made reference to habilitation thesis of the later Minister of Justice and

guidelines for the legislation of the Contracting Parties and thereby does not address the administrative and judicial authorities, but the national legislature.[459] The court held that although the prohibition to discriminate in Article 16(1) EFTA Convention only gives a conditional right to work, it does not just fix such guidelines. Rather, it was found to impose on each Member State an obligation to give individuals from other Member States a right to non-discriminatory treatment in the field of residence. If there were any doubts with regard to this, they were removed by the press release published at the **EFTA Ministerial Meeting** in Bergen, Norway, in 1966. As to the rest, the principle of non-discrimination laid down in Article 16(1) was said to be sufficiently precise in order to be directly applicable by administrative and judicial authorities without another intervention by the national or international legislature. The direct application of the principle of non-discrimination by the national authorities was held to be in no way contrary to the spirit of the Convention. Such application, the Court said, was all the more necessary since the Convention does **not institute a common jurisdiction** which would be accessible to the individuals who, under Article 31 of the Convention, are also prevented from approaching the Council directly.[460] The Court finally pointed out that the administrative authorities of the Confederation also had voiced their assent to the direct applicability of the Convention. In 1990, the Second Public Law Division of the Federal Supreme Court faced the question whether it was prepared to stick to its case law with regard to the effect of Article 16(1) of the EFTA Convention or whether it would follow the illiberal approach taken in the cases concerning the Free Trade Agreement (FTA).[461] The court **confirmed** its *Banque de Crédit international* precedent and stated on the merits that contrary to the view of the Federal Office for Industry, Trade and Labor and the Federal Department of Economic Affairs, the provision of the EFTA Convention in question took precedence over the policy of the Federal Council to stabilize the number of foreign workers.[462]

6. *Attempt to conclude an association agreement with the EEC*

In 1961, the United Kingdom applied to join the EEC. Denmark and Norway, both NATO members, had similar thoughts. The other EFTA States saw the British step as a breach of trust. In this difficult situation, the three neutral

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Police ARNOLD KOLLER, Die unmittelbare Anwendbarkeit völkerrechtlicher Verträge und des EWG-Vertrages im innerstaatlichen Bereich, Berne 1971 71 f.

459 Consideration 2. a.

460 This argument is particularly striking because in the FTA cases (see infra, E. V. 7. c.) the Federal Supreme Court deduced from the lack of an institutionalized dispute settlement a lack of direct effect. See HELEN KELLER, Rezeption des Völkerrechts (fn 380), 590.

461 See infra, E. V. 7. c.

462 ATF 116 Ib 299, 306 *V. AG.*

EFTA States **Austria**, **Sweden** and **Switzerland** started negotiations with the EEC with the goal to conclude an association agreement.[463] In view of the later EEA experience, it is remarkable that during the 1961–63 negotiations the three EFTA governments were able to coordinate their policies. The goal of securing homogeneity of the law was already there. And the EEC Commission made it clear that in view of the autonomy of the Community, participation of the EFTA States in the decision-making was out of the question. The **crucial problems** were essentially the same as later during the EEA negotiations and during the current talks on institutionalization of the bilateral agreements: The form of participation of the EFTA States in EEC legislation, the surveillance of the implementation of the *acquis communautaire*, the competence to give interpretation to the law, and the question of what would happen if an EFTA State refused to take over new law. With regard to surveillance and judicial control, three models were discussed: The subjection to the competence of the Commission and the jurisdiction of the ECJ, the subjection to the competence of an Association Council, and the subjection to the competence and jurisdiction of Swiss organs. Nobody spoke of an EFTA Surveillance Authority or an EFTA Court.[464] Since French President CHARLES DE GAULLE blocked the British attempt to join the Community in 1963, the association negotiations were terminated.

7. Free Trade Agreement with the EEC

a. General

After DE GAULLE'S resignation as President of France on 28 April 1969, the EEC was prepared to admit the United Kingdom and other new applicants. At the same time, the Community declared its readiness to negotiate bilateral FTAs with the remaining EFTA States which did not include harmonization of the law or new institutions such as a surveillance authority and a court. On 22 July 1972, Switzerland signed two FTAs, one with the EEC and one with the ECSC. The FTA with the EEC, which will be dealt with in the following, aimed at eliminating customs duties and quotas for **industrial products**. It was notified under Article XXIV GATT as a regional preferential agreement. Although there was no constitutional requirement, the FTA was, in view of its political and economic significance, subject to the obligatory referendum.[465] The treaty was approved by 72.5% of the people as well as all the cantons and entered into force

463 See DIETER FREIBURGHAUS, Königsweg oder Sackgasse? Sechzig Jahre schweizerische Europapolitik, Zurich 2009, 106 ff.; MARTIN ZBINDEN, Der Assoziationsversuch der Schweiz mit der EWG 1961–1963. Ein Lehrstück schweizerischer Europapolitik, Berne 2006.

464 See DIETER FREIBURGHAUS, Königsweg oder Sackgasse (fn 463), 106 ff.; MARTIN ZBINDEN, Der Assoziationsversuch der Schweiz mit der EWG 1961–1963, (fn 463).

465 See Botschaft des Bundesrates an die Bundesversammlung über die Genehmigung der Abkommen zwischen der Schweiz und den Europäischen Gemeinschaften, BBl 1972 II, 653, 655, 734 ff.

on 1 January 1973. Since all the other EFTA States concluded identical FTA's with the EEC, the whole construction had a multilateral flavor.

b. Dispute resolution through diplomacy

As far as institutions are concerned, the FTA has not even set up a secretariat. Conflicts between the Contracting Parties are to be resolved by diplomatic means. According to Articles 29 and 30 FTA, a **joint committee** consisting of representatives of the Union and of Switzerland was established which is in charge of administering the proper implementation of the agreement. Under Article 31 (2) FTA, the joint committee shall meet at least once a year to review the general functioning of the Agreement. It shall also, at the request of either party, meet as often as necessary. The joint committee acts by consensus. Its decisions shall be put into effect by the Contracting Parties in accordance with their own rules. If the joint committee cannot find a solution to a problem, the injured party may impose **trade sanctions** (Art. 22 [2] FTA).

c. The Federal Supreme Court denies private actors access to justice

aa. Given Switzerland's close economic ties with the European Union, it is probably no coincidence that the Federal Supreme Court was the **first court of last resort** in the entire free trade area which had been created between the EEC and the EFTA countries that had to deal with the question of the status of the FTA in the domestic law of the Contracting Parties. The preamble to the FTA makes reference to the desire of the Contracting Parties «to ensure, with due regard for fair conditions of competition, the harmonious development of their commerce for the purpose of contributing to the work of constructing Europe.» In view of the Federal Supreme Court's monist reputation, commentators had speculated that conflicts could arise between the liberal Swiss attitude and the presumably more restrictive approach of the ECJ.[466] Whoever had expected that the Federal Supreme Court would transpose the liberal approach it had adopted when dealing with the EFTA Convention to the FTA was, however, **disappointed**. In two landmark cases decided in 1978 and 1979, the Court flatly denied any direct effect of Articles 23(1)(ii), 13 and 20 FTA without even mentioning the preamble.

bb. The first case, *Stanley Adams*, concerned Article 23(1)(ii) FTA which declares an «abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof» incompatible with the proper functioning of the Agreement in so far as it may affect trade between the Community and Switzerland. In 1973, Mr. *Adams*, a

466 Michel Waelbroeck, L'effet direct de l'accord relatif aux échanges commerciaux, du 22 juillet 1972, entre la CEE et la Confédération Suisse, Schweizerisches Jahrbuch für internationales Recht 1973, 113, 132; see also Olivier Jacot-Guillarmod, Le juge Suisse face au droit européen, ZSR N.F. 112 II 1993, 227, 352 f.

British director of the division of international affairs at *Hoffmann-La Roche* in Basel, sent a letter to the EC Commission containing information which later enabled the Commission to fine the firm for having violated Article 82 EC (now Article 102 TFEU).[467] The Commission did not protect its **whistleblower**; his name was leaked to the firm. In 1974, Mr. Adams was arrested by the Swiss authorities and in 1975, he was convicted of economic espionage and sentenced to one year of imprisonment on probation and was prohibited from entering Switzerland for a period of five years by the courts in Basel. The Federal Supreme Court (Cassation Division, criminal) in a judgment of 3 May 1978 rejected his claim that the competition provisions of the FTA EC-Switzerland prevented Swiss criminal law from applying and held that these provisions could **not be invoked** by an individual. The court held:

> «The Free Trade Agreement is a pure trade agreement, which is essentially limited to the regulation of industrial free trade [...]. When it was negotiated, not only was an obligation to mutual approximation of the norms of the Community and of Switzerland deliberately excluded [...], but the existing legal orders were mutually recognized and their unrestricted autonomous enforcement was approved [...]. Such an obligation can, therefore, neither be derived from Article 22(2) FTA nor from Article 27(3)(a) FTA. Moreover, Article 23 FTA does not create regulatory law for individuals [...]; it only states which practices are incompatible with the good functioning of the FTA without prohibiting them or qualifying them as unlawful. Unlike Articles 85 and 86 EC Treaty (now Articles 101 and 102 TFEU), Article 23 FTA does not declare such practices null and void nor does it provide for sanctions; it only empowers the Contracting Parties to take appropriate measures in accordance with the conditions and procedures laid down in Article 27 FTA. The application of domestic norms must therefore not stand back if the competition principles of the FTA have been in impaired. If, however, Article 23 FTA does not constitute a norm containing a prohibition, it cannot be violated.»[468]

With this **illiberal approach**, the Federal Supreme Court followed the view of the Federal Council which had shortly before rejected the direct applicability of Article 23 FTA.[469] The views of the EEC were not taken into account.[470]

cc. The Stanley Adams affair was a highly politicized event and the behavior of the Swiss authorities is no glorious chapter in the history of EU-Swiss relations. However, whistleblowing was regarded with suspicion at the time and nobody, even in the European Community, seemed to have sympathy for Mr.

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467 Case 85/76 *Hoffmann La Roche & Co AG v Commission* [1979] ECR 461.

468 ATF 104 IV 175, consideration 2. c., author's translation.

469 Helen Keller, Rezeption des Völkerrechts (fn 380), 592.

470 This has rightly been criticized by Olivier Jacot-Guillarmod, Le juge Suisse face au droit européen, (fn 466), 362 f.; see also Jürg Borer, Massnahmen gleicher Wirkung wie mengenmässige Einfuhrbeschränkungen im Freihandelsabkommen Schweiz-EWG, Berne 1988, 96 ff. For a different approach see the judgment of the Federal Supreme Court (First Civil Division) ATF 123 III 414, consideration 4 concerning the Lugano Convention: The court must be aware that the domestic institutions and dogmatic constructions do not necessarily correspond to the view of the **other Contracting Parties**; infra, E. V. 11. c.

Adams. But the **second case**, *Omo*, in which the Federal Supreme Court was called upon to apply provisions of the FTA on free movement of goods, had no such implications. Sunlight, a subsidiary of the Dutch Unilever group, produced, *inter alia*, a detergent it sold in Switzerland under the trademark «Omo» which it had registered in the Swiss trademark register. In July 1976, Sunlight realized that Bosshard offered, amongst other things, detergent bearing the trademark «Omo» which it had purchased from Unilever's German subsidiary at a very low price. Sunlight brought an action against Bosshard before the Zurich Commercial Court claiming that the court should prohibit the sale of detergent originating from Germany under the trademark «Omo». The Zurich Commercial Court found in favor of the plaintiff. Before the Federal Supreme Court, the defendant argued that the lower court had, *inter alia*, misinterpreted provisions of the FTA. Under Article 24(c) of the old Trademark Act, a civil action could be brought against anyone who sold, offered for sale, or brought into circulation goods of which he knew that they had been provided with a fake, counterfeit or unlawfully affixed trademark. According to the established case law, a Swiss trademark owner was prevented from banning the import of goods if they were manufactured within one and the same concern. Under such circumstances, there would be no confusion if Swiss consumers identified the trademark not only with the Swiss subsidiary, but also with any company belonging to the same concern. If **material differences** created a likelihood of confusion as to the origin of goods, the trademark owner was, however, entitled to prohibit the import. In the case at hand, the court found such differences in that the Omo detergent sold by the plaintiff, unlike the detergent imported by the defendant, contained blue needles, smelled different, and was milder on cloth. The exclusively male court held that **Swiss housewives** did indeed care about such differences. The last statement could also be mentioned in the section on equal rights.[471]

Under Article 13 FTA, quantitative restrictions on imports had to be abolished by 1 January 1973 and any measures having an effect equivalent to quantitative restrictions on imports had to be abolished not later than 1 January 1975. No new quantitative restrictions on imports or measures having equivalent effect were to be introduced. According to its Article 20, the FTA does not preclude prohibitions or restrictions on imports, exports or goods in transit which are justified, *inter alia*, on grounds of «the protection of industrial and commercial property». Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.

The defendant argued that due to these provisions, the action had to be dismissed. However, the Federal Supreme Court (First Civil Division) referred to the *Stanley Adams* precedent and held in its judgment of 25 January 1979:

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471 ATF 105 II 49, consideration 2. b.

> «It must be stated from the history of the FTA that the FTA is a pure trade agreement which, unlike the EEC Treaty, does not aim at creating a uniform single market with a supranational competition order, but only a free trade zone. Moreover, the FTA is essentially restricted to industrial free trade. Not only was an obligation to a mutual approximation of the EEC and Swiss norms deliberately excluded; rather, the existing legal orders and their unlimited autonomous enforcement were mutually reserved [...]. The agreement furthermore does not provide for an organ which, as the European Court of Justice as an institution of the EEC, could decide in a binding way on the direct applicability of individual norms. It contents itself with a joint committee whose task it is to secure the orderly implementation of the agreement, but which can only give recommendations (Article 29 FTA). These differences must be taken into account in the interpretation of individual provisions. Contrary to what the defendant states, it is not acceptable to take over the case law of the European Court of Justice concerning analogous provisions of the EEC Treaty without closer scrutiny. Switzerland is not obliged by the agreement to harmonize its economic policy and internal legislation with the one of the EEC, even if it may be obvious in a given case to aim at similar solutions for similar problems as the neighboring states [...]. But this doesn't change the fact that the Swiss judge must interpret and apply the agreement autonomously according to its trade policy character and aim. International agreements must furthermore primarily be interpreted according to the text [...]. The wording of Article 13 FTA is clear, and there are no indications for a deviating interpretation. The notion ‹measures having equivalent effect› can only mean measures which directly concern the import of goods. Import bans or restrictions justified on the grounds of the protection of industrial and commercial property are expressly reserved in Article 20 FTA. Such reservations can also arise from Swiss trademark law and consequently exclude the application of Article 13 FTA. The provisions of Article 13 FTA moreover address the Swiss legislature and the administration. It cannot be deduced from them that they would create rights and obligations which the Swiss judge would have to respect when deciding on a civil law dispute.»[472]

Shortly after, the Austrian Supreme Court decided the *Austro-Mechana* case along the same lines, but use more cautious language.[473]

d. The ECJ strikes back

aa. It is generally believed that the ECJ gave its reply to the narrow-minded approach of the Federal Supreme Court in *Omo* in Cases 270/80 *Polydor* and 104/81 *Kupferberg*.[474] Both judgments have been widely discussed in academic literature.[475] What is less known is that commentaries in the *Neue Zürcher Zeitung* (NZZ) which appeared under the abbreviation **«ee.»** were written by Professor Pierre Pescatore, an ECJ judge who had participated in the cases. In

472 ATF 105 II 49, 59 *Omo*, consideration 3. a., author's translation.

473 ÖBl 1980, 25.

474 1982 ECR, 329; 1982 ECR, 3641.

475 See only Monroe Leigh/Marco Bronckers, Transposing the Interpretation of EEC Treaty Concepts to Agreements Between the EEC and the Third Countries – Exhaustion of Industrial and Intellectual Property Rights, 76 Am. J. Int'l L, 857, 858 (1982); Marino Baldi, Zur Rechtsnatur des Freihandelsabkommens Schweiz/EWG, WuR 36, 83 ff. (1984).

fact, these reviews are of high juridical quality and clearly differ from what most journalists tend to write on such occasions. It is appropriate to include these reviews into the following analysis for two reasons: One the one hand, they reveal what was on the mind of one of the most influential ECJ judges, and they elaborate on the **trade policy implications** of the different approaches taken by the Federal Supreme Court and the ECJ. On the other hand, the ECJ in the recent past has extended its *Polydor* case law to the bilateral Free Movement of Persons Agreement EU-Switzerland.[476]

bb. The *Polydor* case was registered at the ECJ on 8 December 1980 and decided by the plenum on 9 February 1982. Polydor, the exclusive copyright licensee of RSO under U.K. copyright law, manufactured gramophone records and cassettes of copyrighted recordings which it sold in the United Kingdom. In Portugal, records and cassettes reproducing the same recordings were manufactured and distributed by two Portuguese companies, Phonogram and Polygram Discos, which were licensees of RSO for Portugal. Simon Records imported records produced in Portugal by Phonogram and Polygram from the sound recordings in question from Portugal into the United Kingdom. RSO and Polydor took action against Simon Records and its customer Harlequin to prevent them from importing, selling and distributing the records in the United Kingdom. The Court of Appeal of England and Wales referred questions to the ECJ for a preliminary ruling. The plaintiffs in the national proceedings referenced the case law of the Swiss Federal Supreme Court and of the Austrian Supreme Court. They also submitted that to construe the FTA in light of the interpretation given to the parallel provisions of Community law «would confer a unilateral advantage on producers in non-member countries to the detriment of Community industry. Owners of patents, copyright and other industrial and intellectual property rights in the Community would be deprived of the possibility of enforcing their rights against imports from EFTA countries without being able to benefit from the same treatment in those countries.»[477] The governments of **Denmark**, **Germany**, **France**, the **Netherlands** and the **United Kingdom**, which participated in the case, pointed to the different structure of the FTA and to the fact that disputes are to be resolved by consultations between the Contracting Parties or, possibly, by the adoption of safeguard measures.[478] Harlequin argued that the ECJ's interpretation of the parallel provisions in the EEC Treaty should govern the interpretation of the provisions in the FTA. The ECJ held that the enforcement by the proprietor (or by persons entitled under him) of copyrights protected by the law of a Member State against the importation and distribution of records lawfully manufactured and placed on the market in Portugal by licensees of the proprietor was justified on the ground of the protec-

476 Infra, E. VI. 5. B. bb.
477 270/80 Polydor [1982] ECR 329, 338 f.
478 270/80 Polydor [1982] ECR 329, 340.

tion of industrial and commercial property within the meaning of Article 23 of the FTA EEC-Portugal. It did **not** therefore **constitute a restriction on trade** such as is prohibited by Article 14(2) FTA EEC – Portugal. The enforcement in question was also held not to constitute a means of arbitrary discrimination or a disguised restriction on trade between the Community and Portugal within the meaning of Article 23. The two provisions were identical in substance to Articles 13(2) and 20 of the FTA EEC-Switzerland. The ECJ pointed to the preamble of the FTA which states that the FTA aims at «contributing to the work of constructing Europe.»[479] But it held that the similarity between the terms of Article 14(2) and Article 23 of the FTA and those of Articles 28 and 30 EEC was not a sufficient reason for transposing on the provisions of the FTA the jurisprudence which determines, in the context of the Community, the relationship between the protection of IP rights and the rules on free movement of goods. The ECJ came to this result by comparing the more modest **aims** and the more modest **institutional structure** of the FTA with those of the EEC Treaty. Although the ECJ did not make reference to the interpretation rules of the Vienna Convention, it could well be that the figure of a difference of goals and context between the EEC Treaty on the one hand and international agreements concluded by the Community with third countries on the other has been inspired by Article 31(1) of that Convention.[480] The ECJ did not express itself on whether the FTA provisions in question could have been invoked by Harlequin although the referring court had asked two questions to that effect and all the five participating Member State governments had made respective submissions. It must, however, be noted in this context that on 29 April 1981, the reference in the *Kupferberg* case had reached the court. Obviously the ECJ wanted to address the **two main issues** at stake separately: firstly the question of whether provisions of the FTAs with the EFTA States were to be interpreted in the same way as the parallel Articles of the EEC Treaty in *Polydor* and secondly the question of direct effect in *Kupferberg*.

The *Polydor* ruling dates from 9 February 1982. On 11 February 1982, **«ee.»** published a comprehensive commentary of the judgment in NZZ with the subtitles «pre-history», «the arguments of the parties», «substantive reasoning of the judgment», «the Swiss jurisprudence» and «the question of the economic sense.»[481] The author mentioned that the plaintiff Polydor had argued that the goals of the EEC Treaty on the one hand and the FTA on the other were different and had made reference to the *Omo* judgment of the Swiss Federal Supreme Court of January 1979 and to the *Austro-Mechana* ruling of the Austrian Su-

479 Paragraph 10.

480 According to that provision, «[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».

481 NZZ Nr. 34 of 11 February 1982, 21.

preme Court of July 1979.[482] He then reported that five EEC Member States had sided with Polydor and unanimously answered in the negative the question of whether the FTA had direct effect. The author emphasized that the ECJ did not address the question of direct effect, but concentrated its analysis on the comparison of the goals of the EEC Treaty and the FTA and came to the conclusion that these goals were not identical. He then stated that the ECJ had confirmed (sic!) the *Omo* judgment of the Swiss Federal Supreme Court, but only as to the **result**. The reasoning, he said, was quite different. The Federal Supreme Court had based itself on three arguments, like in parts of its previous *Adams* judgment: First, the FTA was characterized as a pure trade agreement which unlike the EEC Treaty did not aim at establishing a uniform internal market with a supranational competition order. Second, the notion of elimination of «measures having equivalent effect» had nothing to do with the intellectual property rights because the latter were explicitly excluded from the scope of the FTA. Third, the provisions of the FTA in question were directed to the legislature and the public administration; they did not create rights and obligations which the Swiss judge had to take into account. The reviewer emphasized that the ECJ in its reasoning had clearly **distanced itself** from these considerations. The European Court, the author wrote, had taken the definition of a free trade zone in the **GATT** as a starting point because the preamble of the FTA makes explicit reference to that. It had then found that the FTA had led to a far-reaching liberalization of the trade between the Contracting Parties and that a rudimentary competition system was part of the agreement. Intellectual property rights were in no way excluded from the scope of the agreement. They did not affect the unconditional prohibition of quantitative restrictions and of measures having equivalent effect. The writer highlighted that these considerations were an expression of the concern that the effectiveness and the good functioning of the FTA should not be predetermined or restricted by the negative outcome of the case. He added that in this respect, the ECJ had distanced itself from the **defensive attitude** of the Swiss Federal Supreme Court by its free trade friendly approach. The author ended by pointing to the fact that within the EEC, parallel imports were possible without any restrictions so that national markets could no more be exploited separately. In the Community, there were no national markets. This finding was then juxtaposed with the situation under the FTA. It followed from the *Polydor* judgment that these advantages could not be extended to the consumers in the EFTA countries. This jurisprudence, which had been **initiated by the Swiss Federal Supreme Court**, did not bring about any substantial change to the situation within the Community. All it did was to secure the individual markets of the free trade partner countries as **reservations** for an optimal exploitation to the owners of intellectual property rights. On balance, the sovereignty of these countries remains untouched, but the question arises

482 ÖBl 1980, 25; see infra, E. V. 7. e. aa.

whether with this restrictive interpretation of the prerequisites of free trade which has been achieved by way of a tacit agreement of the judges on both sides, the chance to reach a better efficiency has been missed.

cc. In the second case, *Kupferberg*, in which judgment was rendered 8 ½ months after Polydor, namely on 26 October 1982, the ECJ made the Swiss Federal Supreme Court somehow look bad by showing generosity with regard to the issue of **direct effect**.[483] In substance, the reasoning makes reference to the Swiss Supreme Court's narrow-mindedness without mentioning Stanley Adams or Omo.[484] Kupferberg had imported Port wine from Portugal into the Federal Republic of Germany. According to German law, alcohol produced by fruit-farm co-operative distilleries within their distillation allowance was subject to the monopoly equalization duty at a reduced rate. The duty was charged on imported alcohol and alcohol products (i.e. products having an alcohol content greater than 14 per cent per volume). When calculating the duty, the competent Finance Court put imported Port wines in the same category with local liqueur wines to which alcohol produced by co-operative fruit-farm distilleries had been added. The Supreme Fiscal Court referred questions to the ECJ under the preliminary ruling procedure. Again, several governments, namely those of **Denmark**, **Germany**, **France** and the **United Kingdom**, participated in the case, and they contested any direct effect across the board. They put forward three arguments: the lack of reciprocity (commentator «ee.» mentioned the *Omo* judgment of the Swiss Federal Supreme Court), the fact that the FTAs are administered by joint committees and the existence of safeguard clauses, which means that the obligations are not unconditional.

The ECJ held that Article 21(1) of the FTA EEC-Portugal, which obliges the Contracting Parties to refrain from discriminatory taxation (Article 18 in the FTA's concluded by the other EFTA States with the EEC), was **directly applicable** and capable of conferring rights on individual traders which the courts must protect. In this respect, the ECJ referred to the necessity that provisions contained in such agreements were applied uniformly throughout the Community. The fact that with the Joint Committees, the Contracting Parties had created a special institutional framework for the implementation of the agreement, as was emphasized by the Governments of Denmark, Germany, France and the United Kingdom (sc. and by the Swiss Supreme Court in *Omo*), was not found to be sufficient to preclude any application of the Agreements by the courts. The ECJ found that the safeguard clause contained in the FTA applied only in specially defined circumstances. Whether the provision in question was unconditional and sufficiently clear to have direct effect was to be assessed in light of the agreement of which it was part. The ECJ therefore held that Article 21 must

483 The Court had already in Case 181/73 *Haegemann* [1974] ECR 449, paragraph 5, held that the provisions of the association agreement with Greece «form an integral part of Community law».

484 ECJ Case C-104/81 – *Kupferberg*, ECR 1982, 3641.

be examined in the light of both the **object** and **purpose** of the FTA and of its **context**. In this respect, the Court found that although Article 21 of the FTA and Article 90 EC pursued the same aim inasmuch as they were intended to eliminate tax discrimination, each of these two provisions – which were not worded in the same way – had to be considered and interpreted in its own context. In light of the differing objectives of the EEC-Portugal FTA and the EEC Treaty, the interpretation given to Article 95 of the EEC Treaty (now Article 110 TFEU) could not be applied by way of simple analogy to the corresponding provision of the FTA.[485] This means that the *Polydor* formula was not thrown overboard.

The ECJ concluded that products which differ both with respect to the manufacturing method as well as their characteristics may not be regarded as «like products». Liqueur wines to which alcohol had been added and wines which were the result of natural fermentation were therefore not regarded as like products within the meaning of the provisions in question. Importantly, the ECJ did not share the view of Advocate-General ROZÈS and of the participating Member State governments concerning **reciprocity**. The fact that the courts of one party consider certain stipulations in the Agreement to apply directly, whereas the courts of the other party do not recognize such direct application, was found to not in itself constitute a lack of reciprocity in the implementation of the Agreement.[486]

The *Kupferberg* judgment was rendered on 26 October 1982. On 11 November 1982, «**ee**.» commented on it in NZZ.[487] He first observed that the ECJ had for the first time decided on the controversial question of immediate application (direct effect) of the provisions of the FTAs. Although it was the Agreement with Portugal which was at stake, the judgment applies to all the FTAs. The reviewer emphasized that *Polydor* had been about substantive issues, namely the question of the effect of free trade on the exercise of intellectual property rights. *Kupferberg*, on the other hand, dealt with direct effect. The commentator reported what the four participating Member States' governments had pleaded. He went on by stating that the agreements concluded by the Community are part of Community law and that the question of direct effect must, in the absence of express provisions in the agreements, be addressed in light of the public international law principle of **good faith**, and according to the purpose and the objective of the content of the agreements. He then explained that the language of the Court was obviously influenced by the Vienna Convention on the Law of Treaties. That the courts of the individual Contracting Parties may come to different conclusions is inevitable, but that does not amount to a lack of reciprocity in the implementation of the agreements. The

485 1982 ECR, 3641, paragraph 30.
486 1982 ECR, 3641, paragraph 18.
487 NZZ No. 263 of 11 November 1982, 23.

author concluded by saying that the *Kupferberg* judgment shows, on the one hand, that the ECJ is independent from the Member States since the latter have not been successful with their pleadings. On the other hand, it is clear that the ECJ is very well able to distinguish between the internal law of the Community and the relations with third countries. There is no risk that the free trade states will be sucked into the integration dynamics of the common market. Perhaps this could prompt the courts of these countries (sc. the Federal Supreme Court and the Austrian Supreme Court), which have – possibly hastily – taken a position, to **change that position** with regard to the internal effect of the FTAs.

e. Critique and consequences

aa. General

The Federal Supreme Court has repeatedly dealt with the issue of direct effect of provisions of the FTA in later cases. In the SOVAG judgment of 8 March 2005, the First Public Law Division even appears to have recognized the possibility of such effect.[488] Commentators tried to read the tea leaves and argued that the court has meanwhile abandoned the tough stand taken in the two early cases.[489] There is, however, no clear line and *Stanley Adams* and *Omo* were **never overruled**. On 2 September 1986, the Federal Supreme Court (Second Public Law Division) had confirmed the old case law in its judgment *Maison G. Sprl.*[490] In a judgment of 6 September 2006, the same Division left the question open.[491]

Access to the courts was also lacking in the other EFTA countries. As mentioned, the Austrian Supreme Court in essence took the same stand as the Swiss Federal Supreme Court in the *Austro-Mechana* case, but was much more cautious in its reasoning.[492] In the dualist Nordic countries, direct effect was excluded because the FTAs were not incorporated into domestic law. University of Stockholm professor Ulf Bernitz characterized the Swedish attitude (which on balance was not different from the attitude of all the other EFTA countries and their courts) as «a kind of legal protectionism.»[493] The **asymmetry** between EC and EFTA with regard to access to justice was the object of severe criticism. The late University of Neuchâtel professor Olivier Jacot-Guillarmod called the circumstance that provisions of the FTAs concluded

488 ATF 131 II 271, considerations 10.3 and 10.4.

489 See Bruno Spinner, Ungenutzte «Zähne» des Vertrags Schweiz-EG. Rechtsansprüche im europäischen Freihandel, NZZ No. 216 of 16 September 1988, 39; also Daniel Wüger, Bundesgericht wendet Freihandelsabkommen erstmals unmittelbar an – ein Schritt vorwärts, ein Schritt zurück, Jusletter of 4 April 2005; rather reserved Helen Keller, Rezeption des Völkerrechts (fn 380), 594 f.

490 ATF 112 Ib 183, 189 *Maison G. Sprl.*

491 2A.593/2005/fco, consideration 5.4.

492 ÖBl 1980, 25.

493 Ulf Bernitz, European Law in Sweden, Stockholm 2002, 25.

between the EC and the individual EFTA States were able to produce direct effect in Community law, but not in the legal orders of the EFTA States, a **judicial restraint of trade**.[494] Dutch European law professor HENRY SCHERMERS observed: «There is no discrepancy in the treaty obligations; the law is the same for all treaty parties, but there is discrepancy in the actual possibility to get away with breaches of the law.»[495]

bb. The EFTA Secretariat joins in

In 1987, the **EFTA Secretariat** commissioned a non-published background paper on the case law in the Community and the EFTA countries on the application and interpretation of the FTAs and other agreements. That study described the situation in the following way:

> «Assuming that an exporter from Sweden would like to complain against an administrative measure in an EC country, which he considers as a disguised quantitative restriction prohibited under Article 13 of the FTA. He can then either complain to the EC Commission which can bring the question before the EC Court of Justice or appeal to a national court which can refer the question to the EC Court for a preliminary ruling. If the same happened in Sweden, on the other hand, he could not get a Swedish court to examine the matter but would instead have to complain with the government.»[496]

cc. EEA Agreement

The mothers and fathers of the **EEA Agreement** have drawn certain consequences from the FTA debacle. Under Protocol 35 to the EEA, the EFTA States are obliged to introduce, if necessary, a statutory provision to the effect that EEA rules **prevail** in cases of possible conflicts between implemented EEA rules and other statutory provisions. According to settled case law of the EFTA Court, provisions of EEA law which have been implemented into the legal orders of the EFTA States may be invoked in national courts and take precedence over conflicting rules of national law. These principles of **quasi-direct effect** and **quasi-primacy** follow from EEA law.[497] The EEA Main Agreement has been implemented into the national legal orders of the EEA/EFTA States. Sec-

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494 OLIVIER JACOT-GUILLARMOD, Federal Tribunal (Switzerland), Decision of 25 January 1979, Bosshard Partners Intertrading AG v. Sunlight AG, ATF 105 II 49, Annotations to this case, C. M.L.Rev., 1981, 427 ff.

495 HENRY SCHERMERS, The Direct Application of Treaties with Third States: Note Concerning the Polydor and Pabst Cases, C.M.L.Rev., 1982, 563, 567.

496 Group of Legal Experts on the Application and Interpretation of the Free Trade Agreement between the EFTA Countries and the European Communities. A Case Study, Note by the Secretariat, EFTA/GLE 1/87, 18 September 1987, 80 f.; see CARL BAUDENBACHER, Sven Norberg and the European Economic Area, in: Marin Johanssnon/Nils Wahl/Ulf Bernitz (eds.), Liber Amicorum in Honour of Sven Norberg: A European for all seasons, Brussels 2006, 37, 38 ff.

497 Cases E-1/94 *Restamark* [1994–1995] EFTA Court Report, 15; E-1/01 *Einarsson* [2002] EFTA Court Report, 1.

ondary law is being implemented in an ongoing process. In cases of non-implementation or mis-implementation of EEA law, national courts are obliged to interpret national law in an EEA-friendly way. This too follows from EEA law.[498] Most importantly, the EFTA Court, against the resistance of the governments of Iceland, Norway, and Sweden and, a bit surprisingly, the European Commission, held in Case E-9/97 *Sveinbjörnsdóttir* that **state liability** is part of EEA law.[499] This case law has been confirmed many times since. It has also been implemented by the supreme courts of all three EEA/EFTA States as well as by the Supreme Court of Sweden in two cases whose facts had occurred during Swedish EEA/EFTA membership.[500] One may speak of **effect-related homogeneity**.[501] With these mechanisms, homogeneity and reciprocity with regard to access to justice have been preserved to a large extent in both EEA pillars. To the author's knowledge, there has not been a case in which a national court of an EEA/EFTA State refused to set aside a conflicting rule of national law in a vertical context. It is to be noted that, according to the EFTA Court's case law, the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own. Its depth of integration is less far-reaching than that of the EU Treaties, but the scope and the objective of the EEA Agreement goes beyond what is normal for an agreement under public international law.[502] After 18 years of the EEA's existence, it is fair to say that the main difference between EU and EEA law is to be found in the **absence of common policies** in the fields of foreign trade, agriculture, fisheries and currency in the EEA Agreement.

In academic literature, the question has been discussed whether homogeneity in the EEA may be relativized in view of the influence of the European Human Rights Convention.[503] According to the established case law of the EFTA Court, EEA law must be interpreted in the light of **fundamental rights**. The provisions of the ECHR and the judgments of the European Court of Human

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498 Cases E-4/01 EFTA Court *Karlsson* [2002] EFTA Court Report, 240; E-1/07 *Criminal proceedings against A* [2007] EFTA Court Report, 246.

499 [1998] EFTA Court Report, 95.

500 Carl Baudenbacher, Some Thoughts on the EFTA Court's Phases of Life, in: EFTA Court (ed.), Judicial Protection in the European Economic Area, Stuttgart 2012, 2, 9 f.; concerning the two Swedish cases see Martin Johansson, State liability within the EEA from a Swedish perspective – Sveinbjörnsdóttir confirmed, ELR 2005, 50 ff.

501 See with regard to **procedural** homogeneity Cases E-18/10 *ESA v Norway* [2011] EFTA Court Report 202, paragraph 26, E-15/10 *Posten Norge v ESA*, judgment of 18 April 2012, not yet reported, paragraphs 109 f.; order of the Court in Case E-13/10 *Aleris Ungplan v ESA* [2011] EFTA Court Report 3, paragraph 24; order of the President of 25 March 2011 in Case E-14/10 *Konkurrenten.no AS v ESA*, paragraph 9; order of the President of 15 February 2011 in Case E-15/10 *Posten Norge v ESA*, paragraph 8; order of the President of 23 April 2012 in Case E-16/11 *Iceland v ESA* [Icesave], not yet reported, paragraphs 32 f.

502 See Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Court Report, 95, paragraph 59.

503 See Rainer J. Schweizer, Die schweizerischen Gerichte und das europäische Recht (fn 251), 620.

Rights are important sources for determining the scope of these fundamental rights.[504] In its recent landmark judgment in the *Norway Post* case, the Court held that since competition law proceedings which may entail substantial fines fall, as a matter of principle, within the criminal sphere for the purposes of Article 6 ECHR, that provision must apply with its full stringency. This means that the control of a criminal sanction imposed by an administrative body must be undertaken by a judicial body that has full jurisdiction. Thus, the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision. The EFTA Court thereby referenced the relevant case law of the European Court of Human Rights, in particular the *Menarini* judgment of 27 September 2011.[505] First commentators have stated that the EFTA Court has given more weight to the fundamental right to a fair trial than the courts of the European Union.[506]

8. European Patent Convention

There are currently two ways of obtaining a patent in Europe: Inventors can apply to a national patent office for a national patent. If the patent is granted, litigation will take place in the respective national courts. Or they may, if they wish to have their invention protected in more than one country, seek a European patent by the European Patent Office in Munich which was set up under the European Patent Convention (EPC). Switzerland was a **founding member** of the EPC, an international treaty which was signed in Munich on 5 October 1973 by 16 Contracting States. Today, it has 36 members. On the basis of the EPC, the European Patent Organization (EPO) – an intergovernmental entity – was set up on 7 October 1977.[507] The EPC is a special agreement within the meaning of Article 19 of the 1883 Paris Convention and a regional patent treaty

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504 See, in particular, Cases E-2/03 *Ásgeirsson* [2003] EFTA Court Report 185, paragraph 23, E-4/11 *Clauder* [2011] EFTA Court Report 216, paragraph 49.

505 Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*, judgment of 16 April 2012, nyr, paragraphs 84 ff.

506 See *Eric Barbier de la Serre*, A lesson on judicial review from the other European Court in Luxembourg, Kluwer Competition Law Blog of 27 April 2012 <http://kluwercompetitionlawblog.com/2012/04/27/a-lesson-on-judicial-review-from-the-other-european-court-in-luxembourg/> visited 27 April 2012. Concerning the ECJ Cases C-272/09 P KME Germany and Others v Commission, judgment of 8 December 2011, paragraphs 118 ff., and C 386/10 P Chalkor AE Epexergasias Metallon v Commission, judgment of 8 December 2012, nyr, paragraphs 45 ff. Observers have noted that the ECJ did not apply Article 6 ECHR, but limited itself to relying on Article 47 of the Charter of Fundamental Rights of the European Union and that it did not make reference to the ECHR's Menarini judgment; Marco Bronckers/Anne Vallery, Business as usual after Menarini?, MLex Magazine January-March 2012, 44 ff.; with regard to AG Sharpston's opinion in KME see also Ian Forrester/Mark Powell/Axel Schulz, AG Sharpston voices opinion on the standard of judicial review over fines in cartel cases <http://awards.concurrences.com/business/article/ag-sharpston-voices-opinion-on-the> visited 22 April 2012.

507 SR 0.232.142.2.

within the meaning of Article 45, paragraph 1, of the Patent Cooperation Treaty (PTC) of 19 June 1970.[508] The Organization has two organs: the European Patent Office and the Administrative Council. The EPC was amended in 2000, and the amendments came into force on 13 December 2007. The Convention is **directly effective** in Swiss law and its provisions have **primacy** over conflicting provisions of the Swiss Patent Act.[509] Swiss citizens were important protagonists of the EPO. PAUL BRÄNDLI served as its President from 1 May 1985–31 December 1995, and ROLAND GROSSENBACHER was President of the organizations' Administrative Council from 5 March 2000–4 March 2009.

The European Patent Convention provides for a single patent grant procedure, but the European patent is a **bundle of national patents**. Article 2(2) EPC states that «[t]he European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless this Convention provides otherwise.» Enforcement is decentralized and the interpretation of the Convention by the various patent courts may vary, even if one and the same patent is concerned. According to patent litigation statistics, it is estimated that roughly 1 500 infringement and invalidity actions concerning European patents are brought per year.[510] As mentioned, a comparable situation exists under other conventions providing **uniform law**.[511]

In this situation, the dialogue among the patent courts is of paramount importance.[512] The Federal Supreme Court is a participant in this dialogue. To give an example, in a landmark judgment of 4 March 2011, the First Civil Division had to rule on the validity of a patent which had been granted by the European Patent Office to the American pharmaceutical company Merck.[513] The patent concerned the use of the pharmaceutical substance *alendronic acid* in the treatment of osteoporosis. Upon an action by two Swiss companies, the Zurich Commercial Court had declared the patent invalid. The First Civil Law Division of the Federal Supreme Court held that the EPC has created uniform law for granting patents in the Contracting States. Decisions of the EPO are not binding on the courts of the Contracting States, but in view of the Convention's objective to secure legal unity, the practice of the Boards of Appeal of the EPO must be taken into account. Likewise, relevant decisions of foreign courts, in particular supreme courts, but also of lower courts, must be taken into con-

508 Preamble to the EPC.

509 ATF 117 II 480 consideration 2; 133 III 229, consideration 3.

510 Communication from the Commission to the European Parliament and the Council – Enhancing the patent system in Europe, COM(2007) 165 final; STEFAN LUGINBÜHL, Die neuen Wege der einheitlichen Auslegung des Europäischen Patentrechts, GRUR 2010, 97, 99.

511 Supra, E. IV.

512 See with regard to the EPC specifically JOACHIM BORNKAMM, The German Supreme Court: An Actor in the Global Conversation of High Courts, 39 Tex. Int'l L.J. 415, 416 ff. (2004).

513 4A_437/2010. On the same day, a parallel judgment was rendered along the same lines in another case involving Merck and other counterparties; 4A_435/2010.

sideration, provided that they are convincing. On that point, the Division referred to its own earlier judgments under the EPC and to the Federal Supreme Court's case law on the **Lugano Convention**.[514] In substance, the Division reversed the judgment of the Commercial Court and remitted the case to that court. The reasoning was largely based on the practice of the Enlarged Board of Appeal of the EPO, as well as on a judgment of the England and Wales Court of Appeal, whereas judgments of the Tribunal de Grande Instance de Paris and of the German Federal Supreme Court were deemed to be unconvincing.[515]

The main weakness of the EPC is the **lack of a common court**. On 9 March 2011, the ECJ declared a Draft Agreement on the «European and Community Patents Court» incompatible with the provisions of the EU Treaty and the FEU Treaty.[516] The agreement would have created a unified patent litigation system encompassing EU and non-EU states. The EU now plans to create a patent court for EU Member States.[517] For Switzerland, this could lead to a certain marginalization.[518]

9. Council of Europe and the European Human Rights Convention

a. General

The Council of Europe was founded in 1949. On 4 November 1950, the European Convention on Human Rights was adopted. It entered into force on 3 September 1953. The Convention provides for the establishment of a common court of the Member States, the European Court of Human Rights (ECtHR). Switzerland was not a founding Member State of the Council of Europe. Although it essentially shared the values of the Contracting States, the country was reluctant to accept the **international juridification of human rights protection** which came along with the adherence to the European Human Rights Convention. Only when it appeared that the Council's activities would be rather apolitical and that its conventions were not binding on the Member States, the country decided to join in 1963. One will notice that this step was made a few months after the British attempt to join the EEC failed. With it the association

514 4A_437/2010, consideration 2.2.1. – In this author's view, the reference to the Lugano Convention overlooks that Protocol 2 to that treaty lays down special homogeneity rules; see infra, E. V. 11.

515 4A_437/2010, considerations 2.2.1.–2.2.10.

516 ECJ Opinion delivered pursuant to Article 218(11) TFEU – Draft agreement – Creation of a unified patent litigation system – European and Community Patents Court – Compatibility of the draft agreement with the Treaties 1/09 of 8 March 2011, nyr; see CARL BAUDENBACHER, The EFTA Court remains the only Non-EU-Member States Court – Observations on Opinion 1/09 European Law Reporter 2011, 236 ff.; JOHN TEMPLE LANG, The situation of the proposed unitary European Patent after the Opinion of the Court of Justice on the proposed European and Community Patents Court, <http://fordhamipconference.com/wp-content/uploads/2011/04/Temple-Lang.pdf> visited 12 November 2011.

517 <http://ec.europa.eu/internal_market/indprop/patent/index_en.htm> visited 12 May 2012.

518 See infra, G. IV. 7. c.

negotiations of Austria, Sweden and Switzerland had come to an end.[519] Moreover, the decision, like the adherence to the GATT in 1966, must be seen against the background of the transformation of the OEEC into the OECD. The Federal Council used a classical argument in order to make the membership in the Council of Europe digestible for the public: It emphasized that the Council did **not have supranational decision-making structures** so that the sovereignty of the Member States remained untouched. Likewise, the Council's decisions would only have the character of non-binding recommendations.[520]

In 1974, Switzerland was one of the last Western European countries to accede to the European Convention on Human Rights.[521] The Convention has been binding on Switzerland since 28 November 1974. With this step, a rather embarassing *Alleingang* came to an end. University of Lausanne political scientist DIETER FREIBURGHAUS has described another function of Swiss membership in the Council of Europe and in the European Court of Human Rights: The feeling that «we are part of Europe».[522] This sensation is sometimes becoming preposterous, e.g., when publications and lectures on «European law» start with the claim that the European Human Rights Convention is not only part of that field, but the core element.

Academic literature usually classifies the human rights protected by the ECHR, for example into strictly personal rights and the prohibition to discriminate, communication rights, economic rights, judicial and procedural rights, and social rights.[523] No matter where a specific right guaranteed by the Convention figures in such classifications, it may significantly affect the economic law of the Contracting States. In fact, we have seen an increasing influence of the ECtHR on areas such as **unfair competition law**,[524] **property law**,[525] **collective bargaining** and **industrial action law**,[526] **IP law**[527] as well as **anti-**

519 DIETER FREIBURGHAUS, Königsweg oder Sackgasse (fn 463), 113 ff.

520 Bericht des Bundesrates an die Bundesversammlung über die Beziehungen der Schweiz mit dem Europarat, BBl 1962 II, 1085, 1097.

521 SR 0.101.

522 DIETER FREIBURGHAUS, Königsweg oder Sackgasse (fn 463), 115.

523 See, e.g., DIRK EHLERS (ed.), Europäische Grundrechte und Grundfreiheiten, 3rd ed., Berlin 2009, §§ 16 ff.

524 Judgment of 20 November 1989, *markt intern Verlag GmbH and Klaus Beermann v. Germany*, Application No. 10572/83; Judgment of 23 June 1994, *Jacubowski v. Germany*, Application No. 15088/89; ECtHR Judgment of 25 August 1998, *Hertel v. Switzerland*, Application No. 25181/94; Judgment of 12 April 2001, Application No. 43524/98, *Schweizerische Radio- und Fernsehgesellschaft v Switzerland*.

525 Judgment of 30 June 2005, *Bosphorus Hava Yollari Turizm v. Ireland*, Application No. 45036/98.

526 Originally, in cases *Schmidt and Dahlström v. Sweden* (Application No. 5589/72), judgment of 6 February 1976, paragraph 36, and *Swedish Engine Drivers' Union v. Sweden* (Application No. 5614/72), judgment of 6 February 1976, paragraph 40, the ECtHR did not recognize a right to strike. This changed in cases *Demir and Baykara v Turkey*, Application No. 34503/97, Judgment of 12 November 2008 [2008] ECHR 1345 and *Enerji Yapi-Yol Sen./. Turkey*, Application No. 68959/01, Judgment of 21 April 2009.

527 Concerning the question whether trademarks can be regarded as property rights for the purposes of human rights analysis, see ECtHR of 11 January 2007 *Anheuser-Busch Inc. v. Portugal*, Ap-

trust law.[528] The right to a **fair trial** within reasonable time which is guaranteed in Article 6 ECHR is of general significance. The European Human Rights Convention and the case law of its Court are, in other words, of high **economic law relevance**.[529]

b. European Court of Human Rights

aa. Appointment of judges and composition

The ECtHR was established in Strasbourg in 1959. On 21 January 1959, the first judges were elected by the Consultative Assembly of the Council of Europe and on 14 November 1960 the Court delivered its first judgment.[530] Few imagined at the time that the Court, together with the Court of Justice of the European Union, would become the most influential court in Europe over the years. Like every Contracting State, Switzerland has the right to nominate a judge to the ECtHR. This *a priori* means that the Court is **not a foreign court**. The first judge nominated by Switzerland was Professor ANTOINE FAVRE, judge of the Federal Supreme Court from 1952 to 1967 and former member of the Swiss National Council. He served in Strasbourg from 1962 until 1974. In 1975, he was succeeded by Professor DENISE BINDSCHEDLER-ROBERT, an official in the Swiss Foreign Service and professor at the Geneva Graduate Institute of International and Development Studies who served until 1991 when University of Basel Professor LUZIUS WILDHABER was elected. Until 1998, the judges were only employed part-time. On 1 November 1998, with the entry into force of Protocol No. 11, a new court with full-time judges was established. When the new court was about to take up office, Mr. Wildhaber was re-elected. He prevailed, *inter alia*, over University of St. Gall Professor STEFAN TRECHSEL who had been the President of the European Human Rights Commission since 1995. In 1998 Wildhaber became the first president of the new court and served until 2007. University of Geneva Professor GIORGIO MALINVERNI was a judge from 2007 until 2011 when he was succeeded by University of Zurich Professor HELEN KELLER.[531]

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plication No. 73049/01, Paras 72–78; LISA P. RAMSEY, Free Speech and International Obligations to Protect Trademarks, 35 Yale J. Int'l L. 405, (2010).

528 Judgment of 27 September 2011 in case *A. Menarini Diagnostics S.R.L. v. Italy*, Application No. 43509/08, §§ 38 to 44; see also EFTA Court E-15/10 *Posten Norge AS v EFTA Surveillance Authority*, judgment of 18 April 2012, nyr, paragraphs 84–102.

529 See RAINER J. SCHWEIZER, Die EMRK schützt auch die Unternehmen, in: EMRK und die Schweiz, St. Gall 2010, 271 ff.

530 *Lawless v. Ireland*, Judgment of 1 July 1961 (Series A, No. 3).

531 LUCIUS CAFLISCH, a Professor at the Graduate Institute of International Studies in Geneva, served as a Judge of the ECtHR on behalf of the Principality of Liechtenstein between 1998 and 2006, and MARK VILLIGER, a Professor at the University of Zurich, has been the Liechtenstein Judge since 2006. They are both Swiss citizens.

Today, the ECtHR consists of **one judge from each Member State** of the Council of Europe (currently 47 judges). Article 22 Conv. states that judges are elected by the Council's Parliamentary Assembly by the majority of votes cast from a list of three candidates nominated by the Contracting Parties. Occasionally, the Assembly has chosen another candidate than the Government's favorite, for instance in the interest of establishing gender-balance or for reasons of proper qualification. But in most cases, the candidate favoured by the Government is elected. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence (Art. 21 Conv.). This provision is of rather formal nature. Appointment is for a nine-year term which is not renewable. There is an age limit (70 years). Minority judges have a right to **dissent** if a judgment is delivered, but not in inadmissibility decisions (Article 45[2] Conv.).

bb. Locus standi

Actions may be brought by one contracting party against the other or by individuals, NGOs or groups of individuals (Article 33, 34 Conv.). The overwhelming majority of applications are made by **individuals**. A precondition is that the case has been dealt with by the last national instance. In other words, domestic remedies must have been exhausted (Article 35[1] Conv.).

cc. Methods of interpretation

Officially, the ECtHR is not able to determine its methods of interpretation, but is bound by the norms of the **Vienna Convention** on the Law of Treaties. In reality, however, the Court is prepared to construe the Convention dynamically. According to established case law, the Convention is «a living instrument» which must be interpreted «in the light of present day conditions.»[532]

dd. Grand Chamber

Some sort of a two tier-system was introduced by Protocol No. 11. One may speak of a limited appellate procedure. A Grand Chamber of 17 judges has jurisdiction to review judgments of any of the seven Chambers if the case raises a «serious question affecting the interpretation or application of the Convention or protocols thereto, or a serious issue of general importance» (Article 43 of Protocol No. 11).

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532 *Tyrer v. United Kingdom*, Series A No. 26, 2 EHRR (1979–1980) 1, paragraph 31; *Matthews v. United Kingdom*, 30 EHRR (1999) 361, paragraph 39;

ee. System of precedent?

There is no system of precedent in the meaning of stare decisis in any international or European court.[533] However, the ECtHR tends to put greater weight on its previous decisions than, for example, the ECJ. The Rules of the Court make abandonment of precedent one of the grounds for a Chamber to relinquish jurisdiction in favor of a Grand Chamber (Rule 72). According to a statement in *Cossey v. UK*, the Court's approach is to follow its precedents «in the interest of **legal certainty** and the orderly development of the Convention case law». The Court therefore only departs from earlier decisions if there are «cogent reasons» for doing so.[534] It is, however, the Court itself that defines the notion of cogent reasons. This practice has not hindered the Court from interpreting the Convention in an evolutive way. When the permanent ECtHR took up its functions, the then President WILDHABER stated that it will not normally depart from the old Court's jurisprudence as regards substantive issues nor from the Commission's or the Court's practice as regards admissibility.[535]

ff. Effect

The ECtHR is a **highly legalized** court, but the European Human Rights Convention lacks EU style direct effect and the Court's judgments are not directly effective. It is for the Contracting Parties to decide on such effect.[536] The judgments are, however, legally binding on the state which is a party to the dispute, a fact which is recognized in virtually all the Contracting Parties.[537] Switzerland, like any other Convention State, is obliged under Article 46 of the Convention to abide by the decisions of the court. Factually, the judgments of the ECtHR also produce effects for the other Member States. Former ECtHR Judge GEORG RESS has summarized the situation with the following words:

> «In contrast to the ECJ, whose rulings may have direct effect on domestic legal orders because of the supremacy of European Community law, the judgments of the ECHR

533 See the contributions by SIR RICHARD PLENDER, PAUL MAHONEY, LUCIUS CAFLISCH, and JOHN TEMPLE LANG in: Carl Baudenbacher/Simon Planzer (eds.), The Role of Precedent, International Dispute Resolution Vol. 3, Stuttgart 2011.

534 25 September 1990, Ser. A, Vol. 184, paragraph 35, emphasis added.

535 LUZIUS WILDHABER, Precedent in the European Court of Human Rights, in: id., The European Court of Human Rights, 1998–2006 – History, Achievements, Reform, Kehl/Strasbourg/Arlington 2006, 155 ff.; see with regard to the practice of the ECtHR in general also PAUL MAHONEY, Introduction to the panel Precedent in European High Courts, in: Carl Baudenbacher/Simon Planzer, The Role of Precedent International Dispute Resolution, Vol. 3, Stuttgart 2011, 103, 105 ff.; LUCIUS CAFLISCH, Precedent in the Practice of the European Court of Human Rights, ibid., 113, 115 ff.

536 RAINER J. SCHWEIZER, Die schweizerischen Gerichte und das europäische Recht (fn 251), 662.

537 See, e.g., ELISABETH LAMBERT-ABDELGAWAD, The Execution of Judgments of the European Court of Human Rights, Human rights files, No. 19, Council of Europe Publishing, Strasbourg 2002, 7 f., 21.

> constitute binding interpretations of the Convention for future cases only in a very broad sense (as precedents). The judgments of the ECHR are binding only between the parties of the case, even if in interstate applications the binding effect may come very close to an erga omnes effect. Normally, judgments of the Court do not have an erga omnes effect, but they have an orientation effect. There are judgments that the states do not like and that are not complied with, risking of course that they will be found in violation of human rights in a new case before the Court. There are examples of a clear reluctance on the part of some states to follow the reasoning of the Court in the future, but in the long run all the states have accepted the Court's jurisprudence.»[538]

gg. The Swiss approach to the ECHR and the ECtHR

Art. 35(1) and (2) of the Swiss Federal Constitution state under the heading «Upholding of fundamental rights»:

> «(1) Fundamental rights must be upheld throughout the legal system.»
> (2) «Whoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation.»

According to settled case law of the Federal Supreme Court, the human rights guaranteed by the ECHR and the additional protocols have **constitutional rank**.[539] Under Article 95 letter b Federal Supreme Court Act,[540] the violation of international law may be challenged before the court in the same manner as the violation of federal law. As a matter of principle, international law prevails over conflicting domestic law. The legal situation is, however, complicated by Article 190 FC which states under the heading «applicable law» that «[t]he Federal Supreme Court and the other judicial authorities shall apply the federal acts and international law.» In cases of conflict between international law and domestic law, the Federal Supreme Court tends to let international law prevail. According to case law, Article 190 FC contains only an order to apply, but not a prohibition of review.[541] In order to avoid conflicts, the Federal Supreme Court aims at conform interpretation of domestic law. As far as the **guarantees of the ECHR** are concerned, the order to apply federal law contained in Article 190 FC may not apply at all.[542] In other words, the Federal Supreme Court may use

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538 Georg Ress, The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order, 40 Tex. Int'l L.J. 359, 374 (2005) (Symposium: Globalization and the Judiciary, chaired by the author).

539 See, e.g., Federal Supreme Court Judge and former President Heinz Aemisegger, Die Bedeutung des US-amerikanischen Rechts bzw. der Rechtskultur des common law in der Praxis schweizerischer Gerichte – am Beispiel des Bundesgerichts, AJP 2008, 18, 20, with an overview of the case law.

540 SR 173.10.

541 Rainer J. Schweizer, Die schweizerischen Gerichte und das europäische Recht, (fn 251), 628 f.

542 See Heinz Aemisegger (fn 539), 21.

the ECHR in order to **loosen the restrictions** which have been imposed on it by Article 190 FC.

In view of Switzerland's reluctance to accept international courts, the role played by the ECHR in the Federal Supreme Court's case law is remarkable. As in many Contracting States, certain judgments of the ECtHR have been the subject of criticism. But the fundamentally **positive attitude** did not even change when the ECtHR held that a reservation made by Switzerland was incompatible with the *Convention* in the *Belilos* case. Switzerland in its instrument of ratification had given an interpretive declaration to the extent that it considered «that the guarantee of fair trial in Article 6 (1) of the Convention, in the determination of [...] any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of public authorities relating to [...] the determination of such a charge.»[543] *Marlène Belilos*, a student of Swiss nationality had taken part in a demonstration in Lausanne. The Lausanne police laid an information against her for having contravened the municipality's General Police Regulations because no permission had been sought in advance. Switzerland argued that Mrs. Belilos' application was incompatible with the declaration made by Switzerland under Article 6(1) of the Convention according to which no appeal should be available to a court with unlimited jurisdiction against an administrative fine of 200 CHF. The ECtHR held in its judgment of 29 April 1988 that Switzerland had violated Article 6(1). The Lausanne Police Board consisted of a municipal civil servant who sat in personal capacity, was not subject to orders, took a different oath from the one taken by policemen, and was, in principle, not liable to dismissal during the time of office. However, the person concerned was a senior civil servant from police headquarters, liable to return to other departmental duties.

The Court found Switzerland's interpretive declaration to be legally equivalent to a reservation which was, however, **invalid** under the rules of the Convention on reservations. In order to evaluate whether an interpretive declaration made by Switzerland in respect of Article 6(1) of the Convention may actually be invalid, the Court reasoned, «one must look behind the title given to it and seek to determine the substantive content.»[544] The Court held that the applicant could therefore legitimately have doubts as to the independence and organizational impartiality of the Police Board. It seems that «this was the first time ever that an international tribunal had made a decision that a reservation to a treaty was invalid.»[545] A postulate of a member of the State Council to assess the consequences of the ruling for Switzerland (including a possible **withdrawal** from the Convention) failed, however, to succeed.[546]

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543 132 Eur. Ct. H.R. (ser. A) (1988) Belilos, judgment of 29 April 1988, paragraphs 13, 29.

544 132 Eur. Ct. H.R. (ser. A) (1988) Belilos, judgment of 29 April 1988, paragraph 49.

545 Richard W. Edwards. Jr., Reservations to Treaties: The Belilos Case and the Work of the I nternational Law Commission, 31 U. Tol. L. Rev. 195, 195 (2000).

546 Amtliches Bulletin Ständerat 1988, 554, 561.

One must, though, not overlook the fact that the **sword of Damocles** of the *Schubert* case law is also hanging over the Federal Supreme Court's approach to the ECHR.[547] The number of conservative judges has increased in the recent past as a consequence of the success of the Swiss People's Party in several federal elections. This could have an impact on the courts case law concerning the legal status of the ECHR in Switzerland.

10. Insurance Agreement with the EEC

The 1989 Agreement on Direct Insurance against Loss and Damage was concluded after **16 years of negotiations**. This history is a telling proof of the traditional Swiss attitude to such proceedings. Swiss negotiators tend to have plenty of time. The agreement lays down, on a reciprocal basis, «the conditions which are necessary and sufficient to enable agencies and branches of undertakings whose head office is situated in the territory of one of the Contracting Parties and which wish to become established in the territory of the other contracting party, or are established there, to take up or pursue the self-employed activity of direct insurance other than life assurance» (Article 1).[548] Dispute resolution is in the hands of a joint committee.

11. Lugano Convention

a. General

The multilateral Lugano Convention on **jurisdiction** and the **enforcement** of judgments in civil and commercial matters was signed on 16 September 1988 in Lugano. Switzerland had played an active role during the negotiations. Contracting Parties are the old Member States of the European Union, Poland and the three EFTA States Iceland, Norway and Switzerland. The Lugano Convention is a parallel instrument to the **Brussels Convention on the jurisdiction and the enforcement** of judgments in civil and commercial matters. The Brussels Convention was concluded between the six founding EEC Member States on 27 September 1968. New EEC Member States were under an obligation to also accede to the Convention. After 1988, some EFTA States which were parties to the Lugano Convention became Members of the European Community and acceded to the Brussels Convention in 1996. They continued to participate in the Lugano Convention in their new capacity.[549]

On 1 March 2002, the Brussels Convention was replaced by the Brussels I Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the re-

547 With regard to the *Schubert* judgment, see supra, E. II. 2.

548 O.J. L 205/3 of 27.07.1991.

549 See Fausto Pocar, Explanatory report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, O.J. 2009, C 319/1.

cognition and enforcement of judgments in civil and commercial matters.[550] The regulation applies to all EU Member States with the exception of Denmark. Its provisions were extended to Denmark by a separate international agreement with the EC. Although the Brussels Convention had worked very satisfactorily, it was felt that as an international treaty it did not fit the needs of an ever growing Community, that legal certainty had to be improved and that to embed the subject matter in a regulation had the advantage of providing for direct effect and primacy. Commentators called the replacement of the Brussels Convention by the Brussels I Regulation an act of **communitarization** (*«Vergemeinschaftung»*) or Europeanization of private international law and international procedural law.[551] On 30 October 2007, the 1988 Lugano Convention was replaced by the «New Lugano Convention» whose Contracting Parties are the European Community, Denmark, Iceland, Norway and Switzerland.[552]

b. Homogeneity rules

The ECJ has no competence to give preliminary rulings on the old Lugano Convention. The courts of the EU Member States are prevented from making a respective request. This is why the advantages of a uniform interpretation had to be secured in other ways. On the one hand, the Contracting Parties wanted to ensure the homogeneous application of the Lugano Convention itself, and on the other hand, the uniform application of those rules, which were identical in substance to provisions of the Brussels Convention.[553] In order to secure a homogeneous interpretation of the rules in the Brussels Convention and in the Lugano Convention, the Contracting Parties agreed on Recital 6 of the preamble to the convention, on **Protocol 2** and also made two unilateral declarations.

Recital 6 of the preamble of the Convention mentions the Contracting Parties' desire «to ensure as uniform an interpretation as possible of this instrument». According to the preamble of Protocol 2, the Contracting Parties considered, *inter alia*, that the ECJ had jurisdiction to give rulings on the interpretation of the provisions of the Brussels Convention and that they were aware of the rulings delivered by the ECJ on the interpretation of the Brussels Convention up to the **time of signature** of the Lugano Convention. They expressed their desire «to prevent, in full deference to the independence of the

550 O.J. 2001, L 12/1.

551 See, e.g., Jürgen Basedow, The Communitarization of the Conflict of Laws under the Treaty of Amsterdam, 2000 CMLRev, 687 ff., 690; Haris Tagaras, La révision et communautarisation de la Convention de Bruxelles par le règlement 44/2001, Cahiers de droit européen, 2003, 399 ff., 431; Franco Ferrari, Remarks on the Autonomous Interpretation of the Brussels 1 Regulation, In Particular of the Concept of «Place of Delivery» Under Article 5(1)(b), and the Vienna Sales Convention, 1 Revue de droit des affaires internationales/Int'L Bus. L. J. 83, 83 f. (2007).

552 See infra, E. VI. 6.

553 See Paul Volken, Das Lugano-Übereinkommen. Entstehungsgeschichte und Regelungsbereich, in: Ivo Schwander (ed.), Das Lugano-Übereinkommen, St. Gall 1990, 37, 55.

courts, divergent interpretations and to arrive at as uniform an interpretation as possible of the provisions of the Convention, and of these provisions and those of the Brussels Convention which are substantially reproduced in this Convention.»

Article 1 of Protocol 2 states:

> «The courts of each Contracting State shall, when applying and interpreting the provisions of the Convention, pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of **this Convention**.»[554]

According to Article 2 of Protocol 2, the Contracting Parties agree to set up a system of exchange of information concerning judgments delivered pursuant to this Convention and relevant judgments under the Brussels Convention. Article 3 states that the Contracting Parties set up a Standing Committee for the purposes of this Protocol. Moreover, the representatives of the Governments of the EC Member States signatories to the Lugano Convention declared «that they consider as appropriate that the Court of Justice of the European Communities, when interpreting the Brussels Convention, **pays due account** to the rulings contained in the case-law of the Lugano Convention.»[555] On the other hand, the representatives of the governments of the EFTA States signatories to the Lugano Convention declared «that they consider as appropriate that their courts, when interpreting the Lugano Convention, **pay due account** to the rulings contained in the case law of the Court of Justice of the European Communities and of courts of the Member States of the European Community in respect of provisions of the **Brussels Convention** which are substantially reproduced in the Lugano Convention.»[556] These declarations are not part of the Convention.

Academic literature has from the beginning emphasized that «paying due account» is less than «comply.» It was said to mean that the courts are obliged to examine the case law of their counterparts and to make this clear in their reasoning of the judgment.[557]

c. The Federal Supreme Court's case law concerning homogeneity

aa. The provisions of the Lugano Convention are capable of producing **direct effect**. In ATF 125 III 108, the Federal Supreme Court's First Civil Division

554 Emphasis added.

555 Emphasis added.

556 Emphasis added.

557 Frank Heerstrassen, Die künftige Rolle von Präjudizien des EuGH im Verfahren des Luganer Übereinkommens, 39 Recht der internationalen Wirtschaft 179, 181 (1993); Harry Duintjer Tebbens, Die einheitliche Auslegung des Lugano-Übereinkommens, in: Gerte Reichelt (ed.), Europäisches Kollisionsrecht: Die Konventionen von Brüssel, Lugano und Rom, Frankfurt am Main 1993, 49, 53; Christian Kohler, Integration und Auslegung – Zur Doppelfunktion des Europäischen Gerichtshofes, in: Erik Jayme (ed.), Ein internationales Zivilverfahrensrecht für Gesamteuropa, Heidelberg 1992, 11 ff.

held on 23 December 1998 that the Lugano Convention is part of Swiss federal law.[558] From a methodological point of view, two questions had to be answered: (1) How would the Swiss Federal Supreme Court (and for that matter the Supreme Courts of the other EFTA countries) resolve the problem that the ECJ uses a different set of rules when interpreting EU law than the ones of public international law laid down in Articles 31 and 32 of the Vienna Convention? (2) How would the Court deal with Protocol 2 and the two government declarations concerning homogeneous interpretation?

bb. As to the **first question**, it must be noted at the outset that the Brussels Convention was formally speaking a treaty under public international law. In theory, this raised many problems, but in practice, they were minor. On the one hand, the ECJ saw the Brussels Convention as a public international law treaty of a special kind. On the other hand, Recital 19 in the preamble to the Brussels Regulation emphasized the need for continuity as regards the interpretation of the Brussels Convention.[559] That the Lugano Convention constitutes a treaty under public international law which is to be interpreted according to Articles 31 ff. of the Vienna Convention is clear. According to the Federal Supreme Court's well-established case law, the Lugano Convention, like any international treaty, has to 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, as stated in Article 31(1) of the Vienna Convention. The close dependence of the Lugano Convention on the Brussels Convention constitutes an important element of the «context» of interpretation.[560]

cc. As to the second question of **homogeneous interpretation**, the Federal Supreme Court has generated a highly sophisticated jurisprudence. In view of the fact that the homogeneity rules of the Lugano Convention have served as a role model not only for the EEA Agreement but also for the sectoral agreements concluded between Switzerland and the EU on free movement of persons and on air traffic,[561] this case law will be analyzed hereafter in some detail.

In a judgment of 4 August 1995, the Federal Supreme Court (First Civil Division) stated that the Lugano Convention, being an international treaty, was to be interpreted first and foremost according to its wording as the Contracting Parties were supposed to understand it under the principle of trust in view of the purpose of the contract. The wording was said to be the most obvious and most important indication of the common intention of the parties. Furthermore, in the case of an international treaty such as the Lugano Convention, which

558 ATF 125 III 108, consideration 3.b.

559 Ulrich Magnus, in: Ulrich Magnus/Peter Mankowski (ed.), Brussels I Regulation, European Commentaries on Private International Law, Vol. 1, 2nd ed., Munich 2012, 31.

560 ATF 124 III 382, consideration 6.c.; ATF 124 III 382, consideration 6; ATF 129 III 626, consideration 5.2.1; 131 III 227, consideration 3.1. – According to ATF 124 III 382, consideration 6, the declarations of the governments, too, are elements of the context.

561 Infra, E. VI. 5. B. bb. cc.

aims at international harmonization, foreign doctrine and case law as well as the efforts to bring about this unity are of particular significance. The First Civil Division added that since the Lugano Convention was a parallel convention to the 1968 Brussels Convention, the doctrine and the case law concerning the latter were to be **consulted** («heranzuziehen»).[562] This language appears to suggest that the case law of the ECJ is one source (and not even the most important one) among many which are to be used. Two years later, in AFT 123 III 414 (judgment of 26 September 1997), the First Civil Division held that the Lugano Convention aims at realizing a common, uniform order for all those seeking recourse to the law of the EC and EFTA States and thereby a uniform legal area. Its directly applicable international uniform rules are to be interpreted according to the classical rules, but taking into account the specificities of a uniform legal order, which is the (multilingual) wording, the purpose and the inner system of the harmonized order as well as the historic intention of the Contracting Parties. The Court must be aware that the domestic institutions and dogmatic constructions do not necessarily correspond with the view of the other Contracting Parties. In order to foster a uniform interpretation, Article 1 of Protocol 2 on the uniform interpretation of the convention therefore prescribes that the courts of **each contracting party** must pay due account to the principles which have been developed and the relevant decisions of the courts of the other Contracting Parties. The explicit instruction to interpret the harmonized rules by way of taking into account foreign precedent aims at tackling the subtle erosion of the unity in the application of the law by the courts of the Contracting Parties through a deliberate interpretation which aims at fostering unity. Most importantly, the First Civil Division added that the **old case law** of the ECJ on the Brussels Convention constitutes, according to the intention of the Contracting Parties, a **binding basis** of decision-making.[563]

Almost one year after this, on 20 August 1998, the First Civil Division had to deal with the question of whether insurance contracts entered into by a state credit insurance agency with private enterprises are «civil and commercial matters» within the meaning of Article 1 of the 1988 Lugano Convention. In the preamble, the Contracting Parties of the Lugano Convention expressed their desire to secure «as uniform an interpretation as possible». With reference to ATF 123 III 414 the Division held that one of the means intended to secure uniform interpretation is the taking into account of the relevant decisions rendered by the courts of the **other Contracting Parties**, as required by Article 1 of Protocol 2. Moreover, in the preamble to Protocol 2 the Contracting Parties emphasize the substantial link between the convention and the Brussels Convention. And they mention that said Protocol was agreed on in full awareness of the rulings delivered by the ECJ on the interpretation of the Brussels Convention up to

562 AFT 121 III 336, consideration 5.c.
563 ATF 123 III 414, consideration 4.

the **time of signature** of this Convention. The Division finally references the declaration of the representatives of the **EFTA governments** who are parties to the Lugano Convention which is also an element of the «context» of the convention within the meaning of Article 31(2)(b) of the Vienna Convention. Based on these considerations, the Federal Supreme Court held that the notion of «civil and commercial matters» in Article 1(1) of the Lugano Convention, according to the **ECJ's case law**, must be considered as an **autonomous notion** which is to be interpreted with reference to the objectives and the scheme of the Convention as well as to the general principles which stem from the corpus of the national legal systems. Although the Division emphasized that according to the ECJ the autonomous interpretation of Article 1(1) of the Brussels Convention, in the framework of the Community, was justified by the necessity to secure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, the Division concluded that there was **no reason not to follow** this line of interpretation when applying the Lugano Convention. The principal advantage of any autonomous interpretation of the treaty was said to avoid the legal uncertainty which would be the consequence of a simple referral to the national laws of the Contracting Parties. With regard to the latter point the Court cited several **Swiss authors**. It added that the lack of foreseeability of the interpretation which would result from this would undermine the intention shown by the Contracting Parties to ensure an interpretation of the two instruments as uniform as possible.[564]

After this, the Division issued a *caveat*: Referring to ECJ Cases *Tessili* and *Gilly*[565], it stated that due to its foundation on the constitutional law of the Community, the Brussels Convention corresponded to a community functionalism which has been ascertained by the ECJ since its first judgments on the Brussels Convention. It could happen, the Division went on to state, that the joint application of a provision of the EC Treaty, for instance of its Article 6 concerning the prohibition of any discrimination based on nationality (now Article 18[1] TFEU) could have an influence on the interpretation of a provision of the Brussels Convention in the Community's sphere and could impede the taking over of this interpretation by the judiciaries of the non-EC Member States when interpreting the correspondent concepts of the Lugano Convention. But apart from these cases which will remain rare, one must consider that the territories of the states which are parties to the Lugano Convention – even for those for which the Lugano Convention is only a prolongation of the 1972 FTAs – constitute a common geographic entity or a judicial space which, in the interest of the economic operators, calls for an application **as uniform as possible**. On

564 ATF 124 III 382, consideration 6.

565 Cases 12/76 *Tessili* [1976] ECR, 1473, paragraphs 9–11; C-336/96 *Gilly* [1998] ECR, I-2793, paragraph 15.

that point the Division referred to the ECJ's statement in Case C-398/92 *Mund & Fester*[566] that «the Member States of the Community [...] are Contracting Parties to the Brussels Convention whose territories may be regarded as forming a single entity» as well es to **Swiss literature**. It concluded that since an eclectic approach had to be followed when demarcating private law and public law in a given case, there was reason to consider that the criteria used by the ECJ in the framework of its autonomous interpretation could be taken over by the Supreme Court in the framework of the interpretation in the case at hand. In other words, it is not decisive whether the persons who are parties to the legal relationship at issue are private or public, but rather whether the authority in question has acted «jure gestionis» or «jure imperii.»[567]

In ATF 124 III 188, judgment of 9 March 1998, the First Civil Division had to decide whether the place of performance was the place of jurisdiction for a claim arising from an exclusive dealing agreement. When giving interpretation to Article 5 No. 1 Lugano Convention, the Division directly referred to the case law of the ECJ, *inter alia* the judgment in case *De Bloos*, where the ECJ held that for the purposes of determining the **place of performance** within the meaning of Article 5 of the Brussels Convention, the obligation to be taken into account is the one which corresponds to the contractual right on which the plaintiff's action is based, not the characteristic obligation.[568] The Division added that the ECJ's case law in *De Bloos* has been criticized by parts of the doctrine and that some national courts of the Contracting Parties had deviated from it. It also cited the opinion of Advocate General LENZ in the case *Custom Made* which had tried to initiate a change in case law.[569] However, the Division added that the ECJ rejected this approach and stuck to *De Bloos*. It concluded that under Protocol 2 it is **bound** by the ECJ's case law concerning the Brussels Convention which was rendered before the signature of the Lugano Convention. On that point, the Division referred to ATF 123 III 414, consideration 4. It added that the rulings of the ECJ rendered after the signature must be taken into due account, whereby an interpretation as uniform as possible must be aimed at, as follows from the declaration of the governments of the participating **EFTA States**. The Division then stated that even if the critique of the ECJ's approach appeared to be formidable in certain cases, it saw in view of the judgment *Custom Made* and with regard to ensuring parallelism between the Lugano and the Brussels Convention no grounds to construe the notion of obligation in Article 5 No. 1 Lugano Convention in a different way than the ECJ. A

566 Case C-398/92 [1994] ECR, I-467, paragraph 19.

567 ATF 124 III 382, consideration 6.e. The reservation was also made in ATF 124 III 382 consideration 6.c.; ATF 124 III 188 consideration 4.b.; ATF 123 III 414 consideration 4; ATF 121 III 336 consideration 5.c., and ATF 125 III 108, consideration 3.b.

568 Case 14/76 [1976] ECR, 2508, paragraphs 13 f.

569 C-288/92 *Custom Made Commercial* [1992] ECR, I-2931, points 42 ff.

deviating interpretation would abet **legal uncertainty** and a **lack of foreseeability** of the place of performance.[570]

In ATF 125 III 451, the First Civil Division held on 17 September 1999 that there were different opinions in **academic literature** concerning the interpretation of Article 24 Lugano Convention which deals with provisional measures. In view of the Lugano Convention's close affiliation to the Brussels Convention, the ECJ's case law on the parallel provisions of the latter was also be taken into account (*«mitzuberücksichtigen»*). The Division then directly referred to the jurisprudence of the ECJ and concluded that in light of the case law and of the doctrine a certain interpretation had to be chosen. In the judgment ATF 129 III 626 of 30 July 2003, the First Civil Division dealt with a so-called *Mareva* injunction. Invoking the case law of the ECJ, the complainant argued that such a freezing injunction could not be executed in Switzerland because of certain circumstances. The Division found that under Article 1 of Protocol 2 the Contracting Parties were obliged to pay due account to the relevant decisions of the courts of the other Contracting Parties. This would hold true, in particular (*«in besonderem Masse»*), for the case law of the ECJ. The Division considered that the ECJ's case law had been discussed controversially in academic literature. Despite this, it concluded that it was binding on the courts of the Member States of the Brussels Convention respectively the Brussels Regulation under Article 234 EC (now Article 267 TFEU). Although the ECJ has no competence to interpret the Lugano Convention, its rulings according to Article 1 of Protocol 2 and according to the principles of autonomous and uniform interpretation of treaty law must be taken into account when applying the parallel convention. This, the Division said, applies independently of whether the judgments of the ECJ rendered before 1988 have a binding effect for the interpretation of the Lugano Convention. Again, the Division made reference to the declaration of the **EFTA States**, but did not mention the one of the EC States. Given that the relevant provisions are identical by word in both conventions, there was, therefore, no reason to deviate from the case law of the ECJ. This, the Divisions added, corresponded to the predominant view in Swiss literature. In ATF 131 III 227, the Second Civil Division of the Federal Supreme Court on 15 December 2004 referred to the preamble where the Contracting Parties declared their desire to secure an interpretation as uniform as possible of the provisions of the convention – as held in ATF 123 III 414 consideration 4 –. One of the means to come to this uniform interpretation was the taking into account, as requested by Article 1 of Protocol 2, of the relevant decisions rendered by the tribunals of the **other Contracting Parties**. Moreover, the Court went on to state, the Contracting Parties emphasized in the preamble to Protocol 2 that there is a substantial link between the Lugano and the Brussels Convention and that said protocol was concluded in full knowledge of the case law of the ECJ rendered **until the date of**

570 ATF 124 III 188, consideration 4.

signature of the Convention, which is 16 September 1988. Reference was then again made to the declaration of the EFTA States which was said to be part of the context of the Lugano Convention within the meaning of Article 31 paragraph 2 letter b of the Vienna Convention. In view of the same close dependence with regard to the **Brussels Regulation**, the interpretation of the Lugano Convention had, in principle, also take into account the jurisprudence rendered in application of this new regulation. However, a reservation was made for the case in which the interpretation given by the ECJ to the Brussels Convention or the Brussels Regulation was being influenced by the joint application of the **EC Treaty** or of other community rules. This would hinder the taking over of this interpretation by the competent Swiss courts which have to interpret the corresponding concepts of the Lugano Convention.

dd. All in all, the Federal Supreme Court's case law tries to convey the message that the case law of the ECJ is strictly speaking not binding, that old and new case law must be distinguished and that there are other relevant sources which could lead the Court to a different interpretation than the one chosen by the ECJ under the Brussels regime. The Court at times also leaves the impression that it gives weight to (predominantly) Swiss academic literature. These elements of the case law seem to suggest that, in spite of the homogeneity regime laid down in Recital 6 and Protocol 2 to the Convention, the Federal Supreme Court at the end of the day is **not legally bound** to follow ECJ case law. Nonetheless, there are passages in the case law which indicate that old ECJ case law is in effect deemed to be binding and, in fact, also new case law has been followed. In a number of cases, the Court makes reference to the declaration of the Governments of the EFTA States. In an important case, the Federal Supreme Court considered that an interpretation by the ECJ had been criticized and even intimated that it had certain sympathy for that criticism. But in the interest of legal certainty and foreseeability, the Court followed the ECJ's solution. In this case, the Court found that it was **bound** by old ECJ case law. The Federal Supreme Court finally held in several cases that due to its foundation on the constitutional law of the Community, the Brussels Convention and the Brussels Regulation correspond to a Community functionalism which could ultimately impede the taking over of the interpretation by the judiciaries of the non-EC Member States when interpreting the correspondent concepts of the Lugano Convention. However, this reservation so far has not become practical.

d. Comparison: The Norwegian Supreme Court's case law concerning homogeneity

It may be enlightening to compare the Federal Supreme Court's approach concerning homogeneity to the one of the **Norwegian Høyesterett**.[571] In the Bill to Parliament («Storting») on the incorporation of the 1988 Lugano Convention,

571 I am grateful to Høyesterett Justice Prof. Dr. HENRIK BULL for this information.

the Ministry of Justice commented upon Protocol 2 by stating that it was in the interest of all Contracting Parties to attain the greatest possible uniformity in interpretation not only of the Lugano Convention but also of the Lugano Convention and the Brussels Convention. But Norwegian courts would do this anyway. Regarding the two declarations, the Bill observed that since the EC was not a Contracting Party, the ECJ could not be mentioned in the Protocol – hence the two declarations with the same formulation «pay due account to». But again, «this is only an expression of what Norwegian courts would do anyway for obvious practical reasons.» It was not found necessary to include a provision in the Act of Incorporation on the status of the case law of the ECJ when Norwegian courts interpret the Lugano Convention.[572] In the Bill to the Storting on the incorporation of the 2007 Lugano Convention, there are no such statements, but instead there is a quote from a judgment of the Supreme Court:

> «The Lugano Convention is a parallel convention to the Brussels Convention applicable between the EU Member States. In the EU the Brussels Convention has now been replaced by a regulation, the ‹Brussels I Regulation› or ‹Judgments Regulation›. When interpreting the Lugano Convention, the case law of the EC Court of Justice concerning the interpretation of provisions of the Brussels Convention/Brussels I Regulation that have parallel provisions in the Lugano Convention will be an important source of law, cf. Rt. 2004 page 981 at paragraph 22 and Rt. 2006 page 391 at paragraph 21.»[573]

In Rt. 2004 page 981 paragraph 22, the Høyesterett held:

> «The Lugano Convention is on all important points parallel to the Brussels Convention entered into on 27 September 1968 between the EC Member States. The EC Court of Justice is competent in cases concerning the application of the Brussels Convention, and according to a declaration given at the signing of the Lugano Convention, one should, when interpreting that Convention, ‹pay due account› to the rulings of the EC Court of Justice and also to those of national courts concerning ‹provisions of the Brussels Convention which are substantially reproduced in the Lugano Convention›. It follows from this that in particular case law of the EC Court of Justice will be an **important source of law** when Norwegian Courts have to interpret the Lugano Convention.»[574]

Rt. 2006 page 391 paragraph 21 simply refers to Rt. 2004 page 981 paragraph 22.

Two conclusions may be drawn from this: (1) The Norwegian Supreme Court's approach of applying the homogeneity rules of the Lugano Convention is much more sober than the Swiss Federal Supreme Court's *modus operandi*. The Høyesterett has not agonized over the binding or non-binding nature of ECJ case law, over whether there is a significant difference between old and new ECJ case law or over relevant legal literature. With regard to the latter

572 Ot.prp. nr. 94 (1991–1992), 14.

573 The judgment is published in Norsk retstidend (Rt.), 1759. The quotation is taken from paragraph 42 of the judgment.

574 Emphasis added.

point, it must be added that it is not the Norwegian Supreme Court's style to grapple with legal literature, although it is always carefully studied. (2) The expression «important source of law» does of course mean that the Supreme Court has left room for distancing itself from the case law of the ECJ if need be, but it has not elaborated on when that would be necessary. In reality, the Supreme Court has so far always followed the case law of the ECJ when interpreting the Lugano Convention.

e. The ECJ's case law concerning homogeneity

Except for one case, the ECJ has never made reference to case law of the Supreme Courts of the EFTA States party to the Lugano Convention. Although it cannot be excluded that the ECJ conducts an implicit dialogue with those courts, it is doubtful whether this corresponds to the **spirit of Protocol 2** and the declaration of the EC Member States. It may be recalled in this context what Advocate General *Tesauro* stated in Case 32/88 *Six Constructions*. He called «the hope, expressed in the declaration by the representatives of the governments of the States signatories to the Lugano Convention which are members of the European Communities, which states that ‹they consider as appropriate that the Court of Justice of the European Communities, when interpreting the Brussels Convention, pay due account to the rulings contained in the case-law of the Lugano Convention› to say the least, surprising.»[575] One will not, however, overlook that in Case 394/07 *Gambazzi*, a preliminary reference case concerning the interpretation of the public policy clause in Article 27 (1) of the Brussels Convention, the ECJ's First Chamber mentioned that the parties to the main proceedings referred to a judgment of the **Swiss Federal Supreme Court** concerning the parallel provision of the Lugano Convention and added that «[i]n accordance with the declaration by the representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities, it is appropriate that the Court pay due account to the principles contained in that Tribunal fédéral judgment and, in application of Article 1 of Protocol 2 on the uniform interpretation of that convention, the national court is to pay due account to those principles», something the ECJ subsequently did.[576] There is no judgment of the ECJ which cites case law of the Supreme Courts of Norway or of Iceland.

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575 [1989] ECR, 341, fn 3. – For critical remarks see CHRISTIAN KOHLER, Dialog der Gerichte im europäischen Justizraum. Zur Rolle des EuGH bei der Auslegung des neuen Übereinkommens von Lugano, in: Mario Monti/Prinz Nikolaus von und zu Liechtenstein/Bo Vesterdorf/Jay Westbrook/Luzius Wildhaber (eds.), Economic Law and Justice in Times of Globalisation/Wirtschaftsrecht und Justiz in Zeiten der Globalisierung, Festschrift für Carl Baudenbacher, Baden-Baden/Vienna/Berne 2007, 141, 155.

576 [2009] I-2563, paragraphs 35 ff. The referenced judgment of the Federal Supreme Court is Case 4P082/2004.

VI. Post-Cold War

1. IMF

On 29 of May 1992, Switzerland acceded to the International Monetary Fund after a positive referendum. The articles of agreement of the IMF were adopted at the United Nations Monetary and Financial Conference in Bretton Woods on 22 July 1944 and entered into force on 27 December 1945. Each member country is assigned a quota determining its financial commitment to the fund and its voting power. The Federal Department of Finance emphasizes on its website that as the leader of a group of member countries, Switzerland received one of the 24 seats on the Executive Board of the IMF, a fact that allows it «to contribute actively to the IMF and co-determine the stance it adopts.»[577] Switzerland has been able to represent several Central Asian countries and Poland (so-called «Helvetistan voting group»).[578]

2. The failed EEA attempt

From the beginning of European integration, Swiss diplomacy had strived for **participating** in the making of new EEC (later EC and EU) law.[579] These endeavors were motivated by the experience that in order to secure their industry **access to the market**, non-EEC Member States had to take over more and more EEC law. The completion of the single market program of 1985 created the risk of marginalization of Swiss industry. When on 17 January 1989, the then Commission President Jacques Delors in a speech before the European Parliament proposed the establishment of a European Economic Space (EES) which would contain a new form of a more effective and structured cooperation with joint institutions and new organs,[580] many Swiss thought that their time had come. It had become clear during the unsuccessful association negotiations of the years 1961 to 1963 that co-decision rights for non-Member States were hardly feasible, but this knowledge was oppressed. That the relevant passage was not part of the Commission President's written speech text was overlooked. Almost exactly one year later, Mr. Delors withdrew his proposal.[581] Unlike the

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577 <http://www.efd.admin.ch/dokumentation/zahlen/00579/00607/00625/index.html?lang=en> visited 15 March 2012.

578 <http://www.alliancesud.ch/en/policy/other/socially-explosive-swiss-imf-group> visited 22 May 2012.

579 In the 1972 negotiations on a FTA, the Swiss chief negotiator Paul Jolles claimed participatory rights for Switzerland. See Jörg Thalmann, Der EWR, Stanley Adams und die Ost-Erweiterung, in: Mario A. Corti/Peter Ziegler (eds.), Diplomatische Negoziation: Festschrift für Franz A. Blankart zum 60. Geburtstag, Berne/Stuttgart/Vienna 1997, 75, 78.

580 E.C. Bull. Supp. 18/9 17 (1989).

581 Carl Baudenbacher, Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area, 3 *Columbia Journal of European Law* (1996–1997) 169, 175 ff.; Dieter Freiburghaus, Königsweg oder Sackgasse (fn 464), 206 ff.

1972 proceedings, the EEA negotiations were multilateral negotiations. Since the other EFTA States wanted to move on, the Federal Council nevertheless decided to participate in the negotiations. But Switzerland was ill-prepared when the talks started. And the proceedings were difficult for a number of reasons. At the beginning, all the EFTA States drew up lists of areas which they claimed ought to enjoy **permanent exemption** from the scope of the agreement. Switzerland presented a long list containing, *inter alia*, the free movement of workers, the whole area of competition law and the much cherished right of corporations to build hidden reserves.[582] Since the EEA aimed at extending the EC single market to the EFTA States, all these special wishes had to be dropped. The crucial point, however, was the participation in the decision-making of the Community. Switzerland insisted more than the other EFTA States on full co-decision rights. Other EFTA States were less disappointed than Switzerland when it became clear that this was not feasible. They concluded from the impossibility for a third country to fully participate in the EU's decision-making that the EEA would be a transitional step on their way to EU membership. The end of the Cold War, which became reality with the fall of the Berlin Wall on 9 November 1989, also played a role in this.

The Swiss chief negotiator finally realized that the EEA was, despite the lack of a co-decision right, an attractive form of integration because it would secure Swiss industry at large **unrestricted, discrimination free access** to the EU single market while leaving the country's freedom in matters of currency, foreign trade, and agriculture untouched. According to his own proclamation, he had learned during the 16 years of negotiations for the Insurance Agreement that to grant non-Member Countries co-decision rights was not compatible with the fact that the Member States themselves had limited their sovereignty due to the supranational nature of the Community. It had essentially become clear to him that third countries would never be able to fully participate in the Community's and later Union's decision making.[583] In the end, the EFTA States obtained much more than the Community had been prepared to give in 1961: They were granted equal treatment with the EC Member States with regard to the Commission's **decision shaping**. If they refused to take over new EC law, only proportionate sanctions could be imposed on them, and each EFTA State was given the right to refer a respective dispute to arbitration (Article 111[4] EEA). That the latter provision became part of the EEA Agreement was not least a consequence of Swiss insisting. And most importantly, unlike in 1961, the EFTA States were not expected to accept the competence of the Commission with regard to surveillance and the jurisdiction of the ECJ, but were allowed to have

582 See with regard to the right of corporations to build hidden reserves supra, C. VII.

583 Franz Blankart, 50 Jahre Integrationsbüro: Hinweise zur EWR-Verhandlung, Berne, 23.11.2011 <http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3912/e6777/e6778/linkliste6781/BlankartRede_ger.pdf> visited on 5 December 2011, 2.

their own surveillance body, the **EFTA Surveillance Authority**, and their own judicial mechanism, the **EFTA Court** (Article 108 EEA). The chief negotiator saw the right of the EFTA States to have their own court as a worthy compensation for the absence of a co-decision right in the further development of Community law. Nevertheless, two top officials from the federal administration approached the two competent members of the Federal Council, the Minister for Economic Affairs and the Foreign Minister, behind the chief negotiator's back and convinced them that due to the lack of a full co-decision right, EEA membership was only acceptable if Switzerland lodged an application for EU membership at the same time.[584] On 20 May 1992, such an application was made. The public came to know that the decision had been taken in the Federal Council by 4 against 3 votes.

With this, the rejection of the EEA was almost pre-programmed, in particular since the Federal Council was also split with regard to adherence to the EEA. Two out of the 7 Members were opposed to the EEA and a third one kept silent in four languages. The No-camp was very well organized and profited from a patriotic mood which had been fostered by the so-called diamond celebrations of 1989: Veterans of the 1939–45 «border watch» were invited to commemorate the mobilization of the army 50 years ago. The bizarre celebrations were said to express the gratitude of the later born generations.[585] It was a strange coincidence: Roughly 100 years earlier, in 1891, the Federal Council for the first time had seen to it that a national holiday was celebrated on the occasion of the 600th anniversary of the old Swiss Confederation. The event marked a wave of nationalism. The revolutionary mood of 1848 had waned.[586] The pro-EEA campaign started too late and ended with an ineffective overkill. In a referendum of 6 December 1992, a narrow majority of the people, but a clear majority of the cantons **rejected the EEA Agreement**. All in all, the history of the EEA negotiations is an example of the weakness of the Federal Council in European matters. With this, any institutional involvement in European integration had become difficult. For the coming years, Switzerland's relations with the EU remained, on their face, apolitical.

3. WTO

a. General

That Switzerland was a founding Member State of the World Trade Organization was natural since the WTO is a further development of the old GATT. The

584 See Franz Blankart, 50 Jahre Integrationsbüro, Hinweise zur EWR-Verhandlung, Berne, 23.11.2011 <http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3912/e6777/e6778/linkliste6781/BlankartRede_ger.pdf > visited on 9 December 2011, 2.

585 See, e.g., <http://suche.staatsarchiv.djiktzh.ch/report.aspx?rpt=1&id=165293> visited 2 April 2012.

586 Supra, B. VII. 2.

WTO Agreements were signed on 15 April 1994 in Marrakech and entered into force on 1 January 1995. From the beginning, Switzerland effectively participated in the preparations and negotiations. The Federal Council's dispatch emphasized that the WTO Agreements are the fruit of the **most comprehensive multilateral trade negotiations** of all times.[587] The Agreement on the Establishment of the World Trade Organization set the common basis for the three multilateral trade agreements (pillars) GATT, GATS and TRIPS, for the Dispute Settlement Understanding (DSU) and for the Trade Policy Review Mechanism (TPRM) as well as for the plurilateral agreements in the fields of trade in civil aircraft, public procurement, milk products and beef. Other than the multilateral agreements, the plurilateral agreements are only binding on those Member States which have signed them.[588] The WTO is also a forum for further negotiations. A pill Switzerland had to swallow was the **liberalization of agriculture**. The Federal Council wanted this to be assessed in light of the gains which were to be expected from the total improvement of the framework conditions of international trade. It successfully argued that Switzerland's ability to finance income transfers for the benefit of agriculture was linked to the overall performance of the economy.[589] And it pointed to the fact that for the first time the non-economic functions of agriculture, the so-called multi-functionality, were being recognized.[590] Accession to the WTO was subject to the facultative referendum. An attempt to initiate a referendum failed since the required number of signatures could not be collected. Switzerland joined the WTO on 1 July 1995.[591]

Unlike the old GATT, the WTO has legal personality under public international law. It has concluded a relevant agreement with Switzerland and has its headquarters in Geneva.[592] The WTO is an organization which is based on the equality of the Member States. Each Member State has **one vote** (the EU has 27), but in most cases, decisions are taken by consensus (Article IX WTO).[593] The Federal Council's dispatch stressed that the WTO is not a supranational, but rather a classical **intergovernmental organization** and that membership was indispensable because Switzerland needed to participate in all aspects of

587 Botschaft zur Genehmigung der GATT/WTO-Übereinkommen (Uruguay-Runde) (GATT-Botschaft 1), BBl 1994 IV 1, 2.

588 The plurilateral agreements on dairy and beef were terminated in 1997.

589 Botschaft zur Genehmigung der GATT/WTO-Übereinkommen (Uruguay-Runde) (GATT-Botschaft 1), BBl 1994 IV 1, 3, 109 f.

590 Botschaft zur Genehmigung der GATT/WTO-Übereinkommen (Uruguay-Runde) (GATT-Botschaft 1), BBl 1994 IV 1, 43, 111.

591 See Lukas Engelberger, Die unmittelbare Anwendbarkeit des WTO-Rechts in der Schweiz, Berne 2004, 77 ff.

592 SR 0.192.122.632.

593 Consensus voting has a special meaning in the WTO: consensus is achieved when no member present at the meeting when the decision is taken formally objects to the decision. See, e.g., fn 1 to Article IX WTO.

multilateral trade including the environment.[594] In all these respects, WTO membership corresponds to Switzerland's **ideal conception** of an international treaty. The highest decision-making body is the General Council which consists of all the current 155 Member States. The General Council oversees the work of the Special Councils regarding the three areas trade in goods, trade in services and TRIPS. Most importantly, the General Council also acts as the Dispute Settlement Body (DSB) and as the organ reviewing the national trade policies. If it becomes active in these capacities, it is subject to special rules of procedure.[595]

b. Dispute settlement in particular

In view of Switzerland's reluctance to accept special judicial mechanisms that are competent to apply and interpret the provisions of an international treaty (which by definition do not decide according to the consensus principle, but by majority), the WTO dispute settlement mechanism is of particular interest. The Federal Council's dispatch has called it a fundamental pillar of the multilateral trade system.[596] Only **governments** have the right to bring a case. Private parties have no right to sue. All they can do is to lobby a government in order to convince it to bring an action. Governments are, however, free to follow such requests or not. They will act according to their general interest. Three phases of dispute settlement are to be distinguished: Consultations, *ad hoc* panels and the permanent Appellate Body. ***Ad hoc*** panels consist of three, exceptionally five, members. They resemble an international arbitration tribunal. If a panel has been established upon request of a WTO Member, it will hear the case on points of fact and of law and deliver a report on the alleged violations of WTO law. This report enters into validity once it is adopted by the DSB (Article 16 DSU). Instead of waiting for the DSB's decision, the parties may challenge the panel's report before the **Appellate Body** (AB). The AB is competent to hear appeals that shall be limited to points of law covered in the panel report and legal interpretation developed by the panel.[597] It may uphold, modify or reverse the legal findings and conclusions of the panel.[598] Formally, the report of the AB only enters into validity if it is adopted by the DSB (Article 17.14 DSU).

The report of the WTO AB shall be adopted by the DSB and unconditionally accepted by the parties unless the DSB decides by consensus not to adopt it. This means that the winning party would have to **vote against its own victory** (Art. 16 DSU). Under the GATT 47, a decision finding that a Contracting Party had violated its obligations under the agreement could only be taken by unani-

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594 Botschaft zur Genehmigung der GATT/WTO-Übereinkommen (Uruguay-Runde) (GATT-Botschaft 1), BBl 1994 IV, 2, 4, 35, 115.

595 See, e.g., ANDREAS R. ZIEGLER (fn 427), paragraphs 367 ff.

596 Botschaft zur Genehmigung der GATT/WTO-Übereinkommen (Uruguay-Runde) (GATT-Botschaft 1), BBl 1994 IV 1, 35.

597 Art. 22.6 DSU.

598 Art. 17.13 DSU.

mity, i.e. with the consent of the loosing Contracting Party. The implementation of the principle of negative or reversed consent is certainly the most important improvement in the WTO dispute settlement system as compared to the old GATT. But some have argued that conflicts have just been shifted from the decision stage to the enforcement stage. A key catalyst to stimulate legislation for the dispute settlement process was the rather inconsistent policy adopted by the U.S. The growth of the U.S. trade deficit in the early 1990s aggravated the difficulties in persuading Congress to pass legislation bringing U.S. law in line with GATT rulings. The concern to curb the use of «Section 301» of the U.S. Trade Act of 1974 was a key factor in persuading states to accept the automacity in the WTO's dispute settlement procedure. This provision allows the U.S. to threaten, and if necessary, to impose trade sanctions against countries that involve in certain «unfair» international trade practices.[599]

Switzerland has only been a party to dispute settlement proceedings once so far, in the *U.S. Steel Safeguards* case where it supported the European Union.[600]

c. The Appellate Body in particular

aa. Appointment of members and composition

Formally, the highest dispute settlement instance is the DSB, i.e. the totality of the Member States. The most interesting organ is, however, the AB, which consists of seven members and decides in a **three members division**. The members (who from a functional point of view are judges) are appointed by the DSB by consensus after having been nominated by a selection committee consisting of the DSB, the General Council and the four specific Councils. The EU and the U.S. so far have enjoyed «special privileges» enabling them to object to candidates, which has amounted to a (at least informal) veto power.[601] The veto is used in order to ensure that persons being appointed are not exceedingly activist, biased or expansive lawmakers, which is to be judged upon the information available.[602] The DSB decides on the recommendation of the Selection Committee. The procedure of selection before the appointment is not subject to any public control or transparency, it is therefore considered as «extremely politically charged».[603] The first selection processes after the creation of the AB lasted several months and led to serious criticism. The following appointments were conducted quicker and with «great efficiency»,[604] i.e. within the deadlines foreseen.

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599 19 U.S.C. 2411.

600 DS253, 2002/3.

601 Richard Steinberg, Judicial Lawmaking in the WTO, 98 A.J.I.L. 247, 264 (2004).

602 Ibid., 264 with examples.

603 Tomer Broude, International Judicial Bodies as Source of Normativity, A comparative look at the WTO DS system, paper presented at the Round Table on Global Governance and International Legal Theory, University of Utrecht, July 4th 2002.

604 James Bacchus, Experiences from the WTO AB, 38 Tex. Int'l L.J., 469, 475 (2003).

AB members must be persons of «recognized authority» with «demonstrated expertise in law, international trade and the subject matter of the covered agreements generally». They «shall be unaffiliated with any government». A member shall exercise his/her office without accepting or seeking instructions from any international, governmental, or non-governmental organization or any private source. As to the nationality of the judges, there are no formal requirements.[605] It is required, however, that the AB membership shall be broadly representative of the membership in the WTO.[606] The term of office covers four years, reappointment being possible once. This rather short term and the possible pressure on the members in view of reappointment is one of the major aspects of discussion: The current provisions are criticized as not sufficiently guaranteeing the **independence** of the AB members vis-à-vis the appointing bodies.[607] This risk is mitigated by the fact that separate opinions are delivered anonymously: **Dissents** are possible, but the identity of the author remains unknown (Art. 17.11 DSU). The few dissents that have been drafted are written in cautious language. The goal obviously is not to have dissenting opinions, but rather a meeting of the minds. In fact, the AB's Working Procedures provide in Rule 3.2.:

> «The Appellate Body and its divisions shall make every effort to take their decisions by consensus. Where, nevertheless, a decision cannot be derived at by consensus, the matter at issue will be decided by a majority vote.»

In practice, members of the WTO AB are trade diplomats, university professors, civil servants, occasionally also attorneys or politicians. An enormous problem lies in the fact that the AB members usually serve on a **part-time basis**.

bb. Duty to decide

No provision of the DSU expressly requires the panel or the AB to reach a decision. However, one will have to assume that there is a **factual duty**. The same cannot be said of diplomatic instruments. Three former AB chairpersons have emphasized this. Professor Claus Dieter Ehlermann wrote that «neither a panel nor the AB is entitled to refuse to address a claim because the panelists or the AB members want to avoid deciding a legal question that has delicate political consequences.»[608] James Bacchus said that because of Art. 17.12 DSU, «once the parties to a dispute decide to appeal a legal issue to the AB for a final ruling, we seven (Members of the AB) have absolutely no authority not

605 § 6 Working procedures AB.

606 Art. 17 (3) DSU.

607 James Bacchus, Experiences from the WTO AB (fn 604), 469, 475 (2003).

608 Claus-Dieter. Ehlermann, Tensions between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO, 1 World Trade Review (2001), p. 305, citing for his proposition Art. 17.12 and 3.2 DSU.

to rule on that issue.»[609] And Professor GIORGIO SACERDOTI stated that «the Appellate Body has no discretion, such as the Supreme Court in the US enjoys, to take up a case or not.»[610]

cc. Methods of interpretation

Article 3.2 DSU refers to the «customary rules of interpretation of public international law». According to the case law of the AB, Articles 31–33 of the Vienna Convention can insofar serve as a point of reference. The WTO is thus part of **public international law**.[611] Unlike the ECJ, but like the ECtHR, the WTO has openly defined its own rules of interpretation. European University Institute (and former University of St. Gall) International Economic Law Professor ERNST-ULRICH PETERSMANN has stated that in its early days, the AB focused on **textual interpretation**, but later relied more and more on general principles of WTO law, on systematic and on teleological interpretation.[612] In fact, at the beginning, the AB put so much weight on the «ordinary meaning of the terms of the treaty» (Article 31[1] Vienna Convention) that commentators sarcastically noted that the Shorter Oxford Dictionary had become one of the agreements covered by the WTO.[613] Former AB Chairman GIORGIO SACERDOTI has taken the view that the textual method was adopted in order to be «on the safe side». He pointed to the WTO's large and diverse membership, the series of interconnected agreements it comprises and the fact that decisions serve as guidance for other members beyond the parties to the case.[614]

It became clear after a short time that the Vienna Convention did not give sufficient orientation, for instance, when talking about «object and purpose» in Article 31(1), because the different WTO Agreements have different objects and purposes.[615] Moreover, also a judicial body which is prepared to stick to the text of the terms of the treaties will face the situation in which it will have

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609 JAMES BACCHUS, The Bicycle Club: Affirming the American Interest in the Future of the WTO, 37 Journal of World Trade (2003), p. 429, 439.

610 GIORGIO SACERDOTI, Methods of Interpretation by the Appellate Body of the WTO, in: Carl Baudenbacher/Erhard Busek (eds.), The Role of International Courts, Stuttgart 2008, 175, 182.

611 Appellate Body Report, US Gasoline DSR 1996:I, 3, 23; Appellate Body Report, Japan – Alcoholic Beverages II DSR 1996:I, 97, 104; see CLAUS-DIETER EHLERMANN, Experiences from the WTO Appellate Body, 38 Tex. Int'l L. J. 469, 480 (2003).

612 ERNST-ULRICH PETERSMANN, From Trade Diplomacy to Judging in International Trade Law, contribution to the Salzbourg conference on The Role of International Courts, Stuttgart 2008, manuscript of speech, on file with the author.

613 CLAUS-DIETER EHLERMANN, Experiences from the WTO Appellate Body (fn 611), 480; GIORGIO SACERDOTI, Methods of Interpretation by the Appellate Body of the WTO (fn 610), 175, 176.

614 GIORGIO SACERDOTI, Methods of Interpretation by the Appellate Body of the WTO (fn 610), 175, 176 ff.

615 GIORGIO SACERDOTI, Methods of Interpretation by the Appellate Body of the WTO (fn 610), 175, 179 f.; see also ISABELLE VAN DAMME, Treaty Interpretation by the WTO Appellate Body, 21 EuR J Int Law, 605 ff. (2010).

to decide whether the lack of a rule constitutes a **«gap»** (which needs to be filled) or **qualified silence**. The most controversial case of gap-filling was the AB's ruling in the *Shrimp/Turtle* case, where it accepted the possibility of considering non-requested information (*amicus curiae* briefs) from NGOs in panel proceedings.[616] In other cases, the AB has also used a teleological approach. The WTO's judicial mechanism is working much more efficiently than its legislative machinery. The «imbalance between negotiations and judicial decision-making»[617] has led to tensions. No use, however, has been made of the authority to adopt interpretations granted to the WTO Ministerial Conference and General Council by Article IX:2 of the WTO Agreement. All in all, one will concur with the statement of Dr Isabelle Van Damme from the University of Cambridge that «[t]he Appellate Body's use of principles of interpretation has been instrumental in making acceptable its early choice to function as a court and to build its judicial identity.»[618]

One of the most important general principles the dispute settlement organs have recognized is **proportionality**. In the WTO agreements, proportionality is not mentioned. But we see an interesting feature: Europeans sitting on panels and on the AB are bringing their own legal thinking along.[619] In the 1989 *United States Section 337 of the 1937 Tariff Act* case, the EC challenged a U.S. measure which treated patent infringement litigation differently, depending on where the goods in question had been manufactured. U.S. industries claiming that imports infringed their U.S. patents had exclusive access to a special procedure before the U.S. International Trade Commission («ITC») which differed in several important respects from patent litigation before U.S. courts. For instance, foreign respondents were denied the right to file counterclaims before the ITC against U.S. complaining industries in a Section 337 case. The three-member GATT panel included **former ECJ judge** Professor *Pierre Pescatore*.[620] It adopted basically the same solution as the ECJ did when applying the free movement of goods provision of the European Treaty and held:

> «[A] contracting party cannot justify a measure inconsistent with another GATT provision as ‹necessary› in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use,

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616 WT/DS58/AB/R, paragraph 108, Oct. 12, 1998.

617 Thomas Cottier, The Legitimacy of WTO Law, NCCR Trade Working Paper No. 2008/19, <http://phase1.nccr-trade.org/images/stories/publications/IP2/The_Legitimacy_of_WTO_Law_cottier_final%200808.pdf> visited 5 May 2012, 5.

618 Isabelle Van Damme (fn 615) 605.

619 See with regard to the following *Alec Stone Sweet & Jud Mathews*, Proportionality Balancing and Global Constitutionalism, 47 Colum. J. Transnat'l L. 72 ff. (2008).

620 See with regard to Professor Pescatore also supra, E. V. 7. d.

among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[621]»

The Chairman of the AB in the 2001 *Korea Beef* case was Professor CLAUS-DIETER EHLERMANN, a former **top official in the European Commission**. Quoting the statement of the panel in the *United States Section 337* verbatim, the decision says:

«It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important [...] common interests or values are, the easier it would be to accept as ‹necessary› a measure designed as an enforcement instrument. There are other aspects of the enforcement measure to be considered in evaluating that measure as ‹necessary.› One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be ‹necessary.› [...] [D]etermination of whether a measure [...] is ‹necessary› [...] involves in every case a process of weighing and balancing a series of factors [that] include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[622]»

This is in line with a global development that has been called a move from a «culture of authority» toward a «culture of justification» in mature systems.[623]

dd. System of precedent?

The AB quotes its own case law. The question has therefore been discussed whether it operates under a system of precedent. The general view on this has been expressed by Georgetown University Professor JOHN JACKSON who stated that «there is quite a powerful precedent effect in the jurisprudence of the WTO, but that is certainly not stare decisis, and it is not so powerful as to require panels or the Appellate Body considering new cases to follow prior cases, with the possible exception that once prior cases have been numerous regarding a particular issue and approach, and apparently accepted by all members of the WTO, then the language of the Vienna Convention about ‹practice under agreement›, may suggest a stronger impact. But short of that situation, it appears that

621 GATT Panel Report, *United States Section 337* of *the Tariff Act of 1930*, L/6439, BISD 36S/345 (7 November 1989), paragraph 5.26.

622 Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, T/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 5 (10 January 2001), paragraphs 162–164, citation in paragraph 165.

623 MOSHE COHEN-ELIYA & IDDO PORAT, Proportionality and the Culture of Justification, 59 Am. J. Comp. L. 463 ff. (2011); see also DIMITRY KOCHENOV, A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe, Colum. J. Eur. L. 55, 102 f. (2011).

the ‹flavor› of the precedent effect in the WTO is still somewhat **fluid**, and possibly will remain fluid for the time being.»[624]

ee. Effect

As a matter of principle, WTO law does not produce direct effect in any Member State, in particular not in the U.S. where such effect is excluded in the implementing legislation and in the EU where it has been ruled out by the ECJ in Case C-149/96 *Portugal v. Council* as well as in subsequent cases. The ECJ referred to the dispute settlement mechanism which it found to be too diplomatic, to the *travaux preparatoires* and to the lack of reciprocity.[625] Not only provisions of WTO law, but also decisions that have been taken under the DSU lack direct effect in EU law and cannot be invoked before the national courts of the EU Member States nor can damage claims been brought based on them.[626] WTO law is therefore being **treated differently** in EU law than, for instance, the FTAs with the EFTA States. As described above, the ECJ held in Case 104/81 *Kupferberg* that direct effect of a prohibition on tax discrimination in the FTA with Portugal does not depend on reciprocity.[627] Academics have called on the ECJ to overrule its *Kupferberg* judgment and to generally make the recognition of direct effect of international treaties in EU law dependent on reciprocity. They think that the approach taken *vis-à-vis* the WTO and the rulings of the WTO dispute settlement organs should have general application today.[628]

In its *Sunrise and Orange* judgment of 7 May 1999, the Federal Supreme Court (Second Public Law Division) held that the **GATS Agreement** was only binding on the Member States and failed to create directly applicable rights for business operators.[629] However, in its dispatch concerning the GATT/WTO agreements, the Federal Council indicated that several provisions of the **TRIPS Agreement** would be sufficiently detailed in order to be directly applied by the

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624 Sovereignty, the WTO and Changing Fundamentals of International Law, Cambridge 2006, 177, emphasis added; see also the contributions by Rachel Brewster, Akio Shimizu as well as Edwin Vermulst and Juhi Sud in Carl Baudenbacher/Simon Planzer, The Role of Precedent (fn 533). 25 September 1990, Ser. A, Vol. 184, paragraph 35.

625 C-149/96 *Portugal v Council* [1999] ECR I-8295.

626 See, e.g., Paolo Mengozzi, The rights and interests of undertakings, the WTO law and the prerogatives of the EU institutions, in: Carl Baudenbacher/Henrick Bull (eds.), European integration through interaction of legal regimes, Oslo 2007, 65 ff.; Piet Eeckhout, The effect of WTO dispute decisions, autonomy or autarky?, in: Inge Govaere/Reinhard Quick/Marco Bronckers (eds.), Trade and Competition Law in the EU and Beyond, 2011, 226, 228 ff.

627 [1982] ECR, 3641, paragraph 18.

628 Pieter J. Kuijper in: Marco Bronckers & Pieter J. Kuijper, De WTO voor de Europese Rechter, 2004, 4 ff. <http://www.nver.nl/documents/Preadvies2004_NVER_Bronckers_Kuijper.pdf> visited 5 May 2012. Also published as WTO Law in the European Court of Justice, 42 Common Market Law Review 1313–1355 (No. 5, 2005).

629 ATF 125 II 293, consideration 4. d.

Swiss courts.[630] TRIPS was said to be a special case because it refers to other international instruments such as the Paris and Berne Conventions which do have direct effect.[631] In ATF 122 III 469 *Chanel*, a trademark owner invoked the Swiss Trademark Act and (in a very general way) the TRIPS Agreement in order to block parallel imports of perfumes. He argued that TRIPS aimed at strengthening the rights of the trademark owner, but since the plea was incomprehensible, the Federal Supreme Court (First Civil Division) rejected it as inadmissible. The Court added in an *obiter dictum* that no systematic prohibition of parallel imports could be deduced from Article 16(1) TRIPS, which states under the title «rights conferred»:

> «The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed [...].»[632]

The Court concluded from this that it is always open to the parallel importer to prove the nonexistence of a likelihood of confusion, in which case his activity would not violate Article 16 TRIPS.[633] In two later judgments, the Federal Supreme Court did, however, recognize direct effect of Article 16 TRIPS. In ATF 130 III 267 *Tripp Trapp* of 20 January 2004, the First Civil Division held that in the interpretation of the notion of the notorious mark in Art. 3 Abs. 2 lit. b Trademark Act, the objectives of the Paris Convention and of the TRIPS Agreement had to be taken into account. Articles 6bis Paris Convention and Article 16 (3) TRIPS were then deemed to be **applicable** to the case at hand because of its international dimension and because protection was sought for a foreign brand.[634] On the other hand, the Court held in a judgment of 11 August 2009 that it was at least doubtful whether Article 41 TRIPS, which obliges the Member States to introduce appropriate enforcement procedures so as to permit effective action against any act of infringement of IP rights covered by the Agreement had direct effect.[635]

ff. Result

The WTO AB is less legalized than, say, the ECJ or the ECtHR. The WTO Agreements lack direct effect. Only Member State governments have locus

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630 Botschaft zur Genehmigung der GATT/WTO-Übereinkommen (Uruguay-Runde) (GATT-Botschaft 1), BBl 1994 IV, 287 f.

631 Lukas Engelberger (fn 591), 180.

632 See also Article 6 TRIPS, effectively providing that WTO Members remain free to elect the parallel imports regime of their choice.

633 ATF 122 III 469, consideration 5. g. bb.

634 ATF 130 II 267, consideration 4.2.

635 sic! 2010. 86 =Federal Supreme Court of 11 August 2009, 4A_56/2009, consideration 5.2.

standi. Citizens and economic operators only have indirect access to justice by way of lobbying a government.[636] As a matter of principle, proceedings take place behind closed doors.[637] But from a functional viewpoint, there cannot be any reasonable doubt that the WTO AB is a **global trade court**. Its members enjoy a high degree of independence and there is an appeal system. The AB is, however, bound by the interpretation rules of the Vienna Convention. According to commentators, the AB would put the very existence of the WTO system at risk if it were to follow the same methodological approach as the ECJ.[638]

The WTO AB is the only global forum with a functioning judicial mechanism. The flaw that its members are only appointed on a part-time basis will probably be remedied in the future. The notion «dispute settlement» is as much camouflage as are the expressions «Appellate Body» (instead of court) and «chairman» (instead of president). This is not adequately reflected in ECJ Advocate General PHILIPPE LÉGER's Opinion in Case C-351/04 *Ikea Wholesale Ltd*. LÉGER contended that the WTO dispute settlement mechanism does not provide for the creation of a body in the nature of a court. Thus, under Article 19 of the DSU, reports drawn up by panels and appellate bodies are merely recommendations. As to decisions, they do not, in the view of the AG, constitute binding judicial acts, neither as to the form nor to the substance. Those decisions are adopted by the WTO General Council, which, even though ruling as a dispute settlement body, nonetheless constitutes a political body. Moreover, notwithstanding the existence of the DSB, the DSU places particular importance on negotiations between the parties to the dispute. The AG concluded from this that the ECJ could not be bound by the interpretations of the DSB.[639] The AG's view puts too much emphasis on the fact that panel and AB decisions need to obtain formal approval by the DSB.

4. UN

Since 1948 Switzerland enjoyed observer status in the main organs of the UN. The country also participated in numerous sub-organizations (in particular with **economic law relevance**) and was involved in important missions. In 1986, a

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636 See on that point the debate between the two eminent WTO scholars and practitioners Jacques Bourgeois and Marco Bronckers; MARCO BRONCKERS, The domestic law effect of the WTO in the EU – a dialogue with Jacques Bourgeois, in: Inge Govaere/Reinhard Quick/Marco Bronckers (fn 626), 240 ff.; JACQUES H.J. BOURGEOIS, The European Court of Justice and the WTO. Problems and Challenges in: Joseph Weiler (ed.), The EU, the WTO and the NAFTA. Towards a Common Law of International Trade, Oxford 2000.

637 Exceptionally, the Appellate Body may authorize public hearings provided the main parties ask for it. See ALBERTO ALVAREZ-JIMÉNEZ, Public Hearings at the WTO Appellate Body: The Next Step, 59 International and Comparative Law Quarterly (2010), 1079 ff.

638 See, e.g. CLAUS-DIETER EHLERMANN, Experiences from the WTO Appellate Body (fn 611), 483 ff.

639 AG *Léger*, Opinion of 6 April 2006 in Case C-351/04 *IKEA Wholesale* [2007] ECR I-7723, points 93 ff.

first attempt to join the EU clearly failed.[640] On 3 March 2002, a popular initiative was approved by 54,6% of the voters and a narrow majority of the cantons (12 against 11).[641] It may be added that once it had joined, Switzerland became a very active member of the UN. Former Federal Councilor ADOLF OGI was from 2001 to 2007 Under-Secretary-General and Special Adviser to the Secretary-General on Sport for Development and Peace. University of Fribourg Professor NICOLAS MICHEL served as Under-Secretary-General for Legal Affairs and United Nations Legal Counsel from 2004 to 2008. Former Federal Councilor JOSEPH DEISS was President of the UN General Assembly from 14.09.2010 till 13.09.2011.

5. Sectoral bilateralism with the EU

a. Switzerland as a petitioner

The Federal Council tried to detract from its own responsibility for the EEA fiasco on 6 December 1992 by putting the blame on the anti-Europeans. It claimed that they were the guilty ones and that they had forced the country onto the «bilateral path». The EEA chief negotiator was made a scapegoat and those who had advocated the application for EU membership gained the upper hand in the federal administration. Under their influence, the Federal Council took the view that Switzerland within a relatively short period of time would join the European Union. The EEA was still mentioned as an option, but it was gradually pushed to the background. As a **transitional measure**, the country would need bilateral agreements in order to secure its industry unrestricted access to the EU single market. As early as in February 1993, Switzerland formally presented a request to the EU to conclude such treaties in a number of sectors. The European Commission's Communication on «Future relations with Switzerland» from 1 October 1993 is instructive in this respect. The explanatory memorandum mentioned in a reproachful tone that the rejection of the EEA Agreement by the Swiss electorate had caused «substantial delay in its entry into force with respect to the other parties to the Agreement. The Swiss government has made it clear that although the options of EEA and, indeed, Community membership remain open, no action will be taken until the time is ripe. In the meantime, Switzerland has requested the opening of negotiations with a view to the conclusion of new bilateral agreements in a wide range of areas.» The Commission then stated that negotiations should first be opened in the areas of air and road transport and of free movement of persons where Switzerland had not indicated that it wished to conclude bilateral agreements. The Commission went on to contend that Switzerland is part of Europe and that the door should be left open for the future. However, Swiss requests should «be

640 <http://www.admin.ch/ch/d//pore/va/19860316/index.html> visited 10 May 2012.
641 <http://www.admin.ch/ch/d//pore/va/20020303/index.html> visited 10 May 2012.

considered on a strict basis of mutual advantage and without undermining the EEA [...] Any agreement would need to deal satisfactorily with the implementation of the **Community acquis** and the need for Switzerland to accept the discipline involved.»[642] In fact, it took the Swiss negotiators many years until the first bilateral agreements were concluded. It is commonplace that the 1990s were characterized by **zero growth** and high unemployment and that this had to do with the lack of free access to the EU single market for the Swiss industry.[643]

b. First package

aa. General

On 21 June 1999, six and a half years after the rejection of the EEA, **seven treaties** in the fields of free movement of persons, air transport, land transport, agricultural trade, mutual recognition of conformity assessment, public procurement, and scientific and technological cooperation were signed in Luxembourg.[644] They constituted the first package. The seven agreements were linked by way of a **guillotine clause** which stipulates that all the agreements would collectively cease to apply if one of them were to be terminated.[645] With this, the EU wanted to prevent Switzerland from cherry picking by killing an unpopular agreement by way of referendum and keeping the more favorable ones. Although the agreements on free movement of persons, on air transport and on land transport had not figured on the Swiss wish list and the guillotine clause constituted a slap, the Federal Council and Swiss industry were happy.

With regard to the adaptation to new EU acquis and dispute resolution, the agreements correspond at first glance to the traditional Swiss approach. They are essentially static, and they can only be adapted to new EU law with Switzerland's **consent**. Since the first sectoral agreements were thought to be transitional in nature, not much weight was given to co-determination rights. Dispute settlement lies in the hands of **joint committees** which decide by consensus be-

642 COM (93) 486 final, page 1, and points 4, 11, and 13, emphasis added.

643 See for an overview of the treaties concluded between Switzerland and the European Union Christine Kaddous, The Relations Between the EU and Switzerland, in: Alan Dashwood & Marc Maresceau (eds.), Law and Practice of EU External Relations: Salient Features of a Changing Landscape, Cambridge 2008, 227 ff. (230 ff.).

644 Agreements between the European Community and the Swiss Confederation on trade in agricultural products, O.J. 2002 L 114/132; on Scientific and Technological Cooperation, O.J. 2002 L 114/468; on certain aspects of government procurement, O.J. 2002 L 114/430; on mutual recognition in relation to conformity assessment, O.J. 2002 L 114/369; on the Carriage of Goods and Passengers by Rail and Road, O.J. 2002 L 114/91; and on Air Transport, O.J. 2002 L 114/73; agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, O.J. 2002 L 114/6. All O.J.'s date from 30.4.2002.

645 See, e.g., Art. 25 FMPA; also the Commissions Communication of first of October 1993 pt. 12 and Annex VI.

hind closed doors. A referendum was initiated by two small right wing parties, but the Swiss People's Party whose leadership, after the rejection of the EEA, had become the torch bearer of the anti-European movement, did not participate in it. Swiss industry was fully aware of the economic advantages of the agreements and invested considerable means into the campaign. The first package of bilateral agreements was approved by 67,2% of the voters. With this, a development started that ultimately led the Swiss public to believe that the bilateral path was Switzerland's own model of European integration. More referenda were held on relatively minor issues, and the more victories the Government scored, the more the «bilateral path» was glorified.[646]

bb. The Free Movement of Persons Agreement in particular[647]

From a Swiss perspective, the Free Movement of Persons Agreement (FMPA) was the most revolutionary of the new treaties. In the campaign against the EEA, fear that the country could be flooded by EU citizens had played an important part. The FMPA led to a radical break with traditional Swiss law which was based on a quota system for workers and on the **seasonal workers statute**, a tool which aimed at attracting foreign workers while avoiding that they would take residence.[648]

As most of the bilaterals, the FMPA is in substance based on the EU acquis. The mechanism concerning the taking over of new acquis into the agreement is, however, rather weak. Under Article 18 FMPA, the **Joint Committee** has the competence to amend Annexes II and III on the coordination of social security schemes and on the mutual recognition of professional qualifications. The Federal Supreme Court is deemed to be bound by such decisions.[649] However, if Switzerland refuses new acts to be adopted into the FMPA, there are **no sensible consequences**. The scope of the third sentence of Article 16(2) FMPA is controversial. The provision states that in order to ensure the proper working of the Agreement, the Joint Committee, at the request of either Contracting Party, shall determine the implications of new ECJ case law. University of Fribourg European law Professor ASTRID EPINEY has rightly taken the view that such a decision makes the case law in question binding for the Federal Supreme Court.[650] For comparison, it may be mentioned that the EFTA Court held in Case E-6/01 *CIBA* that a decision of the EEA Joint Committee, which is *mutatis mutandis* composed in the same way as the Joint Committee under the

646 See on the further referenda ANDREAS R. ZIEGLER (fn 427), paragraphs 226 ff.

647 See also CARL BAUDENBACHER, From diplomacy to judicialization? – Some thoughts on EU-Swiss relations, in: Pascal Cardonnel/Allan Rosas/Nils Wahl (eds.), Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh, forthcoming in July 2012.

648 See CHRISTINA SCHNELL, Arbeitnehmerfreizügigkeit in der Schweiz, Diss. Zurich 2010.

649 ATF 132 V 423 consideration 9.2.

650 ASTRID EPINEY, Zur Bedeutung der Rechtsprechung des EuGH für die Anwendung und Auslegung des Personenfreizügigkeitsabkommmens, ZBJV 151, 2005, 1, 22 f.

FMPA, constitutes a simplified form of an **international agreement** between the Community and its Member States on the one hand and the EEA/EFTA on the other.[651] This finding may also be relevant for the interpretation of Article 16 (2) FMPA. That the provisions of the FMPA are capable of producing direct effect, has never been doubted.

Like the Lugano Convention and the EEA Agreement, the FMPA contains special **homogeneity rules** which aim at securing a uniform interpretation. Article 16 FMPA states under the heading «reference to Community law»:

> «1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.
> 2. Insofar as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention.» [...]

On paper, said homogeneity rules go less far than those of EEA law. Article 6 EEA and Article 3 (2) of the Agreement of the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice obliges the EFTA Court to follow relevant ECJ case law rendered before the signature of the Agreement (2 May 1992) and to take into due account case law rendered after that date. The distinction between old and new case law is politically important. But the EFTA Court has never relied on it in order to refuse to follow new ECJ case law.[652] There are, therefore, certain differences between the situation under the FMPA and the EEA Agreement in that respect. The Federal Supreme Court understands the duty to take account of **old ECJ case law** laid down in Article 16 (2)(1) FMPA as a contractually agreed obligation. The judgments of the ECJ are being referred to as authoritative *(massgebend)*. In a landmark ruling rendered in Italian, the Federal Insurance Court – which in 2007 was integrated into the Federal Supreme Court – even used the term *«vincolante»* (binding).[653] To be sure, the Court maintains that the FMPA constitutes a public international law treaty, but this amounts largely to paying lip service. It has been said that the homogeneity rule in Article 16(2)(1) FMPA even encompasses the ECJ's *effet utile* jurisprudence.[654] In light of what is stated in the last sentence of Article 16(2) FMPA, it is hardly surprising that the Federal Supreme Court consid-

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651 2002 EFTA Court Report, 281, paragraph 33.

652 See Carl Baudenbacher, Governments Before the EFTA Court in: Bo Vesterdorf/Niels Fenger/Karsten Hagel-Sørensen (eds.), Festskrift til Claus Gulmann, København 2006, 23 ff.; id., From diplomacy to judicialization? – Some thoughts on EU-Swiss relations (fn 647).

653 ATF 132 V 423 (Swiss Federal Insurance Court), considerations 8 and 9; see also ATF 136 II 65 (Second Public Law Division), consideration 4.1.

654 Astrid Epiney (fn 650), 1 ff., 6; see also the Court's approach to old ECJ case law concerning the Brussels Convention under the old Lugano Convention, supra, E. V. 11. c.

ers itself not to be bound by **new ECJ case law**. The provision is interpreted according to the general rules of public international law that have been codified in the Vienna Convention.[655] The Court is, however, prepared to follow new ECJ jurisprudence on a case by case basis, even without a decision of the Joint Committee, in the interest of creating a **parallel** legal situation and a **uniform** free movement area to the largest possible extent. It thereby refers to the preamble of the FMPA and to the first paragraph of Article 16.[656]

In an important judgment of 29 September 2009, the Federal Supreme Court (Second Public Law Division) **overruled** its previous case law concerning the right of residence of a non-EU national in light of the ECJ's judgment of 11 May 2009 in Case C-127/08 *Metock*.[657] A Palestinian whose application for asylum had been rejected and who had been sentenced to over two years of imprisonment married a Spanish citizen with a Swiss permanent residence permit. Altogether, the man had spent almost 13 years in Switzerland.[658] In *Metock*, the ECJ applied the then new Directive 2004/38/EC on the right of Union citizens and their family members to move and reside freely within the territory of the Member States[659] to all family members who accompany or join their Union-citizen spouse. The host Member State was found to be precluded from maintaining a requirement of prior lawful residence in another Member State. The Federal Supreme Court's change of practice is particularly piquant because the Second Public Law Division had also based its previous approach on **ECJ case law**, namely on the latter's judgment in Case C-109/01 *Akrich* of 23 September 2003. There, the ECJ had held that the right to join applies only to third country citizens who had already lawfully resided in an EU State. It is to be noted that the *Akrich* judgment too constituted new case law.[660]

In a further landmark ruling of 5 January 2010, the Second Public Law Division decided that the foreign children of the third country spouse of a French national enjoy a right to join their family under Article 3 paragraph 2 letter a FMPA. The Division stressed that it was not obliged to take over new ECJ case law, but in order to establish a parallel legal situation between the EU Member States and Switzerland, it followed the approach taken by the ECJ in its judg-

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655 ATF 132 V 423, considerations 8.3., 9.1, 9.5.1.

656 See, e.g., ATF 136 II 5, consideration 3.4.

657 [2008] ECR, I-6241.

658 ATF 136 II 5.

659 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC *(O.J. L 158/77 of 30.4.2004)*.

660 [2003] ECR, I-9607. See with regard to these cases Christine Kaddous/Christa Tobler, Droit européen: Suisse-Union européenne, RSDIE/SZIER 2010, 597, 609 ff.; Andreas Zünd, The Application of the Free Movement of Persons Agreement Switzerland-EU, forthcoming in Carl Baudenbacher (ed.), Switzerland – EU: Towards New Ways of Dispute Resolution?, International Dispute Resolution Vol. 4, Stuttgart 2012 (forthcoming).

ment of 17 September 2002 in Case C-413/1999 *Baumbast*.[661] It considered that *Baumbast* which was rendered after the date of signature of the FMPA was based on old ECJ case law, namely on the judgment C-389/87 *Echternach* of 15 March 1989.[662] The Division added that the chosen approach also corresponded to the purpose of the rules on family reunification and to the prevailing view of Swiss literature.[663] Overall, the provision according to which ECJ case law rendered after the date of signature will be brought to Switzerland's attention, is understood as a *de facto* duty to take such case law **into due account**. Academic literature accurately speaks of the relativity of the deadline for the takeover of ECJ case law.[664]

It is obvious that the Federal Supreme Court has gone great lengths to secure a uniform free movement of persons area between Switzerland and the EU.[665] The point is, however, that there is **no legal certainty**. In particular in politically sensitive cases, it is conceivable that the Federal Supreme Court refuses to follow new ECJ case law. An important example concerns the issue of **exportability of helplessness allowance**. In a ruling dated 24 July 2006, the Federal Insurance Court took the view that the case law of the ECJ on European Union law, which assumed an export duty in this area, dated from the period after the signing of the FMPA. An adoption of this case law was deemed to be unwarranted.[666] Two things should be noted in this respect: First, there were good arguments in this specific case to conclude that the new case law was based on old (binding) ECJ case law. Second, the EFTA Court ruled shortly after in a case concerning Liechtenstein that under the substantially identical **EEA law** the helplessness allowance had to be exported to other EFTA and EU States parties to the EEA.[667]

In view of the integration-friendly approach of the Federal Supreme Court, some Swiss authors called the FMPA an integration agreement and assumed that the ECJ would refrain from applying its *Polydor* case law to it. According to *Polydor*, the similarity of the wording is not a sufficient reason to transfer the interpretation given to rules of EU law to the parallel provisions of the FTA. This was justified, in particular, with the different objectives and activities of the TEC (today TFEU) on the one hand and the FTA on the other and the lack of instruments to ensure uniform application of the law under the FTA.[668] In Cases *Grimme*, *Focus Invest AG* and *Hengartner and Gasser*, the Fourth Chamber of the ECJ disappointed the Swiss expectations. It referred to the Swiss «No» to the EEA and transposed *Polydor* to the FMPA. **Certain discriminations** are therefore possi-

661 [2002] ECR, I-7091.
662 [1989] ECR, 723.
663 ATF 136 II 65, considerations 4.3. to 4.6.
664 Astrid Epiney (fn 650), 30.
665 See Andreas Zünd (fn 660), passim.
666 ATF 132 V 423.
667 Case E-5/06 *EFTA Surveillance Authority v Liechtenstein*, 2007 EFTA Court Report, 296.
668 Case 270/80, [1982] ECR, paragraphs 15–20; see supra, E. V. 7. d.

ble under that agreement, which would be unlawful under the TFEU and under the EEA Agreement.[669] The explicit statement that Switzerland rejected the EEA Agreement, which would have opened the way for the same interpretation as in EU law, indicates that the EU Court took offense at the fact that there is no surveillance and court mechanism under the Free Movement of Persons Agreement.[670] And as mentioned above, the Federal Supreme Court never overruled its *Stanley Adams* and *Omo* judgments.[671]

cc. The Air Traffic Agreement in particular[672]

The ATA is out of the ordinary. Article 18(2)(1) states:

> «In cases which may affect air services to be authorized under Chapter 3 (sc. traffic rights), the Community institutions shall enjoy the powers granted to them under the provisions of the regulations and directives whose application is explicitly confirmed in the Annex.»

Prohibitions of cartels and of abuses of dominant positions were taken from the TFEU (Articles 8, 9 11 ATA). The Annex contains the regulations and directives of the third aviation package of liberalization and other civil aviation rules as well as the secondary competition rules. Accordingly, the Joint Committee has no jurisdiction with regard to «questions which are within the exclusive competence of the Court of Justice of the European Communities under Article 20.» (Article 29 *in fine*). Under Article 20 ATA, «[a]ll questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under this Agreement shall be of the exclusive competence of the Court of Justice of the European Communities.» That the provisions of the ATA are capable of producing direct effect in the Swiss legal order[673] and that the agreement contains in Article 1(2) a homogeneity provision similar to Article 16 FMPA is therefore largely irrelevant. The ATA has only played a marginal role in the Federal Supreme Court's case law.[674] Switzerland is the only country in Europe which has subjected itself to the jurisdiction of a **foreign court**. This is somewhat ironic in the light of the almost irrational Swiss fear of foreign judges.

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669 Cases C-351/08 *Grimme*, 2009 ECR, I-10777, paragraphs 27–29; C-541/08 *Fokus Invest AG*, [2010] ECR, I-1025, paragraphs 26–32; C-70/09 *Hengartner and Gasser*, [2010] ECR, I-7233, paragraphs 41–43; similar remarks can be found in the ECJ's order in Case C-476/10 *projektart* of 24 June 2011, not yet reported, although this case was dealt with under the EEA Agreement and had no implications for Switzerland (paragraph 37).

670 Laura Melusine Baudenbacher, «Das Personenfreizügigkeitsabkommen EU-Schweiz ist doch kein Integrationsvertrag», ELR 2010, 34 ff., and «Gar lustig ist die Jägerei – aber für Schweizer ist sie teurer als für andere», ELR 2010, 280 ff.

671 Supra, E. V. 7. E. aa.

672 Agreement Between the European Community and the Swiss Confederation on Air Transport, SR 0.748.127.192.68; 2002 O.J. L 114/73 of 30.4.2002.

673 ATF 138 II 42 S. 47, consideration 3.1.

674 See ATF 138 II 42.

On the basis of Article 18(2)(1) ATA, Switzerland filed a complaint with the European Commission with respect to certain air traffic rules adopted by Germany that seriously affect landing and takeoff at **Zurich airport** and low-altitude flights over the territory of Germany.[675] The Commission decided that Germany could keep its national legislation, and the General Court upheld the Commission's decision.[676] The matter is currently pending before the ECJ.[677]

c. Second package

aa. General

A further set of **nine bilateral sectoral agreements** was signed on 26 October 2004 and entered into force between 2005 and 2009.[678] These treaties go beyond the granting of pure market access. The second package includes, in particular, agreements on the taxation of savings income and on the accession of Switzerland to the Schengen and Dublin systems concerning cooperation in the areas of justice, police, asylum, and migration. The agreements of the Bilaterals II are not as static anymore as the first ones. Since the Swiss Government had started to see the «bilateral path» as the specific Swiss integration model, it insisted in some cases on being given certain participation rights. Therefore mechanisms of adopting EU law and of the decision shaping which are inspired by the EEA Agreement were introduced. There is no guillotine clause.

bb. The Schengen and Dublin Association Agreements in particular

Through the Schengen and Dublin association agreements, Switzerland has docked to the European area of freedom, security and justice. With this, integration has reached a **new dimension**.[679] Switzerland has the right to participate in

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675 Commission Decision of 5 December 2003 on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on air transport and Council Regulation (EEC) No. 2408/92 (Case TREN/AMA/11/03 – German measures relating to the approaches to Zurich airport), O.J. L 4/13 of 8.1.2004.

676 Case T-319/05 *Swiss Confederation v Commission*, judgment of 9 September 2010, nyr.

677 Switzerland first challenged the Commission's decision before the ECJ which referred the case to the General Court; Order of the Court of 14 July 2005, 2005 O.J. (C 296) 8. The ECJ's *modus operandi* has been criticized by Marc Maresceau, EU-Switzerland: Quo Vadis?, 39 Ga. J. Int'l & Comp. L. 727, 749 f. (2011).

678 The most important treaties are: Agreement on Participation of Switzerland in the European Environment Agency and European Information and Observation Network, O.J. 2004, L 90/37; Agreement Regarding Provisions Applicable to Processed Agricultural Products, O.J. 2005, L 23/19; Agreement on Cooperating in the Field of Statistics, O.J. 2006, L 90/2; MEDIA Agreements, O.J. 2006, L 90/23, and 2007. L 303/9; Agreement on the Swiss Confederation's Association with the Implementation, Application and Development of the Schengen Acquis, O.J. 2008, L 53/1; Agreement Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland, O.J. 2008. L 53/5; Cooperation Agreement to Combat Fraud and Any Other Legal Activity to the Detriment of the Financial Interests of the Parties, O. J. 2009, L 46/6.

679 See Helen Keller, Offene Staatlichkeit der Schweiz, in: Armin von Bogdandy/Pedro Cruz

the decision-shaping of new acquis (Article 6 Schengen Association Agreement and Article 2 Dublin Association Agreement). If Switzerland does not implement a new act and no solution can be found in the Joint Committees, the agreements shall be considered **terminated**, unless the Mixed Committee decides otherwise. The same applies if a substantial divergence between the case-law of the ECJ and that of Swiss courts or between authorities of the Member States concerned and the Swiss authorities persists (Article 10 Schengen Association Agreement and Article 7 Dublin Association Agreement). The Schengen and Dublin Agreements were approved by 54,6% of the Swiss voters.[680]

d. The «24 hours» Agreement

On 25 June 2009, Switzerland and the EU concluded an agreement on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures.[681] The name «24 hours agreement» stems from the fact that under Article 7, the Contracting Parties shall see to it that, as a matter of principle, frontier posts are open so that frontiers can be crossed 24 hours a day. Article 22 gives Swiss experts the right to participate in the decision-shaping if new EU legislation is enacted. If Switzerland does not take over an amendment, the EU is entitled to «take appropriate rebalancing measures,» including the suspension of the Agreement (Article 29[1]). Switzerland may ask the **Joint Committee** to submit a dispute on the matter to arbitration. However, no question of interpretation of provisions of the Agreement that are identical to corresponding provisions of EU law may be resolved by arbitration, only questions concerning the proportionality of the rebalancing measures (Article 29[3]). The latter provision has obviously been inspired by Article 111(4) EEA, the difference being that under the EEA Agreement «any Contracting Party» has the right to initiate arbitration proceedings whereas under Article 29(3) of the 24 hours Agreement, the other side (the EU) must agree. Unlike in the Schengen and the Dublin Agreements, there is no provision stating that non-compliance by Switzerland leads to the termination of the treaty. I view of the fact that EU or EEA membership has faded from the spotlight, the Swiss Government has ever since tried to depict this rather technical treaty as a paradigm for a new generation of bilaterals. However, the EU has made it clear that the arrangements in this Agreement can**not** be regarded as a **role model** for future treaties.[682]

Villalón/Peter Michael Huber (eds.), Handbuch Ius Publicum Europaeum, Vol. 2: Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht, Heidelberg 2008, 311 ff. I. 1. e.

680 BBl 2005, 5183.

681 Agreement Between the European Community and the Swiss Confederation on the Simplification of Inspections and Formalities in Respect of the Carriage of Goods and on Customs Security Measures, O.J. L 199/24 of 25 June 2009.

682 See the interview with the EU-Ambassador in Switzerland, Richard Jones, in SonntagsZeitung of 13 May 2012, <http://www.sonntagszeitung.ch/home/artikel-detailseite/?newsid=217501> visited 13 May 2012; Marc Maresceau (fn 677), 752.

6. *New Lugano Convention*

The 2007 Lugano Convention[683] is a multilateral international treaty concluded by the **European Union** and the three EFTA States Iceland, Norway and Switzerland, as well as Denmark. As the Convention is part of EU law, the ECJ has jurisdiction to decide on the validity and interpretation of its provisions under the Article 267 TFEU preliminary ruling procedure. In the EFTA States, the national supreme courts are competent to interpret the Convention. Protocol 2 has been redrafted. Article 1(1) states:

> «1. **Any court** applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities.»[684]

Former ECJ Director General Professor CHRISTIAN KOHLER has convincingly argued that the expression «any court» includes the ECJ.[685]

Referring to ATF 131 III 227, consideration 3.1., the **Federal Council's dispatch** concerning the federal order on the approval and the implementation of the new Lugano Convention pointed to the change as compared to the hitherto existing legal situation because the parallel instrument to the Lugano Convention is now a regulation which is based on Article 65 of the EC Treaty in its Amsterdam version. The Government explained that being part of secondary Community law, this regulation was more exposed to a respective interpretation, in particular by the Court of Justice of the European Union, than its predecessor, the Brussels Convention. As far as an ECJ judgment is based to a significant degree on Community law principles which are neither taken from the revised Lugano Convention nor from the legal orders of the Contracting Parties, this circumstance must be taken into account. This means that these principles and the consequences following from them cannot be transferred unseen to the interpretation of the revised Lugano convention.[686]

A further novelty is that EFTA States have been given the right to submit statements of the case or **written observations** in preliminary ruling proceedings before the ECJ regarding the Lugano Convention (Article 2 of Protocol 2). For the first time, the Swiss Confederation made use of this right in Case C-133/11 *Folien Fischer and Fofitec*, together with the French, German, Dutch, Polish and Portuguese Governments. The case is based on a reference by the

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683 SR 0.275.12; see with regard to the old Lugano Convention supra, E. V. 11.

684 Emphasis added.

685 CHRISTIAN KOHLER, Dialog der Gerichte im europäischen Justizraum (fn 575), 151 ff.

686 Botschaft zum Bundesbeschluss über die Genehmigung und die Umsetzung des revidierten Übereinkommens von Lugano über die gerichtliche Zuständigkeit, die Anerkennung und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen vom 18. Februar 2009, BBl 2009, 1777, 1817.

German Federal Supreme Court and deals with the question of whether an action for a declaration as to the non-existence of liability in tort falls within the scope of the special jurisdiction conferred «in matters relating to tort, delict or quasi-delict» on «the courts for the place where the harmful event occurred or may occur» under Article 5(3) of the Brussels Regulation. The case is currently pending before the ECJ.[687]

7. The EU's call for institutionalization of the bilateral agreements

a. General

The EU and Switzerland have concluded some 120 bilateral agreements, 20 of which are of special significance. Conflicts are, as a rule, to be settled by diplomatic means. In this country, they are understood as intergovernmental affairs, even if they involve private parties. The perspective is always «them against us» or «us against them». Most conflicts are dealt with by **Joint Committees**, i.e. through diplomatic means. Provisions in bilateral agreements may be invoked before the courts of either Contracting Party, which is before the **ECJ** and the **Swiss Federal Supreme Court**. Experience shows, however, that there are limitations. As previously noted, the Federal Supreme Court has denied direct effect of crucial provisions of the FTA in two early landmark rulings and the ECJ has shortly thereafter decided otherwise.[688] In the EU, the Commission may also bring an infringement action against a Member State for violation of a bilateral agreement with Switzerland. It has done so on rare occasions upon repeated complaints from the Swiss Government.[689] On the Swiss side, there is **no surveillance mechanism**.

After the second package of bilateral agreements had been sewn up, Swiss political and business circles cherished the idea that the «bilateral path», which after 1992 was a stopgap measure, had evolved into the specific **Swiss form of European integration**. One political party after the other decided to delete the long-term objective of EU membership from its program. Politicians and business leaders pointed to the fact that the Swiss people had given its blessing to bilateralism more than once. In fact, the bilateral path was confirmed by the people no less than four times.[690] The EEA was largely depicted as inferior to bilateralism, in particular from the viewpoint of state sovereignty. The Swiss banks and the providers of post, railway and telecommunication services, Swiss Post, Swiss Federal Railways and Swisscom, are furthermore opposed to liber-

687 Opinion of Advocate General of Niilo Jääskinen of 19 April 2012, nyr.

688 Supra, E. V. 7. c.

689 <http://www.nzz.ch/nachrichten/wirtschaft/aktuell/eu_schaltet_sich_in_schweizerisch-italienischen_streit_ueber_diskriminierung_von_firmen_ein_1.9936891.html> visited 14 March 2012.

690 See, e.g., Carl Baudenbacher, Rechtsprechung: Rechtssicherheit als Standortfaktor, in: Katja Gentinetta/Georg Kohler (eds.), Souveränität im Härtetest. Selbstbestimmung unter neuen Vorzeichen, Zurich 2010, 247 ff.

alizing trade in services. The same goes for the labor unions since the ECJ and the EFTA Court have handed down their rulings on the relationship between the free movement of services and collective bargaining in the EU and the EEA.[691] The Federal Council and the Swiss public took it for granted that the EU would be interested in concluding **further bilateral agreements** based on the same parameters, i.e. on the adoption of EU acquis at the time of signature, homogeneity rules on the template of the FMPA, and on diplomatic dispute resolution. Nobody thought of an EEA type surveillance and court mechanism. Talks were opened in the areas of **trade in electricity**, **chemical safety** (REACH), **food and product safety** and **free trade in agricultural goods**. Both the federal administration and the umbrella organization of Swiss industry, *economiesuisse*, never tired of claiming that bilateralism as such and the conclusion of bilateral agreements was in both sides' best interest. They also denied that there were any major problems with regard to dispute resolution.

The Union, however, became less and less enthusiastic about the sometimes slow taking over of new *acquis* and the diplomatic conflict management. In the respective Joint Committees, it claimed that Switzerland was violating the FMPA in several respects, that it granted export subsidies that were incompatible with the agricultural trade agreement and that certain cantonal tax regimes implied state aid in violation of the FTA.[692] In December 2008, the Council of the EU claimed that Switzerland had not fully implemented the EU acquis in the field of free movement of persons and that certain cantonal tax regimes were not compatible with the state aid provisions of the 1972 EU-Swiss FTA. Since the EEA judicial framework does not apply to Switzerland, the Council was «concerned with an inconsistent application of agreements concluded between the EU and Switzerland.»[693] In September 2010, the European Parliament called on Switzerland to agree to **horizontal mechanisms** and in December 2010 the Council reiterated and accentuated its criticism pointing to the need for horizontal mechanisms.[694] The Commission for its part made it clear to Switzerland that the conclusion of new bilaterals could only be envisaged if a satisfactory solution could be found for **four institutional issues**: (1) the dynamic adjustment of bilateral law to new relevant EU *acquis*, (2) a mechanism

691 See Cases C-341/05, *Laval* [2007] ECR I-11767; C-438/05 *Viking Line* [2007] ECR I-10779; C-346/06, Rüffert [2008] ECR I-1989; Case E-2/11 *STX Norway Offshore*, judgment of 23 January 2012, nyr.

692 See the Former EU Ambassador in Switzerland, Michael Reiterer, Problems Under the Current Regime? The Point of View of the EU, in: Carl Baudenbacher, ed., Switzerland – EU: Towards New Ways of Dispute Resolution?, International Dispute Resolution Vol. 4 (Stuttgart 2012) (forthcoming).

693 <http://register.consilium.europa.eu/pdf/en/08/st16/st16651-re01.en08.pdf> visited 12 March 2012, paragraphs 27 ff., 29.

694 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf> visited 13 March 2012.

ensuring uniform interpretation of bilateral law, (3) a mechanism for monitoring compliance with the bilateral treaties, and (4) a judicial mechanism.

b. Conceptual remarks

From a legal point of view, there is a clash of two concepts of Switzerland's integration in Europe. The Swiss government, time and again, has put forward the view that Switzerland and the EU are two sovereign players which meet «on eye level». Their contractual relations are, like all international agreements concluded by Switzerland, governed by **public international law**. The EU, on the other side, sees Switzerland as a participant in its internal market. Since its operators enjoy the advantages of participation in this market, the country must abide by its rules. From the perspective of the EU this means that there must be a **level playing field** for individuals and economic operators in Switzerland and in the EU. When it comes to the adoption of new EU *acquis*, the taking over of the new ECJ case law, surveillance and judicial review, the same conditions must apply. What counts, is no more a formalistic legal approach which operates with the concepts of classical international law, but a **functional view**.[695] This is understandable. A third country which now and then negotiates a bilateral agreement with the EU is acting in the framework of public international law. If, however, that country declares the bilateral path to constitute its integration (or business) model and concludes bilateral agreements in a great number, it must accept that with regard to legislation, interpretation and enforcement, it is subject to the same rules as the 27 EU (and the 3 EEA) Member States.[696] This is nothing else than a case of application of the dialectic principle of **transition from quality to quantity**.[697]

As far as **methods of interpretation** are concerned, this new approach of the European Union has become practical in the course of the conflict over certain cantonal tax regimes. Article 23(1)(iii) FTA declares incompatible with the proper functioning of the agreement in so far it may affect trade between the EU and Switzerland «any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods». The Union claims an interpretation of this provision not in accordance with the rules of the Vienna Convention on the Law of Treaties, but in accordance with

695 With regard to the importance of functional interpretation in economic law see supra, Section I.

696 See the Head of the Swiss Desk in the European Commission's European External Action Service Gianluca Grippa, Judicialisation of the Relationship Switzerland-EU? Options from the Perspective of the European Union, in: Carl Baudenbacher (ed.), Switzerland – EU: Towards New Ways of Dispute Resolution?, International Dispute Resolution Vol. 4 (Stuttgart 2012) (forthcoming).

697 See Carl Baudenbacher, «Helvetische Lösung» mit der EU kaum möglich, NZZ international edition of 4 January 2012; with regard to the principle in general Georg Wilhelm Friedrich Hegel, Vorlesungen, Ausgewählte Nachschriften und Manuskripte 7, Hamburg 1989, 170 (in the chapter Greek philosophy, 1st part).

the contemporary understanding of the parallel state aid provision in EU law.[698] It thereby refers to a unilateral declaration made at the time of signature of the FTA where the Commission stated that it would assess practices running contrary to Article 23 based on the criteria which follow from the application of the parallel Articles of the EEC Treaty (now TFEU). Switzerland failed to react to this statement.[699] Since there is no court that can decide on the matter, the said tax conflict must be solved by diplomatic tools.

Economically speaking, the sectoral agreements create a **bilateral monopoly**. It follows from the nature of a bilateral monopoly that disputes can be resolved in three ways: By a court, by an arbitration tribunal, or by negotiations. Under the bilateral agreements, there is neither a court nor an arbitration tribunal. Negotiations will only resolve the dispute if both parties have the possibility to resort to safeguard measures. That means that the resolution of the conflict is ultimately brought off by **militant action**. In this respect, there are clear parallels to collective bargaining where disputes over wages and other working conditions are resolved by the possibility to take industrial action or by such action itself. Under the **FMPA**, there is no mechanism which would force the Swiss authorities to hold out their hand and to agree to a solution. Under **Article 27 FTA**, the EU could open dispute settlement proceedings which could culminate in the taking of safeguard measures.[700] In the framework of the conflict over the cantonal tax regimes, the Union has, however, refrained from pursuing this path. All it did was to express concern about the said tax issues and to regret «the lengthy dialogue on this issue [which] has not yet led to an abolition of the state aid aspects of these regimes.»[701] This means that in reality, there is no mechanism which ultimately guarantees the resolution of a dispute. Disputes will then go on for years, and this is exactly what is currently happening between the EU and Switzerland. It is noteworthy in this context that the Secretary of State in the Federal Department of Economic Affairs stated on 28 December 2012 that the establishment of a dispute resolution mechanism might also be in Switzerland's interest.[702]

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698 See Commission Decision of 13 February 2007 on the incompatibility of certain Swiss company tax regimes with the Agreement between the European Economic Community and the Swiss Confederation, C (2007) 411 final. See also the judgments of the EFTA Court of 10 May 2011 in Joined cases E-4/6/7–10 *The Principality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft v ESA* [2011] EFTA Court Report, 16, and of 30 March 2012 in Joined Cases E-17/10 & E-6/11 *The Principality of Liechtenstein and VTM Fundmanagement v ESA*, nyr.

699 BBl 1972 II 965.

700 See supra, E. V. 7. b.

701 Council Conclusions of December 2010, paragraph 44, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf> visited 13 March 2012; also Maresceau, (fn 677), 732. But see infra, H. II. 1.

702 <http://www.nzz.ch/nachrichten/politik/schweiz/wenn_die_eu_ihre_dogmatische_sicht_aendert_geht_es_1.13916532.html> visited 15 March 2012.

Switzerland's economic success coupled with its unwillingness to integrate politically has furthermore contributed to EU representatives complaining about alleged cherry picking. The 2010 Report «Internal Market beyond the EU: EEA and Switzerland» of the European Parliament's Committee on Internal Market and Consumer Protection states in that regard:

> «Some interviewees from the EU side indicated that for Switzerland the sectoral bilateral approach is a business-model. The approach taken is often not very appreciated by the European Commission. In some views, Switzerland is aiming at grasping all the benefits of the Internal Market while being shy of taking on board other policies that complete the market as for instance EU company law, state aid and competition policy.»[703]

c. Putting wood behind the arrow

In the course of the years 2010/2011, Switzerland indicated *nolens volens* that it would be prepared to speak about an institutionalization of the bilateral agreements. There are good reasons for assuming that such a development would also be in the interest of those whose access to the EU single market the bilateral agreements are guaranteeing. The protagonists of a market are **entrepreneurs**, **workers**, **traders**, **consumers** and **investors**. It is strange that they can hardly defend their rights flowing from the bilateral agreements in court. Adherence to the traditional concept of state sovereignty with diplomatic protection in cases of conflict is out of date in 21st century Europe. For citizens and economic operators to beg for diplomatic help has something paternalistic about it, a whiff of *ancien régime*. Actually, a country with such a proud democratic tradition like Switzerland should realize that judicialization is in the interest of individuals and businesses. It is an expression of **people's sovereignty**, for the benefit of which state sovereignty should step back.

On 8 February 2011, Foreign Minister *Micheline Calmy-Rey* met Commission President *José Manuel Durão Barroso* in Brussels.[704] Whereas the Swiss side claimed that there had been agreement that the negotiations on the institutionalization of bilateralism and on new bilateral agreements should be conducted in parallel, the Commission stated that the institutional questions had to be resolved first. Be that as it may, the year 2011 was lost because the EU accepted that putting pressure on Switzerland could play into the hands of the anti-Europeans in the federal election of October. In fact the Swiss People's Party was the looser of the election.[705] But those who had hoped that the Fed-

703 <http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf> visited 13 March 2012, 32. The Swiss contributor to the report was University of Basel European Law Professor Christa Tobler.

704 <http://eeas.europa.eu/delegations/switzerland/press_corner/all_news/news/2011/20110208_de.htm> visited 14 March 2012.

705 See <http://www.wahlen.ch/new/index.php?sid=4bfb94e5fe5d08f8c23c521706ca8c17&item=./

eral Council would move after the election were disappointed. Towards the end of 2011, the Swiss government came up with an idea which was referred to as a «roadmap»: The agreement on trade in electricity that was almost completed with regard to substance should serve as a **pilot project** where new the mechanisms could be tested. Whether this approach is acceptable to the EU from the perspective of the smooth functioning of the European single market remains to be seen.

With regard to a possible surveillance and court mechanism, the Federal Council's Europe Report of September 2010 discussed **three options**: (1) The docking to the EEA/EFTA institutions EFTA Surveillance Authority and EFTA Court; (2) the establishment of a bilateral court Switzerland-EU; (3) the establishment of a bilateral arbitration tribunal Switzerland-EU.[706] The two latter ideas will hardly materialize. The ECJ has made it clear in Opinion 1/91 that it is not prepared to accept a court applying law which is identical in substance to EU law and making decisions which would be binding on it.[707] Moreover, Article 111(4) EEA states that no question of interpretation of the provisions of this Agreement that are identical in substance to corresponding rules of EU law may be dealt with in arbitration proceedings. A similar rule has been inserted into the «24 hours» agreement.[708] University of Zurich International Law Professor DANIEL THÜRER who had been commissioned by the Federal Council to write an opinion realized that the creation of a bilateral judicial or arbitration mechanism would be impossible.[709] He presented **three models**: (1) The docking to the EEA/EFTA institutions EFTA Surveillance Authority and EFTA Court, (2) the creation of a Swiss implementation body and a chamber at the Federal Supreme Court, and (3) the creation of a Swiss implementation body and of a judicial forum above the Federal Supreme Court. All three proposals were referred to as «two-pillar» models.

On 26 April 2012, the Federal Council announced that it planned to propose a **«two pillar»** solution to the European Union with a Swiss pillar and an EU pillar. In the Swiss pillar, an «independent» surveillance authority consisting of Swiss citizens would be elected by the Swiss Parliament and the judicial function would be exercised by the Federal Supreme Court. There are in particular two arguments which speak against such a model. Firstly, no country which participates in the European single market can monitor itself with regard to sur-

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nationalratswahlen/2011> and <http://www.wahlen.ch/new/index.php?sid=4bfb94e5fe5d08f8c23c521706ca8c17&item=./staenderatswahlen/2011> visited 2 April 2012.

706 Bericht des Bundesrates über die Evaluation der schweizerischen Europapolitik vom 17. September 2010, 71 <http://www.ssn.ethz.ch/var/ssn/storage/original/application/a976a1db23cdce44a60778c8d16ab5b6.pdf> visited 4 January 2012.

707 [1991] ECR I-6079.

708 See supra, E. V. 5. d.

709 The Federal Council refused to publish the THÜRER opinion, but it was leaked to the press and has been posted on the world wide web; <http://www.weltwoche.ch/fileadmin/doc/ausgaben/11/51/Gutachten-Prof-Dr-D-Thuerer.pdf> visited 20 April 2012.

veillance and judicial review. That the German Supreme Court would decide on an action brought by a German surveillance body concerning the compatibility of the German beer purity law with the EU rules on free movement of goods would be unthinkable for any EU and EEA-European.[710] It would be equally impossible that the Norwegian Supreme Court would adjudicate on a case brought by a Norwegian instance concerning the compatibility of the Norwegian ownership restrictions in waterfalls with the EEA free movement of capital rules.[711] This is not just a question of whether the members of a national authority and of a national court would be truly independent. Even the appearance of dependence must be avoided. The argument that with the European Commission and the ECJ, the EU too is monitoring itself, is not convincing. The ECJ is the common court of 27 states composed of judges from those 27 states and therefore has an **outstanding position**.[712] This position has been recognized by Switzerland when accepting the homogeneity provisions of the Lugano Convention, the FMPA and the ATA. The same goes, *mutatis mutandis*, for the EFTA Court.

Secondly, the Federal Council's proposal would not lead to a two pillar, but to a **three pillar structure** in the European single market with three authorities responsible for the initiation of proceedings for breach of law which would be identical in substance and three courts which would interpret the identical provisions. It must be concluded from the second EEA opinion of the ECJ of 1992[713] that the EU has, by accepting the EEA with the EFTA Surveillance Authority and the EFTA Court, gone to the limit of what is feasible from a homogeneity perspective. That the Union would agree to the creation of a third pillar for a single state is unlikely, not least in view of the legal situation of its 27 Member States and the 3 EEA/EFTA countries.

In accordance with a statement of the **Federal Supreme Court**, the Federal Council also expresses the hope that the relations between that court and the ECJ would be intensified by the establishment of an informal exchange mechanism, and this on a reciprocity basis. As stated in Opinion 1/91,[714] the ECJ is basically prepared to give preliminary rulings to non-Member States' country courts, but only if they are binding. Otherwise, the ECJ fears that the binding character of its rulings vis-à-vis the EU Member State courts could be weakened. That the ECJ would ask the Swiss Supreme Court for its opinion if the latter has decided a novel legal question appears to be excluded. On balance, there seem to be two options for Switzerland: Either to «dock» to the ECJ by accepting the latter's jurisdiction to render binding preliminary rulings upon re-

710 See Case 178/84 *Commission v Germany* [1987] ECR 1227.
711 See Case E-2/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Court Report, 164.
712 See Christian Kohler, Dialog der Gerichte im europäischen Justizraum (fn 575), 150 ff.
713 [1992] ECR I-2821.
714 1991 ECR I-6079.

quest by Swiss courts, but without a Swiss judge participating. The ECJ would then be a **foreign court** *in optima forma*. Or to dock to the **EFTA Court** with the possibility to have an own national as a judge there. It is clear that in such a case, some rather tricky problems would have to be overcome because the new EFTA Court would have to apply two different sets of rules.

Admittedly, docking to the EFTA Court (and consequently to the EFTA Surveillance Authority) would be neither fish nor fowl. If that does not work, the only possibility of securing Swiss industry access to the EU internal market, is, in view of the unattainability of EU membership, that Switzerland makes a second attempt to **join the EEA**, possibly with some modifications and amendments. If EEA membership should get on the Government's radar, one would have to look to the future. That means that the following options would have to be examined: It would be worthwhile to strive for the integration of the **Schengen** and **Dublin** association as well as of the **Lugano** regime into the EEA. Another area where it could be advantageous to give jurisdiction to the EFTA Court is **patent law**.

F. Americanization and Europeanization of Swiss economic law in particular

I. General

As set out above, the main mechanisms of foreign law entering Swiss economic law are unilateral action by foreign powers, the (voluntary or forced) conclusion of treaties and the (voluntary or forced) import. The conclusion of treaties has mainly been the subject of part E. of this report. In the following, unilateral action and import (respectively export) of foreign law shall be addressed using the examples of the two main global players in economic law, the United States of America and the European Union.

A preliminary comment must be made regarding unilateral action. The two types discussed, the imposition of sanctions and the application of domestic law to Swiss conduct, are mainly directed against business operators. Yet, there is a **connection** between, say, the application of U.S. antitrust law to Swiss firms and the design of Swiss competition law in that the extraterritorial application of American law creates a pressure on Switzerland to adapt its own legislation. This is confirmed by historic experience. To put it bluntly: who would have imagined 25 years ago that Switzerland would today dispose of a competition act which not only rules out hard core cartels and prohibits the abuse of dominance, but also contains provisions on merger control, on the spot investigations and a leniency program? It is clear that this development has also been fostered by the fact that the originally American concept of antitrust law has meanwhile – at least as a matter of principle – become a global concept.

II. Extraterritorial application of antitrust law

1. Preliminary remarks

It is a consequence of both the strength and the internationality of the Swiss economy and the corporatist tradition in Switzerland that some of the most important American and European antitrust cases involved **Swiss firms**. They have therefore made significant, albeit involuntary, contributions to the development of the extraterritorial application of antitrust law.

2. General

U.S. courts are used to applying American law to foreign conduct. In this respect, international law Professor AUSTEN L. PARRISH stated:

> «U.S. courts have long heard cases involving foreign elements. What is new is the extent to which it has occurred in all areas of the law, in all areas of the world, and how litigants now instinctively turn to domestic courts to solve international problems. In some contexts, domestic law as an instrument of international governance is beginning to replace international law. And with the globalization of commerce, communications, crime, human rights, and other areas, the prevalence of cases where domestic courts meddle with extraterritorial matters has grown.»[715]

The classic example, in particular from a Swiss perspective, is antitrust law.[716]

Under public international law, the competence of courts to decide on a case may be based on several criteria. Since the conclusion of the Westphalian Peace Treaties in 1648, the **territoriality principle** has been the generally accepted maxim. It means that a sovereign state or eventually an international organization has the power to make its legal norms applicable to conduct which occurs within its boundaries, to establish courts which have the authority to hear and decide respective cases and to enforce the judgments rendered by the latter. Until today, territoriality is the most important criterion determining the competence of courts. It is, however, no longer the only one. Several other criteria have been recognized which may justify extraterritorial jurisdiction. Under the nationality principle a state has jurisdiction with regard to its nationals wherever they sojourn, i.e. also abroad. Article 15 of the French CC, for example, reads:

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715 AUSTEN L. PARRISH, Reclaiming International Law from Extraterritoriality, 93 Minn. L. Rev. 815, 849 [2009]; see also JOSEPH D. BECKER, Extraterritorial Dimensions of the Securities Exchange Act, 2 N.Y.U. J. Int'l L. & Pol. 233 [1969].

716 In view of other reports that will be presented at the 2012 Swiss Jurists Conference, the following analysis is limited to that field of law. See with regard to the extraterritorial application of antitrust law also CARL BAUDENBACHER, The CFI's Gencor judgment – Some remarks on its global implications, in: Carl Baudenbacher, Claus Gulmann, Koen Lenaerts, Emmanuel Coulon, Emmanuel Barbier De La Serre (eds.), Liber Amicorum en l'honneur de/in Honour of Bo Vesterdorf, Brussels 2007, 543 ff.

> «Un Français pourra être traduit devant un tribunal de France, pour des obligations par lui contractées en pays étranger, même avec un étranger.»

Under which circumstances a court may also assume jurisdiction based on the **domestic effects** of foreign acts is much more controversial. Section 1 of the U.S. Sherman Act declares that contracts, combinations in the form of trusts or otherwise, or conspiracies, in restraint of trade or commerce among the several states, *or with foreign nations*, are illegal. Nevertheless, American courts were initially reluctant in applying said provision to foreign conduct. In 1909, the Supreme Court held in *American Banana* that «all legislation is *prima facie* territorial» and that a «conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law». The case concerned a suit for damages under U.S. antitrust laws, alleging that the seizure of the plaintiff's property by Costa Rica had been induced by an unlawful conspiracy. The Supreme Court stated:

> «We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged, but need not be discussed. For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman act, but they were not torts by the law of the place, and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute.»[717]

3. *The effects doctrine: An American invention*

Alcoa

This approach could not last in view of the economic reality. Foreign anticompetitive conduct was subject to American jurisdiction for the first time in the 1945 *Alcoa* judgment of the Second Circuit Court of Appeals. The U.S. was about to win World War II when this ruling was handed down. The case involved horizontal price-fixing. The Court ignored the Supreme Court's American Banana precedent and held:

> «[I]t is settled law [...], that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends, and these liabilities other states will ordinarily recognize.»[718]

The Second Circuit further found that agreements made beyond U.S. borders which are **not intended** to affect imports, but which affect them in reality, were not covered by the Sherman Act, neither were agreements which intended to include imports into the U.S. but had **no such effect** in practice. The same rules applied to exports. The Supreme Court adopted the effects doctrine in

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717 *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), paragraph 7.

718 *United States v. Aluminum Co. of America et al.* No. 144, March 12, 1945, 148 F.2d 416, 65 U.S.P.Q. 6.

1962 in *Continental Ore Co. v. Union Carbide & Carbon Corp.* and substantially overruled its finding from American Banana.[719]

Swiss Watchmakers I

In the 1960s and 1970s, it became clear that Swiss industry would be subject to the competition laws of the U.S. In *United States v. Watchmakers of Switzerland*, Swiss public policy – which allowed and even encouraged the use of cartels – clashed with American antitrust law. The United States District Court for the Southern District of New York found in a judgment of 1962 that U.S. watchmakers and Swiss watchmakers, assemblers, and watch organizations had been involved in a set of industry-wide agreements aimed at preventing the growth and development of competitive watch industries outside Switzerland. The conventions, which had been in place since the 1930s, restricted prices, controlled exports from Switzerland to the U.S., and restricted the distribution of watches. The defendants argued that their agreements were compatible with Swiss law and they had acted upon **orders from the Swiss Government**. The court held that the agreements had been recognized by the latter, but «the fact that the Swiss Government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate».[720] In other words, for there to be a foreign government mandate, a true compulsion must be established. The court therefore found that Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act had been violated.

Swiss Watchmakers II and the Basle marriage

The broad reading of the effects doctrine by American courts in Swiss Watchmakers and in other cases[721] was criticized. It was said that the trial court in Swiss Watchmakers «misconstrued and dramatically changed the ALCOA court's intended effects test into a ‹pure effects› test».[722] In 1965, the United States District Court for the Southern District of New York revised its Swiss Watchmakers judgment. The Swiss Government had enacted binding export

719 370 U.S. 690, 704–705 (1962); see also *Kirkpatrick Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990).

720 *United States v. Watchmakers of Switzerland Info. Center*, 1963 Trade Cas. (CCH) ¶70,600 (S. D.N.Y. 1962), paragraphs 77, 456–57.

721 See, in particular, *United States v. Imperial Chemical Industries, Ltd*, 105 F. Supp. 215 (S.D.N. Y.), enforcing 100 F. Supp. 504 (S.D.N.Y. 1952).

722 Margaret Holthusen, U.S. Courts: Walking the Tightrope Between American Trade Interests and International Comity – Do the Factors Presented in Section 403 of the Restatement (Third) of Foreign Relations Law of the United States Facilitate the Determination of Extraterritorial Jurisdiction of United States Antitrust Law?, 4 N.Y. Int'l L. Rev. 60, 61 (1991); see also the critical remarks by Edward L. Rholl, Inconsistent Application of the Extraterritorial Provisions of the Sherman Act: A Judicial Response Based Upon the Much Maligned «Effects» Test, 73 Marq. L. Rev. 435, 449 f. (1990).

regulations to replace the private agreements at the heart of the lawsuit and issued a **diplomatic note**. The U.S. State Department indicated to the Justice Department that a resolution of this litigation, «on a basis consistent with United States antitrust laws, [...] would be advantageous from the standpoint of American foreign policy». In substance, however, the modified judgment did not change much.[723]

That U.S. antitrust law was to be respected also became clear when the two Swiss pharmaceutical companies *Ciba* and *Geigy* merged in 1970, a transaction that at the time was referred to as the **«Basle marriage»**. In this case, the Swiss Government again decided to become active.[724] It may be noted in this context that also the second «Basle marriage», the merger of *Ciba-Geigy* and *Sandoz* was only approved by the Federal Trade Commission by way of a consent decree after anticompetitive concerns had been resolved.[725]

Jurisdictional rule of reason

As a response to the case law of the U.S. courts, some foreign, in particular European, States adopted «blocking legislation», prohibiting compliance with measures taken under foreign law, as well as «clawback legislation», giving defendants who as a consequence of a judgment paid a multiple damage judgment in another country the right to recover the multiple portion from the plaintiff.[726] American courts therefore softened their approach by introducing factors such as **reasonableness** and **balancing of interests**. The «jurisdictional rule of reason» was based on the premise that U.S. courts had jurisdiction over foreign conduct in a given case, but should not exercise it in certain circumstances. It was for the first time applied in the 1976 *Timberlane* judgment of the Ninth Circuit.[727] The 1982 *Foreign Trade Antitrust Improvements Act* (FTAIA) then established that the Sherman Act should only apply where the effects were «direct, substantial and reasonably foreseeable». The new doctrine was an outflow

723 Judgment mod., 1965 Trade Cas. (CCH) ¶71,352 (S.D.N.Y. 1965); see Joseph P. Griffin, United States Antitrust Laws and Transnational Business Transactions: An Introduction, 21 Int'l Law. 307, 326; Jane Lee, Vitamin «C» is for Compulsion: Delimiting the Foreign Sovereign Compulsion Defense, 50 Va. J. Int'l L. 757 ff. (2010). The «foreign sovereign compulsion defense» was recently rejected by the United States District Court for the Eastern District of New York in Case *Vitamin C Antitrust Litigation* 06-MD-1378-BMC-JO, E.D.N.Y. Sept. 2011. The members of a price cartel had argued that they were compelled by the Chinese government to fix prices.

724 See Paul Erni, The Basel Marriage: History of the Ciba-Geigy Merger (fn 35).

725 62 FR 409–01, 1997 WL 1540 (F.R.).

726 See, e.g., R. Edward Price, Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws abroad, 28 Geo. Wash. J. Int'l L. & Econ. 315, 322 ff. (1995); Joseph E. Neuhaus, Power to Reverse Foreign Judgments: The British Clawback Statute under International Law, 81 Colum. L. Rev. 1097 ff. (1981).

727 9th Circuit *Timberlane* 549 F2d 597 (1976). See also 3rd Circuit *Mannington Mills*, 595 F.2d 1287 (1979).

of the idea that the relations between states should be governed by comity.[728] On balance, this did not change much since American courts in virtually every case brought before them arrived at the conclusion that they had jurisdiction. In any case, the circumstances under which the U.S would refrain from exercising extraterritorial jurisdiction were **unilaterally defined** and evaluated.[729]

4. The EU moves into the same direction

Dyestuffs

As indicated, European governments were critical of the sweeping approach of American courts in applying U.S. antitrust law to foreign conduct claiming that it violated principles of public international law. However, once the European Economic Community had gained sufficient economic power, the European Commission, the ECJ and later the GC started to follow the same path. An American commentator has rightly observed in this respect:

> «While foreign governments continued to protest particular invocations of U.S. jurisdiction, and noted qualms about the (sc. effects) doctrine's full implications, they increasingly construed their own laws to permit jurisdiction over foreign conduct.»[730]

Again, Swiss corporations played an important part in the development of the law. At the outset, it should be noted that the Commission's very first case applying the Community's competition rules to a foreign company concerned *Fillisdorf*, a **Swiss firm**, which imported hygienic and cosmetic products from a French supplier, *Grosfillex*. Since no «substantial limitation» of competition within the Common Market had occurred, the Commission granted a negative clearance.[731]

In the *Dyestuffs* cases, the Commission found in 1969 that several EEC and non-EEC firms had engaged in horizontal price fixing and imposed fines on them.[732] The non-EEC firms were located in the U.K. and in **Switzerland** (*Ciba*, *Geigy* and *Sandoz*). The Commission stated that «[t]he competition rules of the Treaty are [...] applicable to all restrictions of competition which produce within the Common Market effects set out in Article 85(1)» (now Article 101 [1] TFEU).[733] Advocate General Mayras suggested the application of the ef-

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728 See with regard to the notion of comity supra, D. IV. 2.b.

729 See Roger P. Alford, The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches, 33 Va. J. Int'l L 1, 12 (1992); Joseph P. Griffin, Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction, 6 Geo. Mason L. Rev., 505, 519 (1998).

730 Edward T. Swaine, The Local Law of Global Antitrust, 43 Wm. & Mary L. Rev., 627, 645 (2001).

731 Decision 64/233 of 11 March 1964, 1964 O.J., 915 f.

732 69/243/CEE Décision de la Commission du 24 juillet 1969, relative à une procédure au titre de l'article 85 du traité C.E.E. (IV/26.267 – *Matières colorantes*), 1969 J.O. L 195, 11.

733 69/243/CEE Décision de la Commission du 24 juillet 1969, relative à une procédure au titre de l'article 85 du traité C.E.E. (IV/26.267 – *Matières colorantes*), 1969 J.O. L 195, 11.

fects doctrine provided the effects were direct and immediate, reasonably foreseeable, and substantial.[734] In its 1972 judgments, the ECJ established Community jurisdiction by applying a theory of **economic unity**. The conduct of the subsidiaries which were located on EEC territory was imputed to the parents located in third countries. The economic unity theory was on its face a variant of the territoriality principle since it required some economic presence in the Community. Territoriality was combined with the concept of piercing the veil which was developed in company law.[735] The economic unity theory was subsequently also used in the application of the abuse of dominance prohibition laid down in Article 86 EEC (now Article 102 TFEU).[736] It was clear at the time that the economic unity theory would provide no basis for establishing jurisdiction over foreign undertakings without subsidiaries on the territory of the EC.

Wood Pulp

The *Wood Pulp* case concerned horizontal price fixing by wood pulp producers and their associations with registered offices outside the Community, namely in Canada, the U.S., Sweden and Finland.[737] Although there was no Swiss firm involved in the alleged price fixing, the case had a **Swiss connection** because the «Research and Information Centre for the European Pulp and Paper Industry» was run by the ***Fides*** trust company of Switzerland. No fine was imposed on *Fides*. (However, in later cases, *AC Treuhand*, the legal successor of Fides, was fined as a cartel facilitator.[738]) In its ruling of 27 September 1988, the ECJ realized that jurisdiction over the foreign firms could not be established under the economic unity approach, since a number of them did **not have subsidiaries** or branches on EC territory. The Court therefore held that «[w]here wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from

734 Case 48/69, *Imperial Chem. Indus. v. Commission*, 1972 ECR 619, 694; see F.A. Mann, The Dyestuffs Case in the Court of Justice of the European Communities, 22 Int'l Comp. L.Q., 35, 46 (1973).

735 See the critical comments with regard to the latter aspect by Roger P. Alford, The Extraterritorial Application of Antitrust Laws (fn 729), 31. One may also speak of «pseudo-territoriality»; see Jürgen Basedow, International Antitrust: From Extraterritorial Application to Harmonization, 60 La. L. Rev., 1037, 1039–40 (2000).

736 See Cases 6/72 *Continental Can* [1973] ECR, 215, paragraph 15; Joined Cases 6 and 7/73 *Commercial Solvents*, [1974] ECR, 223, paragraph 41.

737 85/202/EEC Commission Decision of 19 December 1984 relating to a procedure under Article 85 of the EEC Treaty (IV/29.725 – *Wood Pulp*), 1985 O.J L 85, 1, paragraphs 5 ff.

738 See Cases T-99/2004 – AC Treuhand [2008] ECR II-1501 and Commission COMP/38.589 — Heat Stabilisers, O.J. C 307/9 of 12.11.2010. See with regard to Case T-99/2004 Christian Mayer, The Art of Fining II: In Immunity They Trusted, ELR 2009, 34 ff.; Andreas Weitbrecht/Laura Melusine Baudenbacher, Bußgeld wegen Beihilfe zu einem Kartell? Zum Urteil des EuG vom 8. Juli 2008 (Rs. T-99/2004 – AC Treuhand), EuR 2010, 230 ff.

those customers, that constitutes competition within the common market.»[739] The Commission had thus correctly assessed the territorial scope of Article 85 EEC (now Article 101 TFEU). With regard to the applicants' argument that the Commission's decision was incompatible with public international law, the ECJ held that an agreement such as the one in question «consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof», the **implementation** being the decisive factor.[740] Since the producers in the case at hand implemented their pricing agreement within the common market, the Community's jurisdiction to apply its competition rules to such conduct was «covered by the territoriality principle as universally recognized in public international law».[741] Obviously in view of the unity of undertaking theory which had been used in the *Dyestuffs* cases, the ECJ added that whether or not the producers had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community was immaterial.[742] Advocate-General DARMON had proposed the application of the effects doctrine where the effects were substantial, direct, immediate, and reasonably foreseeable. He argued, *inter alia*, that the effects doctrine was not contradicted by international case law and that the **U.S. courts** had adopted it.[743]

Gencor

In Gencor, the GC for the first time openly acknowledged the effects theory. *Gencor Ltd*, a company incorporated under South African law operating in the mineral resources and metals industries held 46.5% of *Implats*, the rest of whose capital was spread amongst third parties. Implats was a South African company bringing together Gencor's activities in the platinum group metals («PGM») sector. *Lonrho plc* was a company incorporated under English law which operated in various sectors, in particular in mining and metals. It held 73% of *Eastplats* and *Westplats* («LPD»), companies incorporated under South African law which brought together Lonrho's activities in the PGM sector. Gencor had a 27% stake in LPD. Gencor and Lonrho proposed to acquire joint control of Implats and then to grant Implats sole control of LPD. Such a transaction would have eliminated competition between *Implats* and *LDP* with regard not

739 Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö and others* («*Wood Pulp*»), 1988 [ECR] 5193, paragraph 12.

740 Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö and others* («*Wood Pulp*»), 1988 [ECR] 5193, paragraph 16.

741 Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö and others* («*Wood Pulp*»), 1988 [ECR] 5193, paragraph 18.

742 Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö and others* («*Wood Pulp*»), 1988 [ECR] 5193, paragraph 17.

743 Opinion of AG Darmon in Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö and others* («*Wood Pulp*»), 1988 [ECR] 5193, paragraph 53, with reference to the Opinion of AG Mayras in Case 48/69 [1972] ECR, 665, 702.

only to PGM mining and production in South Africa but also to the marketing of PGMs in the Community where those two undertakings achieved significant sales. Thus, the market would no longer have been supplied by three South African PGM suppliers, but by two (*Implats/LPD* and *Amplats*, the leading supplier worldwide). The South African competition authority approved the merger, but the European Commission blocked it. It found that the merger would have led to the creation of a dominant duopoly in the platinum and rhodium markets, as a result of which effective competition would have been significantly impeded in the common market within the meaning of Article 2(3) of the EU Merger Regulation. The GC upheld the Commission's decision. With regard to the territorial scope of Community law, it referred to Article 1 of the Regulation which declares the latter applicable to all concentrations with a Community dimension. That the undertakings in question are established in the Community or that their production activities must be carried out within Community territory is not necessary.[744] Since Gencor and Lonrho had carried out sales in the Community before the merger and would have continued to do so thereafter, there was a Community dimension.[745] As to public international law, the GC found that the concentration would have altered the competitive structure within the common market since instead of three South African PGM suppliers there would have remained only two. The GC then made the succinct statement that «[a]pplication of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community»[746]. With regard to **immediate effect**, the GC rejected the applicant's assertion that the words ‹medium term› used in the Commission's decision in relation to the creation of a dominant duopoly position were ambiguous. «They clearly refer to the time when it is envisaged that Russian stocks will be exhausted, enabling a dominant duopoly on the part of *Amplats* and *Implats/LPD* to be created on the world platinum and rhodium markets and, by the same token, in the Community as a substantial part of those world markets.»[747] The GC conceded that the concentration would not necessarily lead to immediate abuses, but held that it would have the **direct and immediate effect** «of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise

744 Case T-102/96 – *Gencor Ltd v Commission of the European Communities* [1999] ECR II-753, paragraph 79.

745 Case T-102/96 – *Gencor Ltd v Commission of the European Communities* [1999] ECR II-753, paragraph 87.

746 Case T-102/96 – *Gencor Ltd v Commission of the European Communities* [1999] ECR II-753, paragraph 90.

747 Case T-102/96 – *Gencor Ltd v Commission of the European Communities* [1999] ECR II-753, paragraph 93.

to a lasting alteration in the structure of the markets concerned».[748] In view of **substantial effect**, the GC noted that the Commission had established that the concentration would have created a lasting dominant duopoly position in the world platinum and rhodium markets. As to **foreseeable effect**, the GC concluded from all of the foregoing that it was in fact foreseeable that the effect of creating a dominant duopoly position in a world market would also be to impede competition significantly in the Community.

The GC's *Gencor* judgment was not appealed, and the ECJ has not had an opportunity to express itself on the applicability of the effects doctrine since. But there is a high probability that the ECJ would not refrain from showing its colors, also in cartel and dominance cases.[749] It seems that the reluctance of the ECJ to adopt the effects doctrine in the past was mainly influenced by objections put forward by the U.K.[750] This reason would hardly exist anymore after the enactment of a new British competition law in 1999.

5. U.S. courts become harsher

Hartford Fire

The end of the Cold War did not change the approach of American courts, quite the contrary. In 1993, the Supreme Court in *Hartford Fire Insurance*, by 5:4 votes, held that «the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.»[751] American and British firms in the insurance and reinsurance sector had violated the Sherman Act by engaging in various conspiracies. The actions in question had occurred entirely on British soil. The balancing of interest was only deemed to be relevant, if at all, where there was a **true conflict** between U.S. and foreign jurisdiction. Such a conflict was only supposed to exist where a defendant would have to violate the laws of a foreign state in order to comply with U.S. law.

Nippon Paper

A peak of aggressive extraterritorial enforcement of American antitrust law was reached with the First Circuit's 1997 judgment in *Nippon Paper*. Japanese fax paper manufacturers had engaged in price fixing. All the meetings and all the sales to the U.S. distributors as well as all the monitoring activity had occurred in Japan. The First Circuit Court asserted U.S. jurisdiction over wholly foreign

748 Case T-102/96 – *Gencor Ltd v Commission of the European Communities* [1999] ECR II-753, paragraph 94.

749 Alexander Layton/Angharad M. Parry, Extraterritorial Jurisdiction – European Responses, 26 Hous. J. Int'l L., 309, 321 (2004).

750 Jürgen Basedow (fn 735), 1041.

751 *Hartford Fire Ins. v. California*, 509 U.S. 764 (1993).

conduct which produced intended and substantial effects in the U.S. and found that such conduct may form the basis for a **criminal prosecution**.[752] Since both criminal and civil liability were «based on the same language in the same section of the same statute», the Court considered that it followed from settled principles of statutory construction that Section 1 of the Sherman Act had to be interpreted in the same way in a criminal case as in a civil case. The Supreme Court denied certiorari.[753]

6. *Vitamin cartel: Both the U.S. and the EU strike*

After this, it was only a matter of time until the first European nationals would serve time in an American jail for cartel activity. It so happened that the first European managers who had to take the hard path were **Swiss citizens**. *Hoffmann LaRoche*, a flagship of the Swiss pharmaceutical industry, was the ring leader in the global **vitamin price cartel** which was investigated by the U.S. authorities between 1996 and 1999. The Antitrust Division of the U.S. Department of Justice called it «the most pervasive and harmful criminal antitrust conspiracy ever uncovered» and the USD 500 million fine imposed against the Swiss enterprise was «the largest fine ever imposed in any Department of Justice proceeding under any statute.»[754] The former Director of Hoffmann LaRoche's Worldwide Marketing for Vitamins, KUNO SOMMER, and the former President of the Fine Chemical and Vitamin Division, ROLAND BRÖNNIMANN, were **sent to prison** for four respectively five months and ordered to pay fines of USD 100 000 respectively USD 150 000 for their involvement in the cartel.[755]

After having investigated the **European activities** of the cartel, the European Commission imposed a fine of EUR 855,22 million. *Hoffmann LaRoche* had to pay EUR 462 million.[756] No appeals were lodged against this decision.

The vitamin cartel case had repercussions in U.S. courts. American companies sued the cartel members under U.S. law claiming treble damages and obtained more than USD 2 billion by way of settlement.[757] Against this background, foreign plaintiffs with headquarters in Ecuador, Panama, Ukraine and Australia brought suit against *Hoffmann-LaRoche* and other vitamin manufacturers and distributors under Section 1 Sherman Act and Sections 4 and 16 Clayton Act, alleging that the defendants were engaged in a world-wide conspiracy to raise, stabilize and maintain prices of vitamins. Under the FTAIA, a

752 *United States v. Nippon Paper Indus. Co.*, 109 F. 3d 1, cert. denied, 118 S. Ct. 685 (1998).
753 118 S. Ct. 685 (1998).
754 <http://www.justice.gov/atr/public/4523d.htm> visited 18 February 2012.
755 <http://www.justice.gov/atr/public/4523d.htm> visited 18 February 2012.
756 Case COMP/E-1/37.512 Vitamins, O.J. L 6/1 of 10.1.2003.
757 See the speech of Assistant Attorney General for Antitrust R. HEWITT PATE presented at the British Institute of International and Comparative Law Conference London, England, on May 11, 2004 <http://www.justice.gov/atr/public/speeches/204136.htm> visited 20 April 2012.

plaintiff was required to establish that it was specifically the U.S. effects of the defendants's anticompetitive conduct which gave rise to the claim. However, due to the price fixing of the members of the vitamin cartel, **other firms** than the plaintiffs were overcharged on the American market. The plaintiffs themselves had no economic activity and no other relations to the American market. The **District Court** found against them holding that the injuries the plaintiffs sought to redress were sustained in transactions lacking any direct connection to U.S. commerce. However, the **D.C. Circuit** held that the anticompetitive conduct in itself had to violate the Sherman Act and that the harmful effect of the conduct on U.S. commerce must «give rise to a claim» by **someone**, even if it was not the foreign plaintiff. The rationale behind this **extensive approach** was the following: Denying the plaintiffs the right to sue would enable a violator to escape full liability for his illegal behavior and would thereby lessen the deterrent effect of the antitrust laws. «Disallowing suits by foreign purchasers injured by a global conspiracy because they themselves were not injured by the conspiracy's U.S. effects runs the risk of **inadequately deterring global conspiracies** that harm U.S. commerce. Suits only by those injured by the U.S. effects of a conspiracy may not provide sufficient deterrence; a conspirator could expect that illegal profits abroad would offset his liability in the U.S., leaving the conspirator with an incentive to engage in global conspiracy.»[758]

The Supreme Court reversed and held by 8:0 votes with one Justice recusing herself:

> «… [T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. […] This rule of construction reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow. […] This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world.»[759]

> «Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.»[760]

University of Florida antitrust law Professor CLIFFORD A. JONES observed that whereas a number of EU Member States as well as Canada and Japan filed

758 315 F.3d 338, 356, emphasis added.
759 *Hoffmann-La R. Ltd. et al. v. Empagran S. A. et al*, 542 U.S. [2004], 2, 7.
760 *Hoffmann-La R. Ltd. et al. v. Empagran S. A. et al*, 542 U.S. [2004], 12 f.

amicus briefs in the proceedings before the Supreme Court, Switzerland, home of the cartel leader *F. Hoffman-La Roche, Ltd.*, did not. This, he argued, was all the more remarkable since, for example, Germany's brief «could be considered a defense of its national champion BASF.»[761]

7. The effects doctrine becomes world standard

In the meantime, the principle of extraterritorial application of competition law has become global standard.[762] Swiss firms regularly notify merger agreements to the competition authorities in the EU and the U.S. and, as the case may be, to the competent bodies in other jurisdictions. And they face the consequences of American and EU law in cases of conspiracy and abuse of dominance.[763] To be sure, the Federal Act on Cartels and other Restraints of Competition (CartA), too, «applies to practices that have an effect in Switzerland, even if they originate in another country» (Article 2[2]).[764] But Swiss competition policy has until recently hardly been deemed scary. Moreover, it appears that powerful countries and organizations are in a better position to enforce their antitrust laws extraterritorially than small countries. Whether a country has the respective power is said to depend on the **attractiveness of its market** for foreign economic operators. States with large domestic markets upon which foreign firms are greatly dependent will succeed more easily in enforcing their competition laws extraterritorially than states with small domestic markets upon which foreign firms are less dependent.[765] «[A] rational firm will accept antitrust enforce-

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761 Foreign Plaintiffs, Vitamins, and the Sherman Antitrust Act after Empagran (F. Hoffman-LaRoche, Ltd./Empagran,S.A. 2004 WL 1300131, 542 U.S. [2004]), ELR 2004, 270, 274 f.; see with regard to *Empagran* also CARL BAUDENBACHER/KARSTEN BEHN, «Back to Betsy»: Zur Empagran-Entscheidung des U.S. Supreme Court, 2 ZWeR 604–626 (2004).

762 See, e.g., with regard to Russian Federal Law on Protection of Competition, <http://www.russianlaws.com/newsdetail.aspx?news=7211> visited 12 April 2012. According to its Article 2, the Chinese Anti-Monopoly Law applies to monopolistic conduct outside China that eliminates or has a restrictive effect on competition in the Chinese domestic market, <http://www.freshfields.com/publications/pdfs/2007/sept05/19887.pdf) visited 12 April 2012>.

763 See, e.g., Case C-450/98 P. *International Express Carriers Conference (IECC) v. Commission*, [2001] ECR, I-3947; Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission*, [2000] II-491; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P. *Pre-insulated pipes* (involving ABB), [2005] ECR I-5425; Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky v European Commission*, [2010] ECR II-1443; T-138/07, *Schindler Holding Ltd* and Others v. Commission, judgment of 13 July 2011, nyr; T-42/07 *The Dow Chemical Company and Others v European Commission*, judgment of 13 July 2011, nyr.; In re Uranium Antitrust Litig., 480 F.Supp. 1138 (N.D. Ill. 1979), modified, 617 F.2d 1248 (7th Cir.1980).

764 ATF 127 III 219 ff. *Merial*; but see already ATF BGE 93 II 192 ff. *Hachette SA*.

765 See ANDREW T. GUZMAN, Is International Antitrust Possible?, 73 N.Y.U. L. Rev., 1501,

ment as a condition of market participation because from a cost-benefit analysis, the benefits of market participation are greater than the losses of antitrust compliance. Hence, the degree a state can impose its competition laws extraterritorial is a function of the size of the state's market and its attractiveness to foreign firms.»[766] Recent experience shows, however, that the competition authority of a small state such as Switzerland is **not defenseless**. On 24 May 2012, the Swiss Competition Commission (ComCo) imposed a fine of CHF 156 million on the German car manufacturer BMW for obstruction of direct and parallel imports. ComCo alleged that BMW had completely sealed off the Swiss market by preventing authorized dealers in the EEA from selling new cars of the brands BMW and MINI to customers in Switzerland. BMW was ordered to adapt its dealer contracts in the EEA and to lift the export ban clause.[767] The company announced that it will challenge the decision before the Federal Administrative Tribunal.[768]

III. Secondary sanctioning: The example of the Helms-Burton Act

Secondary sanctions are sanctions which are threatened or imposed on **third parties** which do business with the target country or organization.[769] The most (in)famous case concerns the 1996 «Cuban Liberty and Democratic Solidarity Act» (named **Helms-Burton Act** after its sponsors, Senator JESSE HELMS and Congressman DAN BURTON).[770] In Title I, the act requires compliance with the economic and financial embargo concerning Cuba by, *inter alia*, not exporting to the U.S. any goods or services of Cuban origin or containing materials or goods originating in Cuba either directly or through third countries, not dealing in merchandise that is or has been located in or transported from or through Cuba, not re-exporting to the U.S. sugar originating from Cuba without notification by the competent national authority of the exporter or importing into the U.S. sugar products without assurance that those products are not products of Cuba. Compliance was also required with regard to freezing Cuban assets and

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1510 ff. (1998); WILLIAM SUGDEN, Global Antitrust and the Evolution of an International Standard, 35 Vand. J. Transnat'l L 989, 996 ff.; CHARLES W. SMITHERMAN III, The Future of Global Competition Governance: Lesson from the Transatlantic, 19 A. U. Int'l L. Rev., 769, 819 (2004).

766 CHARLES W. SMITHERMAN (fn 765), 819.

767 <http://www.news.admin.ch/message/index.html?lang=de&msg-id=44680> visited 12 June 2012.

768 <http://www.tagesanzeiger.ch/wirtschaft/unternehmen-und-konjunktur/Weko-verdonnert-BMW-zu-MegaBusse–Konzern-wehrt-sich/story/25412557> visited 12 June 2012.

769 See GARY CLYDE HUFBAUER/JEFFREY J. SCHOTT/KIMBERLY ANN ELLIOTT/BARBARA OEGG (fn 339), 130; JEFFREY A. MEYER, Second Thoughts on Secondary Sanctions, 30 U. Pa. J. Int'l L. 905; with regard sanctioning in general supra, D. IV. 2. c.

770 22 U.S.C. § 6021; the Iran-Libya Sanctions Act, also known as the *D'Amato*-Act, follows the same patterns, 50 U.S.C. § 1701.

financial dealings with Cuba. Titles III and IV require termination of **‹trafficking› in property**, formerly owned by U.S. persons (including Cubans who have obtained U.S. citizenship) and expropriated by the Cuban regime. Trafficking includes: use, sale, transfer, control, management and other activities to the benefit of a person. Private operators are given a right of action in U.S. courts. President CLINTON made use of his right to suspend the private right of action for a six-month period. Every U.S. President has since acted accordingly. However, certain liabilities remain.[771]

Switzerland concluded an **investment protection and promotion agreement** with Cuba in June 1996. Swiss companies are clearly potential victims of the Helms-Burton Act and the Swiss Department of Foreign Affairs conveyed the country's disagreement to the State Department in a diplomatic note.[772] But it did not take action. However, on 22 November 1996, the Council of the European Community adopted a **blocking and clawback statute** by enacting Regulation (EC) No 2271/96 which protects against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.[773] According to Article 4 of the regulation no judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect to the Helms-Burton Act or to actions based thereon or resulting therefrom shall be recognized or be enforceable. Under Article 5 of the regulation, no natural person being a resident in the Community, no national of a Member State and no legal person incorporated within the Community, shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the law in question or from actions based thereon or resulting therefrom. Article 6 of the regulation entitles any person concerned to recover any damages, including legal costs, caused to that person by the application of the law in question or by actions based thereon or resulting therefrom. Such recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary. The U.S. and the EU subsequently settled the dispute.[774] It appears that Switzerland has taken a **free ride** on the EU's action.

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771 See, e.g., DANIEL P. FAUST, American Investment in Cuban Real Estate: Close but no Cigar, 34 U. Miami Inter-Am. L. Rev. 369, 374 f.

772 <http://www.ionewmanagement.ch/de/artikelanzeige/artikelanzeige.asp?pkBerichtNr=43545> visited 14 January 2012.

773 O.J. L 309 of 29 November 1996, 1 ff.

774 See STEFAAN SMIS/KIM VAN DER BORGHT, The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts, 93 Am. J. Int'l L. 227 ff.

IV. Export of American law

1. General

Like in the case of virtually all countries of Western Europe, American economic law after World War II was also exported to Switzerland. Both the **legislature** and the **Federal Supreme Court** have proven to be receptive to American ideas. Between 2000 and 2007, the Supreme Court handed down some 30 judgments per year (in all fields of the law) with a close relation to the U.S.[775]

2. Export via the European Union and the ECHR

In economic law, American legal concepts have also found their way to Switzerland via international and EU law. It is well known that when establishing its single market, the EU enormously profited from American experience, in particular with regard to the commerce clause of the U.S. Constitution. JEAN MONNET, one of the founding fathers of the ECSC and of the EEC, spent much time in the U.S. where he realized that a large **internal market** would have huge economic advantages.[776] As mentioned, the EC single market experience was for its part crucial when Switzerland decided to enact single market legislation in 1995.[777] American thinking also played a crucial role when first Germany and then the EEC decided to introduce strict **antitrust** and later **merger control** rules.[778] EU competition law then was the role model for the 1995/2004 Swiss Cartel Act. Financial market legislation has found its way to Switzerland via the EU. Federal Supreme Court Judge and Former President HEINZ AEMISEGGER stated that the EHRC and in particular its application by the ECtHR are influenced by American legal thinking. He even called the Convention an entrance door for Anglo-American principles into Swiss law.[779] Furthermore, Switzerland, like the EU and its Member States, has become the target of the American strategy of **linking trade and IP law** which has, e.g., led to the

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775 HEINZ AEMISEGGER, Die Bedeutung des US-amerikanischen Rechts bzw. der Rechtskultur des common law in der Praxis schweizerischer Gerichte – am Beispiel des Bundesgerichts, AJP 2008, 18 ff.

776 See HOLGER SCHRÖDER, Jean Monnet und die amerikanische Unterstützung für die europäische Integration 1950–1957, Frankfurt am Main/Berlin/Berne/New York/Paris/Vienna 1994, 66 ff. – The same holds true for the principle of primacy. See *Gibbons v. Ogden* – 22 U.S. 1 (1824); concerning recent developments in the EU MATTHIAS KUMM/VICTOR FERRERES COMELLA, The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union, Int. J. Constitutional Law (May 2005) 3 (2–3), 473 ff.

777 See supra, C. III.; infra, F. V. 3. a. aa. (1).

778 The role of the Freiburg School which started to develop the theoretical foundations of a social market economy in the 1930's must not be overlooked. See, e.g., VINCENT MARTENET/ANDREAS HEINEMANN, Droit de la concurrence, Geneva/Zurich/Basel 2012, 11 ff.

779 HEINZ AEMISEGGER ‹Die Bedeutung des US-amerikanischen Rechts bzw. der Rechtskultur des common law in der Praxis schweizerischer Gerichte, (fn 775).

enactment of the Federal Law on the Protection of Topographies of Semiconductor Products of October 9, 1992.[780]

It may also happen that Swiss legislation is originally adopted under U.S. pressure, and that **later developments** in Switzerland are influenced by European law. For example, the Federal Council's dispatch on the Amendment of the Stock Exchange Act (stock exchange offences and market abuse) of 31 August 2011 admits that the rules of the Swiss Penal Code (SPC) concerning insider trading are not strict enough.[781] The benchmark is no more American law, but Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse),[782] and the FATF recommendations as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005.[783] A more recent export product from the U.S. is the Swiss Audit Supervision Act of 16 December 2005 which intends to achieve mutual recognition with the U.S. and the EU.[784]

3. Direct export

a. Preliminary remarks

Beyond this general development, the U.S. has in the last 25 years **singled Switzerland out** when it came to issues related to financial market, bank secrecy, and tax law. This is a consequence of Switzerland's position as a financial center of global importance. Since the fields in question are the subject of other reports to the 2012 Swiss Jurists Conference, the present contribution constricts itself to two particularly significant examples. Switzerland had to accept the introduction of articles into its Penal Code (SPC) which address **insider trading** on the one hand and **money laundering** on the other. With this, the path to requests for legal assistance was opened.

b. Insider trading law in particular

The first case of the U.S. compelling Switzerland to adopt a legal concept which was unknown to its legal system concerned insider trading. On 17 December 1987, the Swiss Parliament adopted a respective provision, Article 161 SPC. The text of the new Article essentially reproduced the then existing legal

780 SR 231.2.; see CARL BAUDENBACHER, Immaterialgüterrecht und Handelspolitik, ZSR Bd. 120, 2001 I, 207, 215 ff.; infra, F. V. 3. a. gg.

781 Botschaft zur Änderung des Börsengesetzes (Börsendelikte und Marktmissbrauch) of 31 August 2011, BBl 2011, 6873.

782 O.J. L 96/16 of 12 April 2003.

783 <http://conventions.coe.int/Treaty/en/Treaties/Html/198.htm>; with regard to FATF see <http://www.fatf-gafi.org/> both visited 15 March 2012.

784 SR 221.302; see HANS PETER WALTER, Das Revisionsaufsichtsrecht als Lex Americana?, ST 82, 854 (2008).

situation in the U.S.[785] On 31 August 1982, Switzerland and the U.S. had signed a «Memorandum of Understanding, i.e. a statement of intent to Establish Mutually Acceptable Means for Improving International Law Enforcement Co-operation in the Field of Insider Trading». Referring, in particular, to the Treaty between the United States and Switzerland on Mutual Assistance in Criminal Matters of 1973, the parties discussed, *inter alia*, concerns in both countries (sic!) with respect to recent cases involving persons who used Swiss banks as intermediaries to effect securities transactions in the U.S., at a time when such persons may have possessed material non-public information concerning the securities involved. The parties concluded that such conduct was detrimental to the interests of both nations. The **Swiss Federal Council** pledged to submit to the Parliament a bill on the misuse of inside information. At the same time, the **Swiss Bankers' Association** concluded an agreement with regard to the handling of requests for information from the Securities and Exchange Commission of the United States (SEC) on the subject of misuse of inside information.[786] The ban on insider trading was, in other words, enacted in order to put to rest the conflict over the refusal by Swiss authorities to provide legal assistance to US prosecutors investigating insider trading through Swiss banks. Prior to the entry into force of Article 161 SPC, insider trading did not meet the requirement of dual or double criminality as enshrined in Article 4(2) of the 1973 American-Swiss Treaty on Mutual Assistance in Criminal Matters[787] unless it qualified as fraud under Article 148 SPC or a breach of a manufacturing or trade secret pursuant to Article 162 SPC.[788]

Due to the widespread perception that Article 161 SPC was adopted in the face of political pressure from the U.S. and the threat of potentially crippling sanctions on Swiss banks, it is commonly referred to as **«lex americana»**. On closer inspection, one discovers, however, that the Swiss legislature saw to it that Article 161 SPC remained largely **ineffective**. The third paragraph of that provision limited the notion of a «confidential fact» to the impending issue of new shares, to mergers or acquisitions or to similar circumstances of compar-

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785 See PETER FORSTMOSER, Effektenhandel durch Insider, SAG (SZW) 45, 133 ff., (1973); PETER BÖCKLI, Osmosis (fn 33), 9, 16 f.; DANIELA KOENIG, Das Verbot von Insiderhandel: Eine rechtsvergleichende Analyse des schweizerischen Rechts und der Regelungen der USA und der EU, Zurich 2006, 84; CHRISTIAN LEUENBERGER, Die materielle kapitalmarktstrafrechtliche Regulierung des Insiderhandels de lege lata und de lege ferenda in der Schweiz: Unter besonderer Berücksichtigung verschiedener theoretischer und öknomischer Konzepte sowie eines Vergleichs mit dem US-amerikanischen Bundesrecht, Zurich 2010, 222.

786 22 I.L.M. 1 (1983), 1983 WL 177913 (I.L.M.); see ELLEN R. LEVIN, The Conflict Between United States Securities Laws on Insider Trading and Swiss Bank Secrecy Laws, 7 Nw. J. Int'l L. & Bus. 318, 332 ff. (1985).

787 SR 0.351.933.6. In the absence of the Treaty, the application of the dual criminality principle would follow from Article 64(1) of the Swiss Federal Law on Mutual Legal Assistance in Criminal Matters (SR 351.1.).

788 ATF 109 I b 56; ATF *Santa Fé* of 16 May 1984 (not published). An unofficial English summary of the Santa *Fé* judgment can be found at 22 I.L.M. 785 (1983), 1983 WL 179048 (I.L.M.).

able significance. This was the main obstacle to the application of Article 161 SPC.[789] A comparable restriction could neither be found in U.S. nor in EC law. One must also not overlook that the Federal Council's 1985 dispatch gave only general information on the US legal system.[790] This suggests that Article 161 SCP was molded as a genuinely **Helvetic response** to the U.S. request, which is why its application by Swiss courts was largely unaffected by the respective U.S. law.

The Federal Supreme Court which itself refers to the legislation as «lex americana»[791] repeatedly rejected a broad interpretation of Article 161(3) SPC and expressly refused to fill the resulting protection gap.[792] Only few convictions were obtained for insider trading with most criminal charges resulting in acquittals.[793] It is therefore justified to consider the offense as still underenforced and hence of limited practical significance. The majority of cases that came before court concerned administrative and legal assistance mostly to the US.[794] On 1st October 2008, Article 161(3) SPC was repealed without replacement. As a result, the scope of application of Article 161 SPC was broadened. It now covers all facts which have an **influence on the market price**, in particular profit warnings.[795]

However, the Federal Supreme Court has given broad application to the **dual criminality rule** so as not to jeopardize the original objective to enable mutual legal assistance in particular to the US. It found that in assessing whether the conduct under investigation amounts to insider trading pursuant to Article 161 SCP, the requirement that the securities must be traded on a Swiss stock exchange does not apply. Instead, for the purposes of the dual criminality rule, Article 161 SCP is to be applied as if the relevant act had taken place in Switzerland.[796] Further expanding the scope of application of the dual criminality rule, the court stated that the underlying acts must not be punishable in the requesting and the requested jurisdictions as identical criminal offences but must merely constitute **any** crime in both jurisdictions.[797] Finally, the Federal Supreme Court went as far as to assume that for a «tippee» to be punishable according to Article 161(2) SPC, it is not necessary for the conduct of the insider

789 See Botschaft zur Änderung des Schweizerischen Strafgesetzbuches (Streichung von Art. 161 Ziff. 3 StGB) of 8 December 2006, BBl 2007, 444.

790 See Botschaft über die Änderung des Schweizerischen Strafgesetzbuches (Insidergeschäfte) of 1 May 1985, BBl 1985 II 69.

791 See 1A.12/2005 of 9 March 2006.

792 ATF 118 Ib 547; 1A.325/2000 of 5 March 2001; 2A.567/2001 of 15 April 2002.

793 Christoph B. Bühler/Daniel Häring, Die selbstgeschaffene Insiderinformation – Transaktionen aufgrund eigener Planung im Lichte des Insiderhandelsverbotes, GesKR, 2009, p. 453.

794 Christoph Peter, in: Marcel Alexander Niggli/Hans Wiprächtiger (eds.), Basler Kommentar Strafrecht II (Art. 111–392 StGB), 2nd ed., Basel 2007, Art. 161 N 41.

795 See Botschaft zur Änderung des Schweizerischen Strafgesetzbuches (Streichung von Art. 161 Ziff. 3 StGB) of 8 December 2006, BBl 2007 439.

796 See ATF 118 Ib 543.

797 See ATF 126 II 409.

to constitute a breach of Article 161(1) SPC.[798] That being said, the Court in interpreting Article 161 SPC has, to the author's knowledge, never relied on U.S. insider trading law as laid down, *inter alia*, in Section 10(b) and Rule 10b-5 of the Securities Exchange Act and the respective jurisprudence.

As mentioned, a further revision of the existing legislation was proposed by the Federal Council on 31 August 2011 in order to bring the prohibition of insider trading in line with EU legislation.[799] According to the Federal Council's dispatch on amending the Stock Exchange Act,[800] ***any*** person shall be prohibited to exploit insider information. The present requirement of acting in a particular capacity is thus to be abandoned. Further, insider trading is to apply to all securities and derivative financial instruments admitted to trading on a Swiss stock exchange or an institution similar to the stock exchange irrespective of whether the transaction is executed on a regulated market or over-the-counter. The proposal also introduces an aggravated form of insider trading if the pecuniary gain derived from the offense is in excess of CHF 1 million. As a felony, insider trading will constitute a predicate offence to money laundering allowing Switzerland to ratify the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of May 16 2005. In addition, the responsibility for prosecution will be transferred from the cantonal prosecution authorities to the Federal Office of the Attorney General which can bring a charge before the Federal Criminal Court sitting as court of first instance. Finally, the offense of insider trading is *de lege ferenda* to become part of the Stock Exchange Act (Article 40). These amendments will not come into force before 1 January 2013.

c. Anti-money laundering law

Switzerland included the offense of money laundering in its SPC in 1990 in Articles 305bis («Money laundering») und 305ter («Insufficient diligence in financial transactions and right to report»). The provisions came into force on 1 August 1990. It was said that the legislation was motivated «by strong pressure from the United States and by internal scandals.»[801] The latter remark is an allusion to the fact that in January 1989, the Federal Councilor responsible for Jus-

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798 See ATF 118 Ib 448. In a later, although domestic case, the Federal Court retreated somewhat from this position leaving this question open, ATF 119 IV 38. In any case, the criminal liability of the «tippee» is not contingent on a criminal conviction of the insider, 2A.494/2004 of 17 November 2004.

799 See Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, O.J. L 334/30 of 18.11.1989; Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), O.J. L 96/16 of 12.4.2003.

800 See Botschaft zur Änderung des Börsengesetzes (Börsendelikte und Marktmissbrauch) of 31 August 2011, BBl 2011 6873.

801 Scott E. Mortman, Putting Starch in European Efforts to Combat Money Laundering, 60 Fordham L. Rev. S429, fn 99 (1992); see also Rebecca G. Peters, Money Laundering and

tice and Police – the first woman member of the Swiss government ever – had to resign after having warned her husband about an investigation concerning possible money laundering by a company on whose board he sat.[802] The Federal Council's dispatch on the amendment of the SPC (legislation on money laundering and lack of diligence in money transactions) of 12 June 1989 mentioned that in the pre-parliamentary consultation process, the necessity of criminal detection of money laundering was in principle accepted. However, various circles expressed concern that Switzerland was pressing ahead internationally and that Switzerland was once again passing a «lex americana».[803] The Federal Supreme Court for its part stated in a judgment of 21 September 1994: «[I]l s'agit d'une infraction inspirée du droit des **Etats-Unis d'Amérique**, qu'il a fallu insérer dans notre droit pénal.»[804] It appears in fact that the term ‹laundering› has its origin «in a practice which developed in the United States of America, whereby organized crime would acquire launderettes and car washes for the purpose of mixing their receipts from, among other things, alcohol smuggling during Prohibition with legally obtained profits.»[805] However, unlike Article 161 SPC, the drafting history of Articles 305bis and 305ter SPC does **not** lend conclusive support to the claim that they are **leges americanae**.[806]

In a second legislative package, Article 260ter («criminal organization») and Article 305ter(2) SPC («right to report») were introduced and the provisions on the forfeiture of assets, Articles 58–60 SPC (now Articles 69–73 SPC), were revised. The amendments became effective as of 1 August 1994. The Anti-Money Laundering Act (AMLA) which entered into force on 1 April 1998 was part of a third legislative package. The AMLA introduced various due diligence obligations, in particular the obligation to report suspicious transactions and also a further criminal provision.[807] In 2009 the AMLA was amended. The Financial Action Task Force FATF had found in the 2005 examination that Swiss law concerning money laundering and terrorism financing was incomplete. On the website of the Swiss Federal Department of Finance (Ministry) one can find the following statement under the heading «Combating financial market crime»:

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its Current Status in Switzerland: New Disincentives for Financial Tourism, 11 Nw. J. Int'l L. & Bus. 104 (1990).

802 <http://de.wikipedia.org/wiki/Elisabeth_Kopp> visited 12 May 2012.

803 The latter critique came from the *Groupement des Banquiers Privés Genevois*; BBl 1989 II 1061, 1077.

804 ATF 120 IV 323, emphasis added.

805 Advocate General Poiares Maduro, Opinion of 14 December 2006 in Case C-305/05 *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres*, 2007 ECR, I-5305, pt. 4.

806 Mark Pieth, in: Marcel Alexander Niggli/Hans Wiprächtiger (eds.), Basler Kommentar Strafrecht II (Art. 111–392 StGB), 2nd ed., Basel 2007, Vor Art. 305bis N 13.

807 See stefan Trechsel/Heidi Affolter-Eijsten, in: Stefan Trechsel et al. (eds.), Schweizerisches Strafgesetzbuch, Praxiskommentar, Zurich/St. Gall 2008, Art. 305bis N 5.

> «Switzerland participates at the front lines internationally in the fight against cross-border financial crime. With its mechanisms for uncovering unlawfully obtained assets and combating money laundering, it has effective means for preventing its financial centre from being abused for criminal purposes. Its efforts and successes in the fight against corruption are of key significance for Switzerland's financial centre. The country actively participates in the Financial Action Task Force (FATF).»

The Department emphasizes that the Anti-Money Laundering Act applies to all financial intermediaries and that it imposes special due diligence obligations on them. They are either supervised by the supervisory authorities specially established for this purpose – the Swiss Financial Market Supervisory Authority (FINMA) and the Swiss Federal Casino Commission (SFCC) – or, in the non-banking financial sector, by self-regulation organizations (SROs). It is also said that Switzerland has actively participated in the FATF's work from the outset and has helped shape its standards, and that Switzerland supports the evaluation and verification measures of the OECD to fight corruption and has joined the UN Convention against Corruption, thereby campaigning for an intensified fight against corruption worldwide[808]. Whether this self-praise is justified, may be left open.

In any case, the Swiss money laundering rules have not proven to be dead letter. In particular Article 305bis shows a strong record of enforcement with on average 129 convictions per year between 2001 and 2005.[809] It appears that the Federal Supreme Court, in applying the Swiss prohibitions on money laundering, did **not** so far refer to the respective provisions of **U.S. law**.[810] While the Court routinely touches upon the respective U.S. law provisions in cases concerning requests for administrative or legal assistance when assessing whether the dual criminality rule is satisfied, it only examines whether, in the light of the facts provided in the request, the respective Swiss criminal provisions, namely Article 305bis or Article 305ter SPC, are met. The same holds true with regard to establishing whether the predicate offence constitutes a felony which too is to be appraised exclusively according to Swiss law.[811] The Court is entitled to presume the correctness of the facts on which the request is based unless the evidence is manifestly flawed.[812] In that respect, it held that mutual legal assistance between Switzerland and the U.S. is governed by the principle of legitimate expectations as recognized by public international law.[813]

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808 <http://www.efd.admin.ch/dokumentation/zahlen/00579/00607/00622/index.html?lang=en> visited 13 January 2012.

809 Mark Pieth (fn 806), Art. 305bis I.

810 18 U.S.C. §§ 1956 and 1957.

811 See 1A.221/2000 of 20 November 2000.

812 See ATF 132 II 81.

813 See 1A.324/2005 of 8 June 2006 referring to ATF 115 Ib 373.

V. Autonomous implementation of European law

1. General

In addition to the contractual rapprochement to the EU which has, in particular, been addressed in part E. of this report, Switzerland has – after the rejection of the EEA in 1992 – intensified its policy to **unilaterally implement** EU law. EU law is thereby systematically imported into Switzerland. The first autonomous implementation program was launched in 1988. In view of the forthcoming completion of the EU single market by the end of 1992, the **Federal Council** decided that its dispatches to Parliament and its proposals for ordinances should contain a chapter explaining whether the new law was compatible with European law.[814] In the framework of the successor program to the failed EEA, the Federal Council launched the «Swiss Lex» package which aimed at adapting important parts of Swiss economic law to EU single market law.[815] In 2002, the new policy became a permanent element of federal legislation. Article 141 of the **Federal Assembly Act** of 13 December 2002 states, *inter alia*, that the Federal Council, when reasoning and annotating draft legislation, has to give comments on «the compatibility with higher-ranking law and the relationship to European law».[816] It has been said that the process of taking over EU law which does not even have a foundation in the Federal Constitution is rather based on pragmatic than on systematic considerations.[817]

Autonomous implementation must be distinguished from the reception of foreign law as described by comparatists. Comparative law is said to be **purposeless**. The Swiss legislature and the Federal Supreme Court by tradition consult foreign legal materials. The Supreme Court is even famous for its comparatist approach. Approximately ten percent, if not more, of all judgments contain comparative remarks. A close look shows, however, that the comparison is in most cases limited to neighboring countries.[818] The legislature and the courts are, however, free to decide whether they want to look to foreign legal orders, which foreign legal orders they want to examine and whether and how they use knowledge which they have gained through comparison. But there may be cases in which the legislature borrows from a foreign legal order and gives the courts a hint that they should interpret Swiss law in the light of this legal order. Autonomous implementation of European law goes one step further. It is based on the decision of the legislature to harmonize Swiss law with European law

814 BBl 1988 III 249 380; see CARL BAUDENBACHER, Zum Nachvollzug europäischen Rechts in der Schweiz, Europarecht 1992, 309 ff.

815 Botschaft über das Folgeprogramm nach der Ablehnung des EWR-Abkommens of 24 February 1993, BBl 1993 I 805 821 f.; see infra, F. V. 1.

816 SR 171.10.

817 MATTHIAS OESCH (fn 340), 1 ff.

818 Occasionally, there may be references to the case law of U.S. courts. See CARL BAUDENBACHER, Judicial Globalization: New Development or Old Wine in New Bottles? (fn 351), 520 ff.

and to avoid differences. In other words, it aims at a **predetermined objective**. EU law is therefore not just one of several tools with equal relevance. It has become the guiding legal order with a leading position. This means that the process of purposeless comparison and assessment has been outsourced to the competent organs of the EU.[819] Switzerland has **no access** to this process.

It goes without saying that the European legal order may, together with other legal orders, also serve as a **source of inspiration** in areas which have not been subject to the autonomous implementation program. In view of Switzerland's cultural, geographic and economic situation, one may assume that European law is more important in this respect than the laws of most other jurisdictions.

2. *Goals*

The autonomous implementation program aims at avoiding differences between EU and Swiss economic law and guaranteeing Swiss operators a **level playing field** in order to secure their competitiveness in the European market. The Federal Council stated in 2006:

> «Since the European Community (EC) in principle only accepts products on its market that have been manufactured according to the provisions of Community law or at most according to equivalent provisions, the competitiveness of the production site and the work place Switzerland depends strongly on whether our law is euro-compatible.»[820]

Further goals are to retain the option of eventual EU or EEA membership,[821] and, finally, the creation of a certain goodwill with the EU. This was particularly obvious after the rejection of the EEA in 1992 when Swiss diplomacy was fighting hard to convince the EU that Switzerland needed further bilateral agreements.[822] To be sure, autonomous implementation does not produce reciprocal rights and therefore **no right to access** to the EU's internal market for Swiss citizens and economic actors.

In contrast to the EU and EEA/EFTA States, Switzerland is, from a legal viewpoint, free to take over European law beyond the scope of the bilateral agreements. There may, however, be constellations where the Swiss legislature does **not have a real choice**. This was the case with regard to Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products,[823] which was taken over by the Federal Product Liability Act of

819 Matthias Oesch (fn 340), 43.
820 Europabericht 2006 of 28 June 2006, BBl 2006 6815, 6831, author's translation.
821 Zwischenbericht zur Europäischen Integrationspolitik der Schweiz of 29 March 1995, BBl 1995 III, 191, 209.
822 Supra, E. V. 5. a.
823 O.J. L 210/23 of 7.8.1995.

18 June 1993.[824] Article 3(2) of the directive contains a third country clause. It states that

> «[w]ithout prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer».

University of Graz comparative law Professor WILLIBALD POSCH has rightly stated that one of the reasons for the implementation of the Directive was that the Swiss legislature did not want to put Swiss **exports** to the EU single market at risk.[825]

3. Legislation

a. Examples

aa. It has been estimated that up to 60 percent of all federal legislation is being influenced by EU law.[826] What is striking is that the legislation which sets the essential parameters of the **framework for the market economy**, namely the Single Market Act, the Cartel Act, and the Technical Barriers to Trade Act, has been heavily inspired by EU law. All three acts were part of the so-called revitalization program for the Swiss economy after the rejection of the EEA.

(1) The Federal Council's dispatch on the 1995 **Single Market Act** conceded that unlike in the EU, the internal market in Switzerland was far from being completed. To the contrary, there were countless restrictions on the free movement of persons and services. The Government deplored unequal treatment of economic operators in individual parts of the country, cantons and municipalities due to the existence of distinctly applicable measures. It also mentioned regulations which made the acceptance of a public contract or the exercise of a business or of a professional activity dependent on domicile and other requirements (indistinctly applicable measures). It is to be noted in this context that the dispatch contains a whole section describing the development of the ECJ's case law concerning the **country-of-origin principle** in the fields of free movement of goods and services and freedom of establishment.[827] To be sure, the principle of free market access and the conditions for its restriction –

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824 SR 221.112.944.

825 WILLIBALD POSCH, Die Europäische Produkthaftung und die Schweiz – mitgegangen, mitgehangen, mitgefangen? in: Helmut Koziol/Jaap Spier (eds.), Liber Amicorum Pierre Widmer, Vienna/New York 2003, 267, 269.

826 See, e.g., the speech of Ambassador JACQUES DE WATTEVILLE, Head of the Swiss Mission to the EU, Défense des intérêts suisses vis-à-vis de l'UE. Le rôle de la Mission de la Suisse à Bruxelles, of 20 June 2011, <http://www.sga-aspe.ch/fileadmin/user_upload/_temp_/2011_06_20__GV_SGA_ASPE__Referat_de_Watteville_CH-EU_1.pdf> visited 14 June 2012.

827 Botschaft zu einem Bundesgesetz über den Binnenmarkt (Binnenmarktgesetz, BGBM) of 23 November 1994, BBl 1995 I 1213, 1227, 1237–1242.

now defined in Articles 2 and 3 of the Act – were always embedded in the Constitution. But the Federal Supreme Court did not do its home work when delineating economic integration and **cantonal sovereignty**. It focused more on the principle of federalism than on the realization of the Swiss internal market.[828] University of Zurich constitutional law Professor GIOVANNI BIAGGINI has therefore called the Act a «kind of legislative tutoring in the matter of Helvetic economic integration.»[829] Still, without the European role model, the Single Market Act, which is based on the **principle of origin**, would hardly have seen the light of day.

(2) The 1995 **Technical Barriers to Trade Act**[830] stands in close connection with the Single Market Act. Article 16a states that, in principle, products which are in conformity with the technical regulations of the EU and, in case of incomplete or lacking harmonization with the technical regulations, of an EU or an EEA Member State and which have been lawfully put into circulation in the respective EU or EEA Member State may be put into circulation in Switzerland.

(3) Under the 1995 **Federal Act on Cartels and other Restraints of Competition**,[831] substantive Swiss competition law is based on three pillars: a presumption that hard core cartels concerning prices, quotas and allocation of customers eliminate competition (Article 5[3] and [4] CartA), a prohibition to abuse a dominant position (Article 7 CartA) and merger control (Articles 9 and 10 CartA). The newly created **Competition Commission** (ComCo) was given the right to issue decisions which were subject to judicial review by the Appeals Committee *(Rekurskommission)* and in the last instance by the Federal Supreme Court. The Appeals Committee was replaced by the Federal Administrative Court in 2007. As far as the underlying competition theory is concerned, the CartA rightly does not follow a specific school of thought, but adheres to an open-ended approach.[832]

The 1995 Act was, however, a half measure in two respects: (1) Until today, the ComCo consists of a large number of **lobbyists** mainly from industry and labor. This is not compatible with the required independence of the members. (2) The ComCo was given the right to take decisions, but sanctions could only be imposed if an undertaking had violated a previous cease and desist order, i.e. upon a second infringement. It was only in 2004 that the latter flaw was corrected (Article 49a CartA). The mood had changed when the Swiss public realized that the competition authorities of the U.S. and of the EU collected $ 725 Million and € 855 Mio, respectively, from the members of the global vitamins

828 Botschaft zu einem Bundesgesetz über den Binnenmarkt (Binnenmarktgesetz, BGBM) of 23 November 1994, BBl 1995 I 1213, 1219.

829 GIOVANNI BIAGGINI (fn 121), Article 27, paragraph 22, author's translation.

830 SR 946.51.

831 SR 251.

832 Botschaft zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG) of 23 November 1994, BBl 1995 I 468, 502 ff.

cartel, whereas the ComCo, which had also opened an investigation, went away empty-handed.[833] The Federal Council's dispatch of 7 November 2001 explicitly stated that by giving the ComCo the competence to **directly impose sanctions**, Switzerland was cloning the EU solution.[834] Along the same lines, the legislature introduced a leniency rule (Article 49a[3] CartA) and created a clear legal basis for on-the-spot-investigations (Article 42[2] CartA). In view of the country's corporatist tradition, the reforms of the years 1995 and 2004 almost amounted to a miracle.

bb. In **contract law**, consumer protection was substantially improved under European influence. Among the 27 federal statutes which were enacted or amended under the heading **«Swiss Lex»** in 1993 were the Package Travel Act which was based on Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours[835] and the Consumer Credit Act which reproduced Council Directive 87/102 of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit.[836] However, the Consumer Goods and Guarantees Directive[837] was not taken over. It was not before 21 January 2011 that the National Council's Committee for Legal Affairs presented a report to the government in which it supported a parliamentary initiative aiming at implementing said directive.[838]

As already indicated, European influence has been crucial in the amendment of the ineffective Article 8 of the Unfair Competition Act, the provision governing **unfair general conditions of trade**.[839] On 2 September 2011 the Federal Council proposed to change Article 8 in the following manner:

> «Shall be deemed to have committed an act of unfair competition, anyone who makes use of general conditions that in a manner which violates good faith, (a) deviate in a serious manner from the statutory provisions; or (b) prescribe a serious and unjustified imbalance between the contractual rights and obligations.»

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833 <http://www.news.admin.ch/NSBSubscriber/message/attachments/14206.pdf> visited 15 March 2012; see with regard to the vitamin cartel supra, F. II. 6.

834 Botschaft über die Änderung des Kartellgesetzes of 7 November 2001, BBl 2002, p. 2001, 2005, 2030. The author was consulted on these issues as an expert by the competent Committee of the State Council.

835 SR 944.3; O.J. L 158/59 of 23.6.1990.

836 SR 221.214.1; O.J. L 42/48 of 12.2.1987. The Directive has been repealed by Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers, O.J. L 133/66 of 22.5.2008.

837 1999/44/EC of the European Parliament and of the Council of 25th May 1999, O. J. L 171, 7/7/1999, 12.

838 Parlamentarische Initiative. Mehr Schutz der Konsumentinnen und Konsumenten. Änderung von Artikel 210 OR – Bericht der Kommission für Rechtsfragen des Nationalrates vom 21. Januar 2011, <http://www.parlament.ch/d/dokumentation/berichte/vernehmlassungen/06-490/Documents/bericht-rk-n-06-490-2011-01-21-d.pdf> visited 15 March 2012.

839 Supra, C. IV. 2.

The dispatch clarified that it was also **discrimination** which prompted the Government to act. Swiss business operators offering goods and services on the EU market were obliged to comply with the more stringent EU rules since the entry into force of the European Directive whereas they could put Swiss consumers at a disadvantage.[840] As to substance, the Federal Council emphasized that Article 8 (b) of the draft corresponded largely to Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which states that

> «[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer»[841].

The Government noted that whereas the Directive only applies to B-to-C contracts, it wanted Article 8 to cover the relationship between suppliers and customers on **all levels** of the economy, not least in the interest of SMUs[842].

This is one of the cases in which lobbies proved to be **immune to rational argumentation**. Although it had been established decades ago that contractual freedom is eliminated at least in B-to-C contracts, Swiss industry, the trade associations and the Swiss Bankers Association still opposed the amendment lamenting that it would restrict the freedom of contract.[843] At first, the National Council rejected the Government's proposal. Its majority contended that the new provision would constitute an exaggerated **interference with contractual freedom**. However, the State Council unanimously agreed on a compromise. The sentence contained in letter a) of the Government's draft, according to which the use of general conditions that depart considerably from the **statutory provisions** may constitute unfair competition, was deleted. It was explicitly stated that the new provision was practically identical with the general clause in the **EU Directive**.[844] This compromise was finally accepted by both chambers. To what extent

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840 Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) of 2 September 2009, BBl 2009, 6151, 6186.

841 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts. O.J. L 95, 21/04/1993, 29.

842 Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) of 2 September 2009, BBl 2009, 6151, 6173; see also the statements of the then President of the Confederation and Minister of Economic Affairs Doris Leuthard in the State Council, <http://www.parlament.ch/ab/frameset/d/s/4815/336882/d_s_4815_336882_336901.htm?DisplayTextOid=336902.>, and of Federal Councillor and Minister of Economic Affairs Johann Schneider-Ammann in the National Council, <http://www.parlament.ch/ab/frameset/d/n/4817/347701/d_n_4817_347701_347702.htm>, both visited 1 January 2012.

843 Bericht Ergebnis Vernehmlassungsverfahren zur Änderung des Bundesgesetzes vom 19. Dezember 1986 gegen den unlauteren Wettbewerb, <http://www.admin.ch/ch/d/gg/pc/documents/1615/Ergebnis.pdf> visited 1 January 2012.

844 See the interventions of State Councillor Hermann Bürgi and of Federal Councillor Johann Schneider-Ammann in the State Council's debate on the resolution of the differences with the National Council, <http://www.parlament.ch/ab/frameset/d/s/4817/350673/d_s_4817_350673_350685.htm?DisplayTextOid=350686> visited 1 January 2012.

dispositive law can be used as a benchmark is therefore, at least in theory, open. This is regrettable since these provisions are based on a **proper risk allocation** between the parties.[845] One must hope that the courts will still use the dispositive statutory law as a benchmark.

The final provision reads:

> «Shall be deemed to have committed an act of unfair competition, anyone who makes use of general conditions that in a manner which violates good faith, to the detriment of consumers, prescribe a serious and unjustified imbalance between the contractual rights and obligations.»[846]

In substance, Article 8 of the Unfair Competition Act is **part of contract law** and its placement in the Unfair Competition Act is unfortunate.[847] But at least the unfairness of the old law has been corrected. For the sake of order, it must be mentioned that the Directive on Unfair Terms of Contract (93/13/EEC), the Consumer Goods and Guarantees Directive (99/44/EU), the Doorstep Selling Directive (85/577/EEC), and the Distance Selling Directive (97/7/EC) have meanwhile been amended and replaced by the **Consumer Rights Directive** 2011/83/EU which has entered into force in December 2011.[848]

cc. In tort law, the most significant import from the EU was the 1993 **Product Liability Act** which was also part of the «Swiss Lex». Switzerland thereby implemented the Product Liability Directive 85/374/EEC.[849] One will not overlook, however, that the very idea of strict liability of the manufacturer of goods stems from the **U.S.** It has rightly been said that «[E]uropean tort lawyers historically have looked to the United States for inspiration and direction in the field of products liability.»[850]. In fact, the Federal Supreme Court had already reset the course in its judgment of 9 October 1984 in the shaftframe *(Schachtrahmen)* case. Overruling its previous case law, the Court established strict liability for a large part of the relevant cases.[851] Workers had lifted a shaftframe of 690 kilos filled with concrete with an excavator. While being lifted, the frame fell down due to a failure of a suspension hook and crushed one of the workers' right foot. The failure of the hook was due to several constructional defects and

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845 Carl Baudenbacher, Wirtschafts-, schuld- und verfahrensrechtliche Grundprobleme (fn 141), 182 ff.; from an American perspective Paul D. Carrington, The Dark Side of Contract Law, 36-MAY Trial 73 (2000).

846 <http://www.admin.ch/ch/d/ff/2011/4925.pdf > visited 1 January 2012.

847 See also Rolf H. Weber, Welches Lauterkeitsrecht braucht die Schweiz? (fn 161), 6.

848 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, O.J. L 304/64 of 22/11/2011.

849 See supra, F. V. 2.

850 Geraint G. Howells/Mark Mildred, Is European Products Liability More Protective than the Restatement (Third) of Torts: Product Liability?, 65 Tenn. L. Rev. 985, 988 (1998).

851 ATF 110 II 456; see concerning the development of the case law Pierre Widmer, Grundlagen und Entwicklung der schweizerischen Produktehaftung(-en), ZSR 114 (1995) I, 23 ff.

to the inappropriate anchoring of the hook in the frame. In the lawsuit brought by the worker against the manufacturer of the shaftframe, the Federal Supreme Court (First Civil Division) found that no violation of the defendant's duties to choose adequate subordinates, to supervise them and to instruct them properly could be established. It held, however, that the producer had to ensure that the final product was controlled. That was said to be part of an adequate **business organisation**. Since the defendant had violated the duty to adequately organise his business, he was liable under Article 55 CO, the provision governing the liability of employers. The question as to whether liability also followed from Article 41 CO, the general tort law provision, was left open. Although the Court relied on Swiss authors, it is clear that the shift was influenced by **American legal thinking**. This new approach was confirmed in the folding chair *(Klappstuhl)* case.[852] With this case law, the proof of exoneration was to a large part excluded, but there were still some doubts, e.g. concerning a possible proof of exoneration in case of outliers or if no employees were used.[853] The Product Liability Act has removed them.

dd. In labor law, the autonomous implementation of the Directives on **transfer of undertakings** in Articles 333 and 333(3) CO and on **collective redundancies** in Articles 335d–335g, 336(2)(c) and 336a(3) CO stand out.[854] They were taken over in 1993 as part of the «Swiss Lex». One of the landmark rulings of the Federal Supreme Court on the interpretation of autonomously implemented directives was rendered under Article 333 CO.[855]

Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the **insolvency** of their employer[856] aims at protecting employees in an employer's bankruptcy, by guaranteeing payment of their outstanding claims. In 1982, Switzerland enacted parallel legislation by amending the Unemployment Insurance Act. Like under Article 4(2) of the Directive, the guarantee originally covered compensation for claims relating to pay for a maximum of the last **three months** of employment for one and the same employment relationship.[857] In its dispatch on the approval of the EEA Agreement, the Federal Council stated that

852 JdT 1986 I 571.

853 See Walter Fellmann, Gutachten zur Haftung bei Transplantationen, Lucerne 2000, 11 f.

854 See Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, O. J. L 201/88 of 17.07.1998. This Directive was updated and replaced by Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employee's rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, O.J. L 82/16 of 22.3.2001; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, O.J. L 225/16 of 12.8.1998. – For details of the Swiss implementation see Gabriel Aubert, Le droit Suisse du travail face à l'intégration européenne, ZSR N.F., 112, 1993, II, 155, 208 ff.

855 ATF 129 III 335; see infra, F. V. 4. c.

856 O.J. L 283/23 of 28.10.1980.

this provision was euro-compatible.[858] Article 4(2) of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer prolonged the protection period from three to **four months** before the employers bankruptcy.[859] On 3 September 2008, the Federal Council had presented its draft on the amendment of the 1982 Employment Insurance Act and proposed an extension of the protection period to four months. The legislature followed this proposal (Article 52(1) of the act. The dispatch did not contain any reference to the draft directive although one may assume that the extension of the protection period has been inspired by it.[860]

ee. The 2011 amendment of the **Unfair Competition Act** has taken account of European law. The Federal Council's dispatch mentions that the 2005 Unfair Commercial Practices Directive[861] is structured in a similar way as the Swiss act in that it contains a general clause followed by prohibitions of misleading and aggressive commercial practices (although it only applies to B-to-C relations).[862] It is also said that like Swiss law, EU law contains a general prohibition to deceive which follows from the 2006 Misleading and Comparative Advertising Directive.[863] The dispatch makes further reference to the 2004 Regulation on consumer protection cooperation which forms the basis for the «Rapid Alert System for non-food consumer products» (RAPEX).[864] Under Article 21(2) Unfair Competition Act, as amended, the Federal Council has the competence to conclude international treaties concerning the cooperation with foreign enforcement authorities with the aim of combating cross-border unfair competition. However, Switzerland has not so far been able to dock to RAPEX, apparently because of

857 Article 52(1) of the 1982 Federal Act on Mandatory Unemployment Insurance and Insolvency Compensation, SR 837.0

858 Botschaft I über die Anpassung des Bundesrechts an das EWR-Recht of 27 May 1992, BBl 1992 V 1, 295, 387; see also Jean-Fritz Stöckli, Schweizerisches Arbeitsrecht und europäische Integration, ZSR N.F. 112, 1993 II, 1, 95 ff.; Urs Burgherr, Die Insolvenzentschädigung. Zahlungsunfähigkeit des Arbeitgebers als versichertes Risiko, Diss. Zurich 2004, 14 f.

859 O.J. L 283/36 of 28.10.2008.

860 Botschaft zur Änderung des Arbeitslosenversicherungsgesetzes of 3 September 2008, BBl 2008, 7733, 7755.

861 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, O.J. L 149/22 of 11.6.2005.

862 Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) of 2 September 2009, BBl 2008, 6151 ff.

863 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, O.J. L 376/21 of 27.12.2006.

864 Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection, O.J. L 364/1 of 9.12.2004.

the EU's postulate that the institutional questions must be resolved before new sectoral agreements can be concluded.[865]

However, unlike, for instance, its German counterpart, the Swiss legislature did not amend the general clause laid down in Article 2 of the Unfair Competition Act in light of Article 5(2) of the Directive. Said provision defines as «unfair» commercial practices which are «contrary to the requirements of **professional diligence**» and materially distort or are likely to materially distort the economic behavior, with regard to the product, of the average consumer whom they reach or to whom they are addressed, or of the average member of the group if commercial practices are directed to a particular group of consumers. The choice of the term «requirements of professional diligence» has obviously been inspired by Article 10bis(2) of the 1883 **Paris Convention** which defines as unfair competition «[a]ny act of competition contrary to honest practices in industrial or commercial matters.»[866] This decision of the EU legislature is deplorable. Article 10bis(2) of the Paris Convention was created at a time when unfair competition law was understood as describing the rules of conduct of the honest merchant. It does not take into account that in particular in Germany and in Austria – and, for that part, also in Switzerland – a new concept of unfair competition law has been developed since the 1930s that is based on a **present day-functional approach** and defines as unfair competition (also) acts which jeopardize the existence and the functioning of the competitive process itself.[867]

ff. As far as the governance model of corporations is concerned, it must be noted that a genuine European company law has emerged over the years and decades. The national laws of the Member States have been harmonized to a large extent by way of specific company law directives and the relevant ECJ case law.[868] The central focus is on the law of corporations and, to a lesser extent, on the law of the limited liability company. Fields which for the most part have been harmonized are **accounting** and **auditing**.[869] In both areas, American

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865 See supra, E. VI. 7.

866 <http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html#P213_35515> visited 12 June 2012.

867 Supra, C. VI. 2. a.; see with regard to the general clause of the Directive and its implementation in British law the *Tiscali v British Telecom* judgment of the High Court of Justice, Queen's Bench Division, of 16 December 2008, [2008] EWHC 3129 (QB), paragraph 6: «It is interesting to see that the relatively unfamiliar concepts of ‹honest market practice› and ‹the general principle of good faith›, which are both relevant to the concept of ‹professional diligence› in Regulation 3(3) of the Consumer Protection Regulations, are construed in such a way that a breach may be found even in the absence of dishonesty as it is traditionally understood in domestic jurisprudence. That is why Mr [...], on the Claimant's behalf, observed at the earlier hearing that infringement of the regulations would be easier for his client to prove than the ingredients of the tort of injurious falsehood (which do include the need to establish dishonesty).»

868 See, e.g., Peter Nobel, Internationales und Transnationales Aktienrecht, 2, Europarecht, 2nd ed., Berne 2012.

869 Peter V. Kunz, Gesellschaftsrecht der Europäischen Union (EU) – Übersicht sowie rechts-

influence has been strong.[870] By way of regulation, the EU has created European types of companies such as the Societas Europaea[871] or the European Cooperative Society.[872]

University of Berne economic law Professor PETER V. KUNZ has recently observed that in Switzerland, European company law is only regarded lightly.[873] This statement is remarkable because academic literature has dealt with the subject from the beginning and is continuously doing so.[874] What is true is that European company law has never been the subject of a coherent autonomous implementation. The Federal Council's dispatch concerning the actual draft bill on the amendment of the law of corporations and the accounting law of 21 December 2007 states that although Switzerland is not obliged to take over the relevant secondary law of the European Union, it would be problematic to go for total independence. The draft is said to be «in large parts» compatible with European law.[875] In fact, there is European law influence. However, the draft **deviates** from EU law on numerous points, in particular with regard to the rights of shareholders to participate in the general meeting, the valuation of contributions in kind, shareholders' subscription rights, the share capital reduction and the bookkeeping and accounting rules.[876] A reason for these deviations is not given. With regard to the EU bookkeeping and accounting standards, the Federal Council's dispatch relies on an empty formula, stating that Switzerland is not legally obliged to harmonize its corporate law with the law of the European Union.[877] In academic literature, it has been said that the legislature's method resembles cherry picking, the reason being the wish to keep certain **regulatory advantages**.[878] It is clear that the minority shareholders are again the ones paying the price.[879]

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vergleichende Bedeutung für die Schweiz, in: Peter V. Kunz/Oliver Arter/Florian S. Jörg (eds.), Entwicklungen im Gesellschaftsrecht VI, Berne 2011, 179, 181, 217.

870 See also supra, D. IV. 4.

871 Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE), O.J. L 294, 10/11/2001, 1 ff.

872 Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), O.J. L 207, 18.8.2003, 1 ff.

873 PETER V. KUNZ, Gesellschaftsrecht der Europäischen Union (EU) (fn 869), 204.

874 See, in particular, PETER NOBEL, Europäisierung des Aktienrechtes: Materialien für die schweizerische Totalrevision, Diss. St. Gallen 1974; PETER NOBEL/MARKUS KAEMPF, Aktuelle Entwicklungen im Europäischen Gesellschaftsrecht, Schweizerisches Jahrbuch für Europarecht 2009/2010, Berne 2010, 167 ff., and Schweizerisches Jahrbuch für Europarecht 2010/2011, Berne 2011, 149 ff.

875 Botschaft zur Änderung des Obligationenrechts (Aktienrecht und Rechnungslegungsrecht sowie Anpassungen im Recht der Kollektiv- und der Kommanditgesellschaft, im GmbH-Recht, Genossenschafts-, Handelsregister- sowie Firmenrecht) of 21 December 2007, BBl 2007, 1589, 1630.

876 Botschaft zur Änderung des Obligationenrechts (fn 875), 1630 ff.

877 Botschaft zur Änderung des Obligationenrechts (fn 875), 1635.

878 PETER V. KUNZ, Gesellschaftsrecht der Europäischen Union (EU) (fn 869), 212.

879 See already supra, C. VII.

gg. In IP law, the Trademark Act,[880] the Patent Act[881] and the Copyright Act[882] have been amended in light of European legislation. The Topography Act has not least been created because Council Directive 87/54/EEC on the legal protection of topographies of semiconductor products[883] contains a **reciprocity clause**. If the right holder is not a national of an EU Member State or has started the commercial exploitation in the EU, protection depends on special declarations of the Member States in agreement with the European Commission (Article 3). Protection will be extended to non-EU states if there is material reciprocity. The EU legislature has thereby reacted to a reciprocity clause in the U.S. Semiconductor Chip Protection Act (SCPA) from 1984.[884] In order to avoid the application of the national treatment provision of the Berne Convention for the Protection of Literary and Artistic Works (Article 5), Congress declined to amend the U.S. Copyright Act, but created a special statute, thereby allowing the U.S. to use the principle of reciprocity.[885]

hh. Swiss **gender equality law** is based on Article 8(3) FC and on the 1995 Gender Equality Act (GEA)[886] which, according to its Article 2, applies to private and public employment relationships. Article 8(3) FC states:

> «Men and women shall have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women shall have the right to equal pay for work of equal value.»

When preparing the Gender Equality Act, the legislature had recourse to European law concepts. The Federal Council's dispatch repeatedly refers to Council Directives 75/117 of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, 76/2007 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as well as the relevant case law of the ECJ.[887] In view of Switzerland's backwardness with regard

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880 Botschaft zu einem Bundesgesetz über den Schutz von Marken und Herkunftsangaben (Markenschutzgesetz, MSchG) of 21 November 1990, BBl 1991 I 1, 59.

881 Botschaft zur Änderung des Patentgesetzes und zum Beschluss über die Genehmigung des Patenrechtsvertrags und der Ausführungsverordnung of 23 November 2005, BBl 2006, 1, 28.

882 See with regard to the 1988 program Carl Baudenbacher, Zum Nachvollzug europäischen Rechts in der Schweiz, Europarecht 1992, 311 ff.; with regard to the Copyright Act 1992 already Carl Baudenbacher/Irene Klauer, Zur Europafähigkeit der URG-Reform, St. Gall/Berlin 1991.

883 O.J. L 24/36 of 27.1.1987.

884 17 U.S.C. §§ 901–914 (1994).

885 See Carl Baudenbacher, Trademark Law and Parallel Imports in a Globalized World – Recent Developments in Europe with Special Regard to the Legal Situation in the United States, 22 Fordham Int'l L.J. 645, 693 f. (1999); Id., Immaterialgüterrecht und Handelspolitik, ZSR Bd. 120, 2001 I, 207 ff.

886 SR 151.1.

887 Botschaft des Bundesrates zum Bundesgesetz über die Gleichstellung von Mann und Frau (Gleichstellungsgesetz) und zum Bundesbeschluss über die Genehmigung einer Änderung der

to gender equality, this was almost natural. In the present context, it must also be emphasized that the Federal Council has explicitly recognized the **economic law relevance** of gender equality by stating that such equality on the labor market and the dismantling of discrimination contribute to an optimal allocation of resources and the securing of a system of free, undistorted competition.[888]

As far as **positive discrimination** is concerned, the legal foundations in European and Swiss law are to a large extent identical. Article 3 of the GEA contains a general prohibition to discriminate. Of particular interest is its third paragraph which addresses the problem of positive discrimination or affirmative action and states that «[a]ppropriate measures aimed at achieving true equality are not regarded as discriminatory». Under Article 2(4) of Directive 76/207, Member States could maintain or adopt measures to promote equal opportunity for men and women, in particular by removing existing inequalities affecting women's opportunities.[889] Article 141(4) EC (now, after the entry into force of the Lisbon Treaty, Article 157(4) TFEU) states:

> «With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.»

ii. A breakthrough towards modern standards was achieved under European influence in the area of **maternity protection**. In 1993, after the failed attempt to join the EEA, University of Geneva labor law Professor Gabriel Aubert described the respective legal situation with the words that Swiss law did not know a real paid maternity leave.[890] On 3 October 2003, a new regulation was introduced in Title IIIa of the Compensation for Loss of Earning Act according

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Verordnung über die Zuweisung der Ämter an die Departemente und der Dienste an die Bundeskanzlei of 24 February 1993, BBl 1993 I 1246, 1249, 1273, 1277 ff., 1287; Council Directive 75/117 of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, O.J. L 45, 19/02/1975 19; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. L 39, 14/02/1976 40 ff.; see also Michael Duttwiler/Astrid Epiney, Das Recht der Gleichstellung von Mann und Frau im Europäischen Gemeinschaftsrecht und Schweizerischen Recht – Konvergenzen und Divergenzen, ZBl 105/2004, 37 ff.

888 Botschaft des Bundesrates zum Bundesgesetz über die Gleichstellung von Mann und Frau (fn 887), 1249, 1319 f. On page 1319, the dispatch states: «Today, resources are not only wasted by the misallocation of female workers, but among other also by the delayed structural change and the distortion in investment in other factors of production and in training. If women are discriminated against within an industry, this leads to a distortion of competition.» (Author's translation.)

889 See now Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O.J. L 204 of 26.7.2006, 23 ff.

890 Gabriel Aubert (fn 854), 218.

to which 80% of the salary is paid for 14 weeks (98 days) after birth. The Swiss People's Party successfully launched a referendum against the new law, but on 26 September 2004, 55.4% of the voters approved it. The new law entered into force on 1 July 2005. Wealthy Switzerland was the **last European country** which introduced maternity insurance. It is obvious that the reform was motivated by Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. According to Article 8(1), the Member States are obliged to take the necessary measures to ensure that female workers are entitled to a continuous period of maternity leave of at least 14 weeks.[891]

jj. Furthermore, the Attorney Act, the Therapeutic Products Act, the Aviation Law, the Telecommunications Act, the National Bank Act, the Merger Act, the Value Added Tax Act, the Product Safety Act and the Investment Fund Act, the Collective Capital Investment Act as well as insurance law were designed according to European law. The same holds true for the Genetically Modified Organisms («GMO») Act.[892] The list is obviously not exhaustive.

b. Inconsistencies

Since Switzerland is not a Member State of the EU or of the EEA, the implementation of European law is neither subject to monitoring by a surveillance organ nor to judicial control by a supranational or quasi-supranational court. Firstly, the objective of creating a level playing field for Swiss operators may be in contradiction to the goal of maintaining a **regulatory competitive advantage** for certain businesses. The quest to keep such a favorable situation may not prevent the enactment of euro-compatible legislation forever, but if special interest groups in Parliament are able to build up enough resistance in a particular case, implementation may at least be blocked or diluted. This is possible because the taking over of EU law is hardly an issue in the political debate. There is a simple reason for this: Which member of Parliament is prepared to tell his/her voters that his/her role consists in an ever increasing number of cases of nodding through laws of the EU (possibly in a slightly different form)? Examples of considerable **delay** can be found in the areas of insider trading[893], unfair

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891 OJ L 348 of 28 November 1992, 1–7.

892 See PETER V. KUNZ, Instrumente der Rechtsvergleichung in der Schweiz bei der Rechtssetzung und bei der Rechtsanwendung, 108 ZVglRWiss, 31, 54 ff. (2009); with regard to insurance law in particular ANTON K. SCHNYDER, Schweizerisches Versicherungsrecht vor dem Hintergrund europäischer Entwicklungen, in: Heinrich Honsell, Roger Zäch, Franz Hasenböhler, Friedrich Harrer, René Rhinow, Arnold Koller (eds.), Privatrecht und Methode, Festschrift für Ernst A. Kramer, Basel 2004, 865 ff.

893 Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing and Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), see infra.

general conditions of trade,[894] legal guarantees in consumer sale contract law,[895] product safety,[896] or the rules on maternity protection.[897] Regulatory competition may be beneficial for attracting businesses and creating jobs. But as mentioned, somebody has to pay the price.

Secondly, there is no guarantee that Swiss law which has been enacted on the basis of EU legislation will be adapted to **new developments** of the EU *acquis* in a timely manner. Whereas the EU and EEA Member States are legally obliged to implement such changes within a certain time limit, it may happen that Swiss law is not or only belatedly updated. University of Lausanne law Professor FRANCESCO MAIANI has aptly remarked: «It is [...] often the case that originally euro-compatible Swiss rules become over time euro-*in*compatible, due to the evolution of EU legislation and case law.»[898] In other words, the clash of the Swiss' leisurely pace of politics and the dynamic policy approach of the EU may lead to **disparities**. An example of belated implementation of an amendment concerns product liability. The first Product Liability Directive 85/374/EEC from 25 July 1985 exempted in its Article 2 from liability without fault agricultural products and game which had not undergone a processing of industrial nature.[899] This privilege which lacked any rational reason and was inserted upon pressure by the European agrarian lobby was taken over in Article 3(2) of the 1993 Swiss Product Liability Act. In 1999, the European legislature corrected this mistake by amending the 1985 Directive.[900] A leading Austrian commentator wrote in 2003 that Switzerland should not wait too long to repeal the respective provision in the Swiss Act.[901] It was not, however, before 2009 that Swiss law was changed accordingly.[902]

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894 Supra, F. V. 3. a. bb.

895 Supra, F. V. 3. A. bb.

896 The Swiss Product Safety Act which implements Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (O.J. L 4/11 of 15.1.2022) entered into force on 1.7.2010, <http://www.news.admin.ch/message/?lang=de&msg-id=33155> visited 12 June 2012. However, Directive 2001/95/EC was preceded by Council Directive 92/59/EEC of 29 June 1992 (O.J. L 228/24 of 11.8.1992).

897 Supra, F. V. 3. a.

898 FRANCESCO MAIANI, 13.

899 Supra, F. V. 3. a. cc.

900 Art. 1 of Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

901 WILLIBALD POSCH (fn 825), 274.

902 See Article 20(2) of the Federal Product Safety Act (SR. 930.11).

4. *Application of autonomously implemented European law by Swiss courts*

a. *Preliminary remarks*

In **comparative law**, courts (and administrative bodies) wanting to proceed according to the comparative method may face difficult problems.[903] When it comes
to the application and interpretation of **autonomously implemented EU law**, these difficulties arise to a lesser extent. Still, the question poses itself whether a certain act is the result of autonomous implementation or not. That the statutes of the «Swiss Lex» package are of European origin is clear. After the rejection of the EEA Agreement in the popular referendum of 6 December 1992, 27 federal statutes which had been part of the EEA package (so-called «Euro lex») were enacted or amended under the label «Swiss lex». But otherwise there are no official statistics concerning the number and scope of autonomously implemented EU acts. The Federal Council has refused to earmark relevant legislation or to report on the percentage of autonomously implemented EU law acts of all federal legislation.[904] For a court or an administrative body, the initial question is therefore **how to identify** cases of autonomous implementation. Once this question has been answered in the affirmative, there are further problems.

b. *The methodological debate*

aa. General

Swiss academic literature discusses a number of questions concerning the issue of how the courts should construe autonomously implemented EU law. Unsurprisingly, *mutatis mutandis* the same problems arise as in the interpretation of the bilateral agreements concluded between Switzerland and the EU.[905]

bb. Are Swiss courts obliged to follow old ECJ case law?

Euro-compatible interpretation aims at harmonizing Swiss law with European law. Methodologically, it is said to be part of teleological interpretation, but also of historic interpretation.[906] Euro-compatible interpretation is, however, more than that. University of Berne Professor WOLFGANG WIEGAND has rightly stated that the benefits of autonomous implementation of European law

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903 Supra, D. IV. 5. d.

904 See the answer of the Federal Council to a postulate of National Councillor ROGER NORDMANN of 14 February 2007, <http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20063839> visited 12 March 2012.

905 See supra, E. VI. 5.b. bb.

906 ERNST A. KRAMER, Methodologische Probleme des «autonomen Nachvollzugs» von EU-Richtlinien durch die Schweiz, in: Friedrich Harrer/Heinrich Honsell/Peter Mader (eds.), Gedächtnisschrift für Theo Mayer-Maly, Vienna 2011, 269, 272.

can only be reached if the interpretative findings in Switzerland are essentially the same as in the EU.[907] Others have called upon the Federal Supreme Court to interpret Swiss law in the sense of normative compliance with EU law, unless the legislature has clearly taken a decision to the opposite.[908] The Swiss legislature does not, as a matter of principle, oblige the courts to construe autonomously implemented EU law in a euro-compatible way. An exception is the dispatch on the **Gender Equality Act**, where the Federal Council summarized the main results of the ECJ's case law concerning the notion of indirect discrimination as developed under the EU Equal Treatment Directive 76/207/EEC as well as concerning the notion of equal pay for work of equal value and invited the courts to construe the act in light of these principles.[909]

cc. Are Swiss courts obliged to follow new ECJ case law?

The situation may arise in which an act of European law which formed the basis of autonomous implementation is being rewritten by the ECJ in a way which does not correspond to the implementation in Switzerland. University of Basel Professor Ernst A. Kramer has asked the right question in this regard: Should Swiss courts in such a case, without waiting for a clarification by the legislature, by way of gap filling (analogy or teleological reduction) follow the case law of the ECJ (based on the argument, that the Swiss legislature, as a matter of principle, wanted to join the European legal situation) or should they assume that the clear intent of the Swiss legislature to resolve the problem in question according to the Swiss view is still decisive?[910]

As will be shown, the First Civil Division of the Federal Supreme Court in two landmark decisions leaned towards the first alternative.[911] Academic literature is split. Some commentators agree with this approach,[912] whereas others ar-

907 Wolfgang Wiegand, Zur Anwendung von autonom nachvollzogenem EU-Privatrecht, in: Peter Forstmoser/Hans Caspar von der Crone/Rolf H. Weber/Dieter Zobl (eds.), Der Einfluss des europäischen Rechts auf die Schweiz, Festschrift für Roger Zäch zum 60. Geburtstag, Zurich 1999, 171, 177.

908 See, in particular, Marc Amstutz, Evolutorische Rechtsmethodik im europäischen Privatrecht – Zur richtlinienkonformen Auslegung und ihren Folgen für den autonomen Nachvollzug des Gemeinschaftsprivatrechts in der Schweiz, in: Franz Werro/Thomas Probst, (eds.), Le droit privé suisse face au droit communautaire européen, Berne 2005, 105 ff.

909 Botschaft zum Bundesgesetz über die Gleichstellung von Frau und Mann (Gleichstellungsgesetz) und zum Bundesbeschluss über die Genehmigung einer Änderung der Verordnung über die Zuweisung der Ämter an die Departemente und der Dienste an die Bundeskanzlei of 24 February 1993, BBl 1993 I 1248, 1295.

910 Ernst A. Kramer, Methodologische Probleme (fn 906), 277 (author's translation).

911 ATF 129 III 335, consideration 6; 133 III 568, consideration 4.6.; see infra, F. V. 4. c.

912 Franz Werro, Contrat de voyage à forfait et … vacances gâchées! Y a-t-il un lien entre l'indemnité due et le contrat? in: Pierre Tercier/Marc Amstutz/Alfred Koller/Jörg Schmid/Hubert Stöckli (eds.), Gauchs Welt, Recht, Vertragsrecht und Baurecht, Festschrift für Peter Gauch zum 65. Geburtstag, Zurich 2004, 695 ff.; Bernd Stauder, Reiserecht, in: Alexander Brunner/Sébastien Chaulmontet/Marlis Koller-Tumler/Bernd Stauder/FranzWerro, Schweizerisches Privatrecht X, Konsumentenschutz im Privatrecht, Basel/Geneva 2008, 293, 361; Marc

gue that the Swiss judge should show restraint and wait for the decision of the legislature.[913] If one is serious about the need to create a **level playing field**, the dynamic approach must prevail.

dd. How should Swiss courts proceed when facing novel legal questions?

University of Basel methodologist ERNST A. KRAMER discusses the constellation that a Swiss court is faced with a question without there being any relevant case law of the ECJ. He recommends that in such a case, the Swiss courts should take into account the case law of the neighboring EU countries.[914] This may be an option, but it would be at least as obvious for Swiss courts (including the Federal Supreme Court) to look to the **EFTA Court**. Unlike the courts of the EU Member States, the EFTA Court benefits from the input of the European Commission (which is also an important part of the EU legislature), the EFTA Surveillance Authority and, as the case may be, governments of EU and EEA/EFTA States.[915]

ee. What should Swiss courts do if the legislature deliberately deviates from European law?

Since the Swiss legislature is not legally bound to take over EU law, the question arises what courts should do in cases of **deliberate deviation**. There is a certain parallel to the situation under public international law. According to its ***Schubert*** jurisprudence, the Federal Supreme Court feels bound by federal law which violates public international law, as long as the latter is not *ius cogens*.[916] This has been criticized.[917] If the goal of securing a level playing field (also) for Swiss operators is taken seriously, *Schubert* cannot be lightly transposed to the interpretation of autonomously implemented EU law. For the sake of completeness, it may be added that if the Swiss legislature deviates from EU law by mistake, the courts ought to correct this.

Swiss legal literature discusses a variety of **further methodological questions** such as how Swiss courts should proceed if the legislature has only partially implemented European law (in such a case European law could still be relevant as a comparative law source, in particular if there is a gap), if autonomously implemented law has not or only partially been updated in view of the

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AMSTUTZ, Evolutorische Rechtsmethodik, 68; KUNZ, Instrumente der Rechtsvergleichung (fn 892), 76.

913 HANS PETER WALTER, Das rechtsvergleichende Element – Zur Auslegung vereinheitlichten und rezipierten Rechts, ZSR 126 (2007) I, 270, 272; ERNST A. KRAMER, Methodologische Probleme (fn 906), 277.

914 ERNST A. KRAMER, Methodologische Probleme (fn 906), 273 f.

915 See in that regard the Norwegian Høyesterett's judgment in the first *Finanger* case, Rt. 2000, 1811, 1820.

916 Supra, E. II. 2.

917 Supra, E. II. 2.

amendments to the original EU legal act, if the Swiss legislature has gone beyond the scope of the European act (question of whether there should be a split interpretation). It may also happen that Switzerland is obliged by a bilateral agreement to implement certain parts of EU law, but then takes over more.[918] There is no definite answer to these questions. All that can be said is that if the aim of (economically) docking to the EU single market is deemed to be important, the courts ought not to deviate lightly from EU law **as it stands**.

c. Do Swiss courts follow ECJ case law?

aa. General

The Federal Supreme Court has not adopted a uniform approach to the matter. In a celebrated judgment of 25 March 2003 in a case concerning a **transfer of an undertaking**, the **First Civil Division** held that although the law of the EU does not have any immediate binding effects in Swiss law, it must be drawn on as a tool of interpretation in the case at hand because the 1993 reform of the Swiss CO aimed at adapting Article 333 CO to the respective EU Directive. Autonomously implemented EU law must «in case of doubt» be interpreted in conformity with European law. If Swiss law is adapted to a foreign order, *in casu* the European order, harmonization must be aimed at not only in the legislation, but also, and in particular, in the interpretation and application of the law, as far as the national methodology allows for it.[919] The reservation that Swiss methodology must allow such an interpretation and the caveat that this should only happen in cases of doubt have resulted in a lack of legal certainty. In a **package tour** case, the same Division shortly after found that the Package Travel Act was created in the framework of autonomous implementation of Council Directive 90/314/EEC on package travel, package holidays and package tours and must in case of doubt be interpreted in conformity with European law. The Division made reference to its precedent in the transfer of undertakings case.[920] In a judgment of 18 March 2011 concerning the **Product Liability Act**, the First Civil Division summarized its jurisprudence concerning the significance of the case law of the ECJ for the interpretation of autonomously implemented EU law. It stated that Swiss legislation had largely been inspired by Council Directive 85/374/EEC. Other than when applying the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, there is, however, no obligation for the Swiss courts, when interpreting the Federal Product Liability Act, to consider the European case law on product liability. That being so, the legislative intent to autonomously adapt the Swiss

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918 Ernst A. Kramer, Methodologische Probleme (fn 906), 274 ff.

919 ATF 129 III 335, consideration 6.

920 ATF 130 III 182 consideration 5.5.1. The judgment even cites the Federal Council's dispatch of 27 May 1992 on the adaptation of Swiss law to EEA law which became obsolete after the rejection of the EEA on 6 December 1992.

law to EU law must be taken into account, and it is therefore necessary to avoid thwarting the desired harmonization without a good reason.[921]

A pro-European approach can also be found in judgments of the **Second Public Law Division**, for instance in the law of **value added tax**. In a ruling of 30 April 2004, the Division – referring to an earlier judgment – held that Swiss value added tax law corresponds to a large extent to the law of the European Union. Although Switzerland is not bound by EU law, EU law and the law of the EU Member States cannot be ignored since they constitute a source of knowledge and a tool of interpretation, provided that the Swiss legislature has not explicitly and consciously deviated from them. This language is more cautious than the one used by the First Civil Division in the above mentioned transfer of undertakings case. The Federal Administrative Court found in a decision dated 5 December 2007 that the Federal Law on Pharmaceutical and Medicinal Products must be construed autonomously, although the legislature had aimed at euro-compatibility. The reference of the complainant to EU law was called a «comparative remark.»[922]

However, certain Divisions of the Federal Supreme Court use the same rules when construing autonomously implemented EU law as when interpreting autochthon Swiss law, meaning that they proceed according to the principle of **method pluralism** or of «principled lack of principle» *(grundsätzliche Grundsatzlosigkeit)*.[923] Depending on the circumstances, the text, the history, the scheme or the purpose of the norm may tip the balance. This is in **clear contrast** to the methodological approach of the courts in the EU and the EEA. Both in EU and in EEA law, dynamic interpretation and interpretation according to the *effet utile* or the principle of effectiveness play an important role.[924] It may be mentioned that, in another context, the Federal Administrative Court expressed what pundits had suspected all along: that interpretation according to the **principle of effectiveness** is unknown to Swiss methodology.[925]

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921 ATF 2A.334/2003, consideration 2.3., author's translation; see PETER V. KUNZ, Instrumente der Rechtsvergleichung (fn 892), 108 ZVglRWiss, 31, 75 (2009).

922 C-2092/2006, consideration 3.5.

923 The notion has been created by ARTHUR MEIER-HAYOZ who took a critical view of the judges' freedom to choose the method which best suited their needs (Article 1 CC, paragraph 221, in: Berner Kommentar: Kommentar zum Schweizerischen Privatrecht, Vol I, Berne 1966). See also ERNST A. KRAMER, Juristische Methodenlehre, Berne 1998, 127 ff.

924 See concerning the *effet utile* principle in EU law CARL BAUDENBACHER/ANDREAS BERGMANN, Der EuGH ausser Kontrolle?, forthcoming in: Ulrich Haltern/Andreas Bergmann (eds.), Der EuGH in der Kritik, Tübingen 2012; concerning the situation in EEA law JOHN TEMPLE LANG, The Duty of National Courts to provide Access to Justice in the EEA, forthcoming in EFTA Court (ed.), Judicial Protection in the European Economic Area, Stuttgart 2012. – See with regard to effet utile in EEA law Case E-4/11 *Arnulf Clauder*, [2011] EFTA Court Report, 216, paragraph 34.

925 Judgment of 21 January 2010, A-7789/2009, Consideration 3.5.2.

bb. New ECJ case law

As indicated above, the Federal Supreme Court's **First Civil Division** has taken the view in a transfer of undertakings case that adaptation to ECJ case law in the application of autonomously implemented EU law cannot be guided only by the European legal situation as it stood at the time of implementation. Rather, an eye must be kept on the further development of European law.[926] At any rate, this must apply as far as Swiss methodology allows,[927] meaning that the Swiss judge, as a matter of principle, ought to **update** autonomously implemented European law in view of new ECJ case law rendered after the implementation. When sitting in a different composition, the same Division has, however, taken another stand. In a judgment on the Copyright Act of 9 July 2007, it found that even if harmonization with European law was a concern of the Swiss legislature, it was not possible to introduce, by way of Europe-friendly interpretation, a rule which is not provided for in the law.[928]

The question of whether the Federal Supreme Court should rewrite autonomously implemented European law could also become practical in **package tour law**. According to Article 5(2) of the EU Package Travel Directive of 13 June 1990, Member States shall take the necessary steps to ensure that the organizer is liable for «the damage resulting for the consumer from the failure to perform or the improper performance of the contract». Article 14(1) of the Swiss Package Travel Act of 18 June 1993[929] states under the heading «Liability, general» that the operator is in principle liable for correct performance of the contract. Hardly anybody thought at the time that the liability could extend to immaterial damage, neither in the European Union nor in Switzerland. In 2002, the ECJ had to decide whether the notion of damages comprised also non-material loss. The family of ten year old *Simone Leitner* booked a package tour with a stay in a holiday club in Turkey, where the girl became ill from salmonella poisoning caused by the food provided by the operator. The family brought suit in the Austrian courts for damages for the loss of enjoyment. Following the opinion of Advocate General Tizzano, the ECJ held that Article 5 (2) of the Directive was to be interpreted to the effect that it covers **non-material damages**. The Directive aimed at eliminating the disparities between the national laws and practices of the Member States which required a uniform interpretation of the term «damages».[930] If the Federal Supreme Court were to be confronted with a similar case, it would have to decide whether to follow this jurisprudence or not. The situation may be complicated by the fact that on 24 October 1989, before the enactment of the Package Travel Statute, the Federal

926 ATF 129 III 335, consideration 6.
927 ATF 129 III 335, consideration 6.
928 ATF 133 III 568, consideration 4.6.
929 SR 944.3.
930 Case C-168/00 *Simone Leitner* [2002] ECR I-2631, paragraphs 21 ff.

Supreme Court (First Civil Division) held that **no compensation** shall be paid for loss of holiday enjoyment. The Court noted that the question of whether such a loss was eligible for compensation had been answered in the affirmative by the Upper Court of the Canton of Zurich in a judgment of 1980. Said Court had gained inspiration from German law (which for its part has inspired the European Directive).[931] The Federal Supreme Court rejected this idea and held that losses which do not affect property are no damage.[932] At the time, package travel agreements were deemed to constitute innominate contracts.[933]

cc. «Historic» interpretation

In order to avoid a euro-compatible interpretation of autonomously implemented EU law, the Federal Supreme Court (First Civil Division) in an important case argued that the relevant provision of EU law was only introduced into the relevant directive **after** the Swiss parliament had taken its decision. In the season 1996/1997, the *Schauspielhaus* Zurich staged the play «Die Hose» («The Trousers» or «The Underpants») by German author CARL STERNHEIM. Sternheim had passed away on 3 November 1942. The Schauspielhaus took the view that the 50 years protection term under the 1922 Copyright Act had expired on 31 December 1992. The fact that the new Copyright Act which had entered into force on 1 June 1993 had prolonged the term of copyright protection from 50 to 70 years after author's death was deemed irrelevant in the view of the Schauspielhaus. CARL STERNHEIM's heirs argued that the work was protected anew because the author's right had been revitalized due to the prolongation.

Article 1 of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights[934] states under the heading «duration of authors' rights»

> «1. The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.
> 2. In the case of a work of joint authorship the term referred to in paragraph 1 shall be calculated from the death of the last surviving author.»

According to Article 3 of the Directive, the term of protection for performers, producers of phonograms, producers of the first fixation of a film and broadcasting organizations shall be 50 years.

Recital 9 of the Directive states:

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931 ZR 79/1980 Nr. 131.

932 ATF 129 III 355, consideration 6.

933 See with regard to this qualification WALTER R. SCHLUEP/CARL BAUDENBACHER, Der Reiseveranstaltungsvertrag, in: Frank Vischer (ed.), Schweizerisches Privatrecht VII/2, Basel 1979, 919 ff.

934 O.J. 1993 L 290, 9.

> «Whereas due regard for established rights is one of the general principles of law protected by the Community legal order; whereas, therefore, a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by rightholders in the Community; whereas in order to keep the effects of transitional measures to a minimum and to allow the internal market to operate in practice, the harmonization of the term of protection should take place on a long term basis;»

The main reason for the harmonization was that certain Member States had introduced a longer protection term. In countries like Germany and Austria, the protection term had been prolonged to 70 years after author's death whereas in other Member States it was shorter. This was deemed to be a threat to the smooth **functioning of the single market** (Recital 2).

Article 10 of the Directive states under the heading «application in time»:

> «1. Where a term of protection, which is longer than the corresponding term provided for by this Directive, is already running in a Member State on the date referred to in Article 13(1), this Directive shall not have the effect of shortening that term of protection in that Member State.
> 2. The terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least one Member State, on the date referred to in Article 13(1) (sc. 1 June 1995), pursuant to national provisions on copyright or related rights or which meet the criteria for protection under Directive 92/100/EEC (sc. on rental right and lending right and on certain rights related to copyright in the field of intellectual property).
> 3. This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in Article 13(1) (sc. 1 June 1995). Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties.
> ... »

It was uncontested that the Directive had been the main reason for the introduction of the 70 years protection term in the 1993 Copyright Act. However, the Federal Supreme Court found that at the time when the Swiss Parliament dealt with the Act, Article 10(2) was not yet part of the Directive. In fact, the Commission's proposal did not contain such a rule.[935] The Court therefore felt free to decide the matter on other grounds and, based on historic, intertemporal (no retroactive effect) and constitutional considerations, concluded that the 50 years protection term for STERNHEIM's play had expired and could not be revitalized.[936] The issue of securing a level playing field for business operators in the economic space Switzerland-EU was not even mentioned.

With this, the Federal Supreme Court created a significant **difference** between Swiss and European law.[937] Shortly after, the ECJ made it clear that Article 10(2) does produce a certain retroactive effect. In Case C-60/98 *Butterfly*

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935 ATF 124 III 266 consideration 4. g. bb.

936 ATF 124 III 266, consideration 4.

937 CARL BAUDENBACHER, Ist die Schweiz auch im Urheberrecht eine Insel in Europa?, SZW/RSDA 1998, 316 ff., 318 ff.

Music v CEMED,[938] Butterfly had produced a CD with the title «Briciole di baci», containing songs of the Italian singer MINA which had been recorded between 1958 and 1962. The term of protection for such recordings in Italian law was originally 30 years. The recordings in question had therefore entered the public domain in 1992, but had again become protected as a result of the provisions transposing the Directive into Italian law. The ECJ held that in Member States whose law so far was based on a shorter term of protection, the application of the relevant provisions of the Directive may, according to the express will of the European legislature, have the effect that works which have entered the public domain under the previous law are **protected afresh**. As the Federal Supreme Court rightly stated, the Commission's original proposal did not contain a rule such as the one laid down in Article 10(2), but the proposal was amended by the European Parliament. Still, the Member States had the right to protect acquired rights of third parties. The ECJ therefore came to the following conclusion:

> «[I]t is apparent that the Directive did provide for the possibility that copyright and related rights which had expired under the applicable legislation before the date of its implementation could be revived, without prejudice to acts of exploitation performed before that date, while leaving it to the Member States to adopt measures to protect acquired rights of third parties. In view of the wording of those provisions, such measures must be regarded as measures which the Member States are obliged to adopt, but whose detail is left to the discretion of the Member States, provided, however, that they do not have the overall effect of preventing the application of the new terms of protection on the date laid down by the Directive.»[939]

dd. Gender equality law in particular

As stated above, in the dispatch on the Gender Equality Act the Federal Council urged the Federal Supreme Court to follow ECJ case law.[940] In two cases, the Court had to deal with cantonal initiatives in Solothurn and Uri aiming at establishing quotas in favor of women in political and judicial authorities.[941] In the **Solothurn case**, a cantonal popular initiative demanded a proportional distribution of all the posts in government, parliament and judiciary between both genders through the establishment of a rigid quota system. In its judgment of 19 March 1997, the First Public Law Division held that a system which guarantees a certain quota of seats in parliament, government and courts to one gender amounts to a direct discrimination of the other gender under Article 8(3) first

938 Case C-60/98 *Butterfly Music v CEMED* [1999] ECR 1999, I-3939; see CARL BAUDENBACHER, Nochmals: Vom Inseldasein des helvetischen Urheberrechts, SZW/RSDA 1999, 254 ff.; SIMONE TICHY, Massnahmen zum Schutz erworbener Rechte Dritter bei Wiederaufleben des Urheberrechtsschutzes, ELR 1999 418 ff.

939 Case C-60/98 *Butterfly Music v CEMED* [1999] ECR 1999, I-3939, paragraph 23.

940 Supra, F. V. 3. a. hh.

941 ATF 123 I 152; 125 I 21.

sentence of the old FC and a violation of the freedom to vote. The court went on to state that there should be **equality of opportunity**, i.e. of starting conditions, but not necessarily equality of results. According to the Court, Article 4(2) of the old FC did not prescribe an equal distribution of the posts in question between men and women. This provision stated:

«Men and women have equal rights. The law shall provide for their equal treatment, especially as regards family, education and work. Men and women are entitled to equal pay for equal work.»

In this context, the court mentioned that in the judgment of 17 October 1995 in Case C-450/93 *Kalanke v Freie Hansestadt Bremen*, the ECJ had found a rigid quota system concerning promotion in the public service in the German Land Bremen to be incompatible with Community law.[942] In said case, the ECJ held that Article 2(4) of Directive 76/2007 permits measures which – although discriminatory in appearance – are in fact intended to eliminate or reduce actual instances of inequality that may exist in the reality of social life. Measures relating to access to employment, including promotion, that give a specific advantage to women with a view to improving their ability to compete on the labor market and to pursue a career on an equal footing with men fall within the scope of that provision.[943] However, as a **derogation from an individual right**, Article 2(4) of the Directive had to be interpreted strictly. The national rules at issue guaranteeing women in the case of equal qualifications absolute and unconditional priority for appointment or promotion in the public service were found to be incompatible with the Directive. The Court, following the Opinion of Advocate General TESAURO, found that such measures went beyond promoting **equal opportunities** and substituted equality of representation for equality of opportunity.[944] *Kalanke* «provoked strong reactions from the Member States and from their respective social environments.»[945] The government of the EEA/EFTA State Norway declared its intention to ignore this decision.[946] In its judgment in Case C-409/95 *Marschall v Land Nordrhein- Westfalen*, the ECJ adjusted its approach by taking into account the impact of prejudices and stereotypes concerning the role and capacities of women in working life. The Court found that the mere fact that a male and a female candidate are equally qualified did not mean that they had the same chances.[947] Preferential treatment of female candidates in sectors where they are under-represented could there-

942 ATF 123 I 152, considerations 4 cc., 5.

943 Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, paragraphs 18–19; see already Case 312/86 *Commission v France* [1988] ECR 6315, paragraph 15.

944 Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, paragraphs 21–23.

945 HANS MICKLITZ, Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law, EUI Working Papers LAW 2009/19, 21.

946 See LAURA MOLINARI, The Effect of the Kalanke Decision on the European Union: A Decision With Teeth, But Little Bite, 71 St. John's L. Rev. 591, 629 f. (1997).

947 C-409/95 Marschall v Land Nordrhein- Westfalen [1997] ECR I-6363, paragraphs 29–30.

fore fall within the scope of Article 2(4) of the Directive if it was capable of counteracting the prejudicial effects on female candidates of societal attitudes and behavior and reducing actual instances of inequality. However, the ECJ went on to state, such a measure may not guarantee absolute and unconditional priority for women in promotion, but should be subject to a **savings or flexibility clause**, guaranteeing an objective assessment of all candidates, taking into account their individual circumstances. Such an assessment, which should not be based on criteria that discriminate against women, could then override the priority accorded to women if the assessment tilted the balance in favor of the male candidate.[948]

The Federal Supreme Court's ruling in the Solothurn quota case was heavily criticized in Swiss legal literature.[949] Without going into details, it appears that the allegation that the initiative did not mention any qualification criteria is particularly unacceptable. As is generally known, there are no such requirements under the current law when it comes to elections to Swiss political and judicial bodies.[950]

In the second ruling of 7 October 1998 concerning the **Uri quota system**, the First Public Law Division somewhat softened its stand. A popular initiative demanded the amendment of the cantonal constitution by a provision according to which, in particular, all authorities and commissions whose members were elected by the people or appointed by elected organs had to be composed of approximately fifty percent women and fifty percent men. The Court mentioned that the distinction between equal opportunities and equal results made in the Solothurn case formed the basis of the ECJ's *Kalanke* judgment. However, the Court added, that Kalanke had been specified by the ECJ in *Marschall*.[951] It held that quotas concerning political mandates that were based on popular election were inadmissible, but that quotas concerning persons appointed by elected organs were proportionate and therefore constitutional.[952] It is remarkable that the Federal Supreme Court not only followed the ECJ's *Kalanke* judgment (including its weaknesses), but also the partial overruling of Kalanke in *Marschall*.

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948 C-409/95 Marschall v Land Nordrhein- Westfalen [1997] ECR I-6363, paragraph 35.

949 See, e.g., Denise Buser/Tomas Poledna, Politische Quoten auf dem Schafott – Reflexionen zum Bundesgerichtsurteil zur «Solothurner Quoteninitiative», AJP 1997 981, 988; Astrid Epiney, Chancengleichheit über das Ergebnis?, AJP 1997, 1033 ff.; Christa Tobler, Frauenförderung durch Quoten und Rechtsgleichheit der Geschlechter. Oder: «Es ist zum Besten der Gesellschaft, wenn die Wertauffassungen der Frauen und ihr Gerechtigkeitssinn Teil der Politik werden», recht 1998, 100 ff.; Samantha Besson, Mesures positives: le nouvel équilibre asymétrique. Perspectives pour le droit suisse AJP 4/1999 390 ff.

950 See with regard to the Federal Supreme Court itself supra, B. VI. 1.

951 C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, paragraphs 26–27.

952 ATF 125 I 21 consideration 5; with regard to this case see Christa Tobler, Lohnnachforderungen und Quoten: Zwei wichtige Bundesgerichtsentscheide zur Rechtsgleichheit der Geschlechter. BGE 125 I 14 und 125 I 21, recht 1999, 144–155; Astrid Epiney, Das Recht der Gleichstellung von Mann und Frau im Europäischen Gemeinschaftsrecht und Schweizerischen Recht – Konvergenzen und Divergenzen, ZBl 105/2004, 37 ff.

In what seems to be the only case involving a quota system in **working life**, the Second Public Law Division of the Federal Supreme Court in its judgment of 14 March 2005 only made a summary reference to ECJ case law. As part of the federal promotion program for young academics, the University of Fribourg in 2001 advertised **one position** only for women. The federal government had required 40% of the junior positions to be reserved for women in order to increase the number of female academics. Since the University had already fully exploited the contingent of 60% of the posts for men, the only way to obtain further federal funds was to hire a woman. Mr. *Tiziano Balmelli* applied anyway, and when his application was not considered due to his gender, he brought suit. The Court assessed the program for the advancement of women in question as a serious interference with an individual right. This required *a priori* a legal basis which in the case at hand was deemed to be missing. In view of this, the Court limited itself to stating that the most recent case law of the ECJ appeared to point to the same direction as far as the violation of an individual right was concerned.[953] The *Balmelli* judgment of the Federal Supreme Court has been heavily criticized by female scholars. University of Zurich constitutional law Professor BEATRICE WEBER-DÜRLER has rightly stated that the *Balmelli* ruling is a serious setback for women's promotion.[954] In fact, the reference to ECJ case law is **not convincing**. Even if the Second Public Law Division was determined to follow the latter's jurisprudence as a matter of principle, it could and should have distinguished the case on its peculiar facts.

It lies in society's and industry's very own interest to better activate the unused potential of female leaders. Equal rights are an economic and business law issue par excellence. The times when it was sufficient to base oneself on the principle of equal opportunity to improve the framework conditions for working women are probably over. The only measure which promises real remedy appears to be **quota regimes**. In that regard, the experience of Switzerland's longstanding EFTA partner Norway which, according to its 2007–2009 Action Plan for Women's Rights and Gender Equality in Development Cooperation, wants to be «a fearless champion of women's rights and gender equality» should be taken into account.[955]

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953 ATF 131 II 361 consideration 6.7.

954 BEATRICE WEBER-DÜRLER, Auf dem Rechtsweg zur Gleichberechtigung – vom Fall Kempin bis heute, VSH-Bulletin Nr 1, April 2008; see also CHRISTA TOBLER, Quoten zum Dritten: Gesetzliche Grundlagen für Frauenförderungsmassnahmen und Entschädigungen für Diskriminierungen. Zur Entscheidung des Bundesgerichtes vom 14. März 2005 in der Rechtssache Tiziano Balmelli gegen Rekurskommission der Universität Freiburg im Üechtland, recht 2005, 220 ff.

955 <http://www.oecd.org/dataoecd/38/57/38830980.pdf> visited 8 April 2012.

d. Swiss courts disregarding the EU orientation of the statutes that are at the basis of the market economy in particular

When interpreting the Single Market Act, the Technical Barriers to Trade Act and (in particular) the Cartel Act, the Federal Supreme Court has deviated from the legislature's intent. It has thereby undermined the policy underlying the three statutes which are of utmost importance for the functioning of the **Swiss market economy**.

(1) The 1995 **Single Market Act** did not produce the results which the Federal Council and Parliament had hoped for. In a judgment of 1999, the Federal Supreme Court (Second Public Law Division) held that the principle of free market access did **not** apply to the **freedom of establishment**. A dental prosthetist from the Canton of Zurich had been refused a license to practice in the Canton of *Grisons* with the argument that Grisons law prohibited the respective self-employed activity. In fact, Article 2 of the 1995 Single Market Act did not mention the freedom of establishment. The Court rejected the view that the principle of origin applies also to the freedom of establishment as being incompatible with the clear wording of the norm and with the general maxims of the territorial application of different legal orders (sic!).[956] In 2007 the Single Market Act was amended.[957] The Federal Council's dispatch accuses the Court of having given precedence to the principle of federalism over the single market principle and states that the Court's narrow reading of the principles of market access and of origin is obstructing both mobility and competition.[958] Whether the new statute will be more effective remains to be seen.

(2) In a judgment of 27 August 1998, the Federal Supreme Court (Cassation Division) reversed a ruling of the Upper Court of the Canton of Berne where it had been held that a provision laid down in an ordinance of the Federal Council which has the effect of a technical barrier to trade cannot be applied anymore under the Technical **Barriers to Trade Act**.[959]

(3) The Federal Council's dispatch on the **Cartel Act** repeatedly emphasizes that the new law has been modeled on the European template as much as possible.[960] In spite of that, the First Civil Law Division of the Federal Supreme Court showed great restraint to interpret the CartA in a euro-compatible way in a judgment of 13 November 1998.[961] It had to decide on a non-compete clause

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956 ATF 125 I 276.

957 SR 943.02.

958 BBl 2004 I 465, 472, 481.

959 ATF 124 IV 225.

960 Botschaft zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG) of 23 November 1994, BBl 1995 I 468, 494, 495, 496, 528 ff. See also FRANZ HOFFET, Die schweizerische Kartellgesetzrevision von 2003 – ein zweiter Paradigmenwechsel?, in: Ingo Brinker/Dieter H. Schleuig/Kurt Stockmann (eds.), Recht und Wettbewerb: Festschrift für Rainer Bechtold zum 65. Geburtstag, Munich/Würzburg/Berlin 2006, 191 ff., 194 ff.

961 ATF 124 III 495.

between two former partners (A and B) under the Code of obligations. As part of a judicial settlement liquidating the partnership, A undertook not to compete with B in the production or distribution of a certain speciality tool. No time limit was set. In case of violation of this obligation, B agreed to pay a contractual penalty. The Court held that such a non-compete clause was unilateral and therefore did **not constitute an agreement** affecting competition pursuant to Article 4 CartA. As a result, the CartA was deemed to be inapplicable. The Court came to this conclusion because it interpreted the new CartA in light of the old FC. According to Article 31bis(III)(d) old FC, the legislature had the power to legislate against the damaging economic and social effects of cartels and similar organizations. The Court found that the phrase «similar organizations» required that two or more undertakings must knowingly and willfully conspire in order to exercise market power.[962] As a unilateral non-compete clause served rather to overcome a conflict of interests between the parties, the Court found that this requirement was not met. The Court contended that, although the revised CartA sought to effect a certain convergence with the law of the EC, a complete harmonization was not intended.[963] Whether the Federal Supreme Court's judgment is still good law, may, however, be doubted. Article 96 FC does not refer to «similar organizations» anymore, but to «other restraints on competition». The FC has thereby been put in line with the new approach underlying the CartA. There is no longer a requirement that the undertakings involved must knowingly and wilfully conspire.[964] Consequently, one may conclude that the premise on which the judgment of the Court was based has become **obsolete**. In fact, the ComCo in 2006 regarded non-compete obligations as **agreements** affecting competition within the meaning of Article 4 CartA. After concurring with the widespread criticism the Federal Supreme Court's judgment received by legal commentators,[965] the ComCo drew attention to its Notice Regarding the Competition Law Treatment of Vertical Restraints which, *inter alia*, contains provisions about the validity of vertical non-compete clauses. Since Article 6 CartA provides that notices shall lay down «the conditions under which *agreements affecting competition* are in general deemed to be justified on grounds of economic efficiency», the applicability of the CartA has been implicitly acknowledged.[966]

962 ATF 124 III 495, consid. 2.a.

963 ATF 124 III 495, consid. 2.a.

964 See Monika Ruggl/Markus Vischer, Konkurrenzverbote in Unternehmenskaufverträgen, SJZ 102 (2006), 294, 299 (2006).

965 RPW 2006/4, *(ISS/Edelweissfm)*. 688; see Michael Leupold, Sind Konkurrenzverbote Wettbewerbsabreden im Sinne des Kartellgesetzes?, SZW 1999, 151; Franz Hoffet, Zum Verständnis des Begriffs der Wettbewerbsabreden im Sinne von Art. 4 Abs. 1 und Art. 5 f. KG, sic! 1999, 347; Marc Amstutz, Bemerkungen zu BGE 124 III 495, AJP 1999, 1478.

966 RPW 2006/4, *(ISS/Edelweissfm)*, 682, 690.

In its *Swisscom Mobile* ruling of 11 April 2011, the Second Public Law Division has all but burned the bridges.[967] The Court had to review a judgment of the Federal Administrative Court which had annulled a decision of the ComCo. In this decision, ComCo had fined *Swisscom Mobile* CHF 333 365 685 for abuse of a dominant position in the wholesale market for incoming telecommunication services into its mobile phone network in the field of voice telephony. Swisscom Mobile was reproached that it had imposed unfair termination fees on other telecommunication services providers. Article 7(2)(c) CartA is virtually **identical in substance** to Article 102(2)(a) TFEU. Whereas the European law provision states that an abuse may, in particular, consist in «directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions», the Swiss rule declares that in particular «any imposition of unfair prices or other unfair conditions of trade» is unlawful. The question was posed whether the existence of a dominant position was sufficient for the conclusion that there was an abuse or whether the word **«imposition»** in Article 7(2)(c) CartA had its own, independent meaning.

The Federal Department of Economic Affairs took the view that the CartA was to be interpreted in light of **EU competition law**. However, the Court started by saying that there is no common Swiss-EU competition law in the framework of a bilateral agreement and that Swiss law must therefore in principle be interpreted **autonomously**. It contended that the CartA did not have a special European policy background. The Court conceded that the legislature did lean towards EU law when formulating the individual prohibitions of abuse and even used the same notion of «imposing» as is contained in Article 102(2)(a) TFEU. According to the Federal Council's dispatch, the regulatory patterns of EU competition law were, however, only taken into account insofar as a different solution was not appropriate on objective grounds. Reference was made to Federal Gazette (*Bundesblatt*, BBl) 1995 I page 471. The Division then went on by citing the Federal Council's statement that Swiss and EU law differ with regard to **conceptual orientation** in that Swiss law is based on the abuse principle and not on the prohibition principle and deduced from this that Swiss law does not fully correspond to EU law. As for the rest, the Division went on to contend that not even according to the case law of the ECJ, the power of a dominant firm leads, in itself, to the conclusion that its prices are abusive. Rather, it would be necessary to consider all the circumstances. After having concluded that EU law was of no relevance, the Division felt free to interpret Article 7(2)(c) CartA according to **classical Swiss methodology** and concluded that if a fine imposed for an abuse of a dominant position by way of imposing unfair prices or other unfair trading conditions is to be reviewed, the element of «imposing» has its own independent meaning.[968]

967 ATF 137 II 199.

968 ATF 137 II 199 consideration 4.3.

The judgment of the Federal Supreme Court must be criticized. The argument that Swiss law is based on the abuse principle whereas EU law had implemented the prohibition principle is, in the context of abuse of a dominant position, **irrelevant**. It is true that the Federal Council stated on page 471 of its dispatch that the regulatory patterns of EU competition law had only been taken into account insofar as a different solution was not appropriate on objective grounds. The Government explicitly referred to the lack of a cartel prohibition and the more generous merger control regime in this context.[969] With regard to the abuse of a dominant position there is, however, **not the slightest difference**. It was in particular undisputed that Article 7 of the CartA which in paragraph 1 states that dominant undertakings behave unlawfully «if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners» has been taken over at full scale from what is now **Article 102 TFEU**. Ambassador Dr MARINO BALDI, who played a crucial role in the drafting of the 1995 CartA, has stated that Article 7 is closely linked to EU law.[970] The legislative history clearly shows that the CartA was as far as possible created on the template of EU competition law[971]. The statement in the Federal Council's dispatch that «the current reform does not primarily have a European policy background»[972] can only be understood to the effect that the reform was deemed to be necessary **regardless of which path Switzerland would chose** with respect to European integration.[973] The Swisscom Mobile judgment is finally also **substantially erroneous**. With its overly strict interpretation of the notion of «imposing», the Federal Supreme Court has rendered 7(2)(c) CartA almost obsolete.[974]

The euro-skeptical attitude of the Federal Supreme Court in competition law matters finally becomes apparent in the **review of arbitral awards**. In 1992, the Court (First Civil Law Division) set aside an arbitral award under Article 190(2)(b) Code on Private International Law Act (CPIL) (erroneous decline of jurisdiction). The arbitral tribunal had refused to review the compatibility of the disputed contract with EC competition law (ex-Article 85 EC) although one of the parties had asked for it.[975] However, in 1998, the Court clarified that arbitral tribunals are under no obligation to ascertain a possible infringement of

969 Botschaft zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG) vom 23. November 1994, BBl 1995 I 468, 471.

970 Zur «Philosophie» des neuen Kartellgesetzes, Festschrift für Franz Blankart, Berne/Stuttgart/Vienna 1997, 349, 361 f., 562 f., 568, 632 f.

971 Supra, F. V. 3. a. (3).

972 Botschaft zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (fn 969), 484.

973 Botschaft zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (fn 969), 484.

974 ROLF H. WEBER, «Erzwingung unangemessener Preise» – Wohin geht der Weg?, Jusletter 1. November 2010.

975 ATF 118 II 193.

competition rules *ex officio* if a respective plea has not been raised by the parties.[976] This restrictive stance was confirmed in 2006 when the Court ruled that competition law is not part of the fundamental principles of law such as the sanctity of contract, the principle of legitimate expectations or the prohibition of the abuse of the law. European competition law was therefore **not** deemed to fall within the ***ordre public*** according to Article 190(2)(e) CIPL.[977] That being said, at the same time, the Court upheld that arbitral tribunals on request by one of the parties must apply foreign law, failure of which may render the arbitral award actionable under Article 190(2)(b) PILA. The judgment of the Federal Supreme Court was in contrast to the view of the majority of legal writers which considered competition law to be part of the *ordre public*.[978] Unsurprisingly, the judgment has been met with criticism[979] not least because the ECJ had concluded in Case C-126/97 *Eco Swiss China Time*[980] that Article 85 EC (now 101 TFEU) is a matter of ordre public. To justify its differing view, the Federal Supreme Court contended that the ECJ in its finding relied on the significance of Article 85 EC for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market[981] which allegedly was not the case in Switzerland.

Two critical observations appear pertinent. First, whether or not competition law forms part of the fundamental principles of any legal order implies a sliding scale. With the dissemination of competition law in almost all jurisdictions in the world, at least the prohibition of hard-core cartels has become a **generally accepted** tenet of law.[982] It appears that the reasoning of the judgment does in any case not hold good in the future. Second, although Switzerland is not a Member State of the EU, it is through its network of bilateral agreements to a large extent part of the EU internal market. The adoption of the Internal Market Act and of the Cartel Act were to a considerable extent aimed at aligning the Swiss legal system in order to facilitate *de facto* **participation in that market**.

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976 ATF of 13 November 1998, ASA Bull. 1999, 529 = SZIER 2000, 566; Restated in ATF 128 III 234.

977 ATF 132 III 389.

978 See e.g. Carl Baudenbacher, Enforcement of EC and EEA Competition Rules By Arbitration Tribunals Inside and Outside the EU, in: Claus-Dieter Ehlermann/Isabela Atanasiu (eds.), European Competion Law Annual 2001, Oxford/Portland 2003, 349; Marcel Meinhardt/Jan-Michael Ahrens, Wettbewerbsrecht und Schiedsgerichtsbarkeit in der Schweiz – Eine Würdigung des Entscheids des Bundesgerichts vom 8. März 2006, SchiedsVZ 2006, 182.

979 Marcel Meinhardt/Jan-Michael Ahrens, Wettbewerbsrecht und Schiedsgerichtsbarkeit in der Schweiz (fn 978), 182; Bart Volders/Valentin Rétornaz, Challenging an Arbitral Award for Infringement of Competition Law: The *Terra Armata* Decision of the Swiss Federal Tribunal of 8 March 2006, in: Petar Sarcevic/Paul Volken/Andrea Bonomi (eds.), Yearbook of Private International Law, Volume VIII (2006), Berne 2007, 307.

980 [1999] ECR I-3055.

981 [1999] ECR I-3055, paragraph 36.

982 See <http://www.internationalcompetitionnetwork.org/> visited 22 June 2012.

The reasoning of the ECJ regarding the importance of competition law for the achievement of the internal market must therefore be extended to Switzerland.

The case law on the CartA clearly shows the **limits** of the autonomous implementation program. It can only function as long as the actors **play by the rules on their own motion**. From an economic law point of view, the CartA is much more important than, for example, legislation on package tours or on consumer credit. A country's competition act is part of its economic constitution. Competition policy is a core element of *Ordnungspolitik*. It aims at protecting competition, the central mechanism of **optimally allocating scarce resources** throughout the entire economy. The *Swisscom Mobile* judgment gives reason for suspecting that the Federal Supreme Court has still not overcome the old anti-European reflex in competition law.[983] It may finally be of interest that 3 out of the 5 judges who participated in the case were from the anti-European Swiss People's Party, one was a social democrat and one belongs to the Green Party.

5. Result

The main goal of the autonomous implementation program is the establishment of a **level playing field** for Swiss operators who are economically, but not legally part of the European single market. It lies, however, in the nature of things that this goal can only be achieved to a very limited extent. After more than 20 years, one has to say that the results of the program are mixed. On the one hand, many fields of Swiss law (and in particular of economic law) have been aligned with the European model and in crucial areas reforms were only carried out because that model was there. On the other hand, the most important mechanisms for the safeguarding of a level playing field are by definition missing. The Swiss legislature is not obliged to take over European solutions. It reserves the right not to take over parts of relevant EU law if it comes to the conclusion that for any reason this does not serve Swiss interest. To give an example, the Federal Council stated in its dispatch on the amendment of the Law of Obligations of 21 December 2007 under the subtitle «Relationship to European law»:

> «Switzerland is not obliged by an international treaty to take over the relevant secondary law of the European Community (EC) in the area of company and accounting law. [...] Nevertheless, a completely independent development of Swiss company and accounting law would be problematic. The draft is to a large extent in line with relevant EU legislation. The taking over of relevant provisions of EC law was, however avoided in particular where these regulations do not convince in substance.»[984]

983 One is almost reminded of the *Stanley Adams* saga; see supra, E. V. 7. c., d., and e.

984 Author's translation.

This reasoning which applies to the whole autonomous implementation program is **circular**. The question is often not whether an EU rule is «convincing» or not, but whether certain pressure groups are able to successfully oppose its adoption. In fact, there have always been areas where new Swiss law is enacted or existing law is maintained although or because it is not compatible with European law. The autonomous implementation policy results in an **inherent conflict** with the policy of creating or defending regulatory advantages.

There seems to be a trend which goes into the direction of giving up regulatory advantages. Although Swiss Parliament retains the full **freedom** to decide on whether it wants to legislate in a euro-compatible way or not, deviations must under Article 141 of the Parliament Act be reasoned which in the end means justified. This in itself leads to a relativization of the Parliament's freedom. Moreover, there is a constant factual (political and economic) pressure coming from the European Union which is first and foremost due to the sheer size of its market. Academic authors and some politicians stress that as a matter of fact, Swiss law is more and more Europeanized and that this process occurs in a half-hidden way. The Federal Council has stated many years ago that the Europe-compatibility test has created a «Europe reflex» in Swiss legislation in that new laws are, as a rule, **euro-compatible**.[985] But whether that is true or not in a given case, is an open question. Even if the legislature comes to the conclusion that European law should be taken over, there are no mechanisms which safeguard that the implementation is done in a correct way and that the implemented law is adjusted to later amendments of the European template because unlike in the EU and EEA, there is **no surveillance** and the Swiss courts do not have the right to refer questions for a preliminary ruling to the ECJ (or to the EFTA Court). Much ink has been spilled on methodological questions such as whether Swiss courts are obliged to follow old and new case law of the ECJ. Even if the legislature would oblige the courts to follow the ECJ and even if they were willing to do so (which they are not or not unconditionally), this would be no guarantee for the maintenance of equal conditions of competition. On the one hand, a Swiss court may, as any national court, misunderstand ECJ case law. On the other hand, since the Swiss courts do not have the right to request a preliminary ruling from the ECJ, it may be that they decide a case based on existing case law whereas the ECJ might have chosen a **new path**. The most difficult problems arise if a Swiss court faces a novel legal issue, one that has not yet been addressed by the ECJ. In such a case, the lack of the possibility to make a reference is of particular significance. From a single market perspective,

985 See Bruno Spinner/Daniel Maritz, EG-Kompatibilität des schweizerischen Wirtschaftsrechts. Vom autonomen zum systematischen Nachvollzug, in: Peter Forstmoser/Hans Caspar von der Crone/Rolf H. Weber/Dieter Zobl (eds.), Der Einfluss des europäischen Rechts auf die Schweiz, Festschrift für Roger Zäch zum 60. Geburtstag, Zurich 1999, 127, 129.

all this has the potential of leading to **fragmentation** and goes against the very purpose of the autonomous implementation program.

The basic problem of autonomous implementation cannot be resolved with the help of methodological guidelines, since it is of **institutional nature**. The autonomous implementation program leads if not to chaos then to a **lack of legal certainty**. It is a **half measure** and can only be defended as a transitory solution.

From a **state sovereignty** perspective, autonomous implementation is the worst of all solutions. Switzerland has neither a co-decision right nor a co-determination right when new EU legislation is being enacted. If the legislature (or the courts) decides to deviate from the European model in individual cases, this does not so much bring back sovereignty than cause **confusion**. Unsurprisingly, the situation resembles the one under the bilateral agreements, with one major difference: Unlike the bilateral agreements, autonomous implementation does **not create access to the European market**.

V. The emergence of a «Swiss European law»

Due to the systematic adoption of EU law under the autonomous implementation program, Swiss courts and the legal profession in general have become acquainted with this vital subject. European law also occupies an important place in the curricula of Swiss universities. On closer inspection, one discovers, however, that the result is not a real Europeanization of Swiss law. Rather, something new, a ***tertium***, has emerged, which is indeed close to EU law, but nevertheless different.[986] The shortcomings of autonomous implementation both on the legislative and on the judicial level have contributed to that, and the dogma of the classic public international law nature of the bilateral agreements[987] has taken its toll.

Hence it is not surprising that lectures on EU law in certain Swiss universities are converted at least partly into courses on Swiss-EU bilateralism (including autonomous implementation and the interpretation of autonomously implemented European law by the Swiss courts) or into comparative considerations on the Swiss and the EU federal systems. In academic literature, there are approaches to analyze crucial features of the EU legal system specifically from a Swiss, i.e. a third country perspective.[988] And a book containing the bilateral agreements and the case law rendered on them in Switzerland and in the Union bears the title «Swiss European law» *(Schweizerisches Europarecht)*.[989] One is

986 See Francesco Maiani (fn 898), 2.

987 Supra, E. VI. 7. b.

988 See Tobias Jaag, Europarecht. Die europäischen Institutionen aus schweizerischer Sicht, Zurich 2003.

989 Peter Hänni/Markus Gredig/Danielle Schneider (eds.), Schweizerisches Europarecht. Sämtliche relevanten Erlasse zum Schweizerischen Europarecht mit Anmerkungen, Zurich 2007.

a little bit reminded of the emergence of the German common law *(gemeines Recht)* from Roman law in medieval Germany. This development is disturbing. It is not only detrimental to **legal certainty**, but may in the end even impair the capacity of Swiss law schools to participate in international exchange programs. Both, Swiss and foreign students have a right to be taught the *sedes materiae* (in more colloquial terms: the real thing) if they decide to attend a European law class at a Swiss university: The law of the European Union. The law of sectoral bilateralism may then be taught as an additional subject.

G. Contributions of Swiss Law to Foreign, International and European Law

I. Preliminary remarks

The present report deals with the challenges posed to Swiss economic law by international and European law. However, Swiss law also has an impact on foreign legal orders, whether national, international or European, both on the legislative as well as on the judicial level. The following considerations are dedicated to some of the **most significant** Swiss contributions.

It must also be mentioned that for over 100 years Switzerland, has been home to **international organizations**. To the present, it has signed 24 headquarters agreements. Geneva is a Mecca for international organizations, the entities of the UN and the WTO constituting the most important examples.[990] Moreover, there are some 250 NGOs which have been granted consultative status by the UN.[991] It is particularly remarkable that Switzerland was the second seat of the UN after New York as well as the seat of the GATT long before the country itself became a member of these organizations.

II. Import of Swiss economic law by other jurisdictions

1. Civil Code

The most famous example of foreign countries borrowing from Swiss law is the reception of the Civil Code (including the law of obligations) by **Turkey** under the regime of *Kemal Ataturk* in 1926.[992] It appears that there were mainly five reasons for Turkey to take this revolutionary step: Modernization of private law was required by the League of Nations; leading Turkish politicians believed

990 <http://www.eda.admin.ch/eda/de/home/topics/intorg/inorch.html> visited 3 July 2012.

991 <http://www.uno.admin.ch/eda/de/home/topics/intorg/inorch.html> visited 2 January 2012.

992 See, for example, Arzu Oguz, The Role of Comparative Law in the Development of Turkish Civil Law, 17 Pace Int'l L. Rev., 373, 380 ff.; Adnan Güriz, Sources of Turkish Law, in: Par Tuğrul Ansay/Don Wallace (eds.), Introduction to Turkish Law, The Hague 2005, 1, 9.

that only a secular and westernized country would be successful politically and economically; the Swiss Civil Code was chosen over the codes of France and of Germany because it was deemed to be more modern and more flexible; the Swiss Code was available in French which rendered it accessible to Turkish legal elites; the Turkish Prime Minister of the time had obtained his higher education in Switzerland.[993] It was clear from the beginning that the adoption of a modern Western code by a state which until 1839 had been theocratic and until 1924 semi-theocratic would lead to frictions.[994] But it is hardly surprising that «[i]n the sphere of contracts, the introduction of the Swiss Code of Obligations has not caused any great difficulties.»[995] For the sake of order, it may be added that elements of Swiss civil law have also been taken over by other countries such as **democratic** China (and therefore: Taiwan), Peru, Italy and Greece as well as by Middle Eastern and North African countries.[996]

2. *Unfair Competition Act*

As mentioned, the Swiss legislature implemented a **present-day conditions-functional approach** in the 1986 Unfair Competition Act which aims at the protection of competition itself. This was done on the basis of academic publications by representatives of the St. Gall school of economic law who in turn had been inspired by German legal thinking. The Swiss courts have, however, barely tapped the full potential of this reorientation of unfair competition law.[997] But that did not hinder the **German legislature** from taking over the functional approach from Switzerland when it amended the German Unfair Competition Act in 2004.[998]

It may be added that in unfair competition law, the Swiss legislature and the Swiss Federal Supreme Court were also ahead of foreign and European developments regarding the treatment of **comparative advertising** and the model of the **informed consumer**.[999]

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993 Arzu Oguz (fn 992), 381 f.

994 Hifzi Veldet Velidedeoglu, The Reception of the Swiss Civil Code in Turkey, 9 International Social Science Bulletin 60, 62 (1957).

995 Hifzi Veldet Velidedeoglu (fn 994), 65.

996 See most recently Peter V. Kunz, Dealing with International Law and European Law: Overview of the «Swiss Approach», jusletter of 2 July 2012, 1, 3.

997 Supra, C. VI. 2. a.

998 See Helmut Köhler/Joachim Bornkamm/Adolf Baumbach/Wolfgang Hefermehl, Gesetz gegen den unlauteren Wettbewerb, Commentary, 30th ed., Munich 2012, Einl UWG, paragraph 2.17.

999 See supra, C. VI. 2. b., c.

3. *Exclusive distributor's right to compensation for clientele*

One of the hotly debated issues of the law of distribution intermediaries after World War I concerned the question whether such operators are entitled to a compensation for clientele. The law in Europe was shaped by **legal transplants** carried out by legislatures, but also by the case law of courts of last resort. Swiss law played a prominent role in this development. In 1949, a new chapter on the commercial agents contract was inserted into the Swiss CO. It has certainly been a coincidence that in the same year, ARTHUR MILLER published his famous play «Death of a Salesman» which describes the suicide of *Willy Loman*, a failing sales representative.[1000] But the play has made it clear that distribution personnel was low on the social ladder at that time.[1001] Having said that, it must be emphasized that a salesman or sales representative is not the same as a commercial agent.

Concerning **commercial agents**, Article 418u CO states under the title «compensation for clientele»:

> «[1] Where the agent's activities have resulted in a substantial expansion of the principal's clientele and considerable benefits accrue even after the end of the agency relationship to the principal or his legal successor from his business relations with clients acquired by the agent, the agent or his heirs have an inalienable claim for adequate compensation, provided this is not inequitable.
> [2] The amount of such claim must not exceed the agent's net annual earnings from the agency relationship calculated as the average for the last five years or, where shorter, the average over the entire duration of the contract.
> [3] No claim exists where the agency relationship has been dissolved for a reason attributable to the agent.»

Article 418u CO was largely a replication of § 24 of the 1921 **Austrian Commercial Agents Act**.[1002] In 1953, a similar provision was introduced into the **German Commercial Code** in § 89b. Other countries enacted comparable legislation.[1003] The German Federal Supreme Court held in 1958 that § 89b of the Commerce Code may apply to **independent dealers** by analogy.[1004] In 1989, the Austrian Supreme Court followed suit basing itself on German case law and academic literature.[1005] In Switzerland, however, the right of an independent dealer who acts in his own name and for his own account to compensation for clientele was only recognized by the Federal Supreme Court in 2008.[1006]

1000 First edition, New York 1949.
1001 See Botschaft des Bundesrates an die Bundesversammlung zum Entwurf eines Bundesgesetzes über den Agenturvertrag of 27 November 1947, BBl 1947 III 661 ff.
1002 Botschaft des Bundesrates (fn 1001), 864.
1003 See HANS JAKOB MAIER/HANS JOACHIM MEYER-MARSILIUS/RUDOLF REGUL (eds.), Der Handelsvertreter in den Ländern der EWG und der EFTA, Baden-Baden 1976.
1004 BGHZ 29, 83, 85 f., judgment of 11 December 1958.
1005 1 Ob 692/89.
1006 ATF 134 III 497.

In 1962, the Federal Supreme Court (Civil Division) annulled a decision of the Cantonal Court of *Valais* to award compensation for clientele to an **exclusive distributor** holding that Article 418u CO, which grants such a claim to agents, could not be applied to independent dealers by analogy. The court took a rather formalistic approach and found that – unlike the agent whose task it is to conclude business contracts in the name and for the account of the principal – the exclusive distributor is an **independent dealer** who runs his business as he sees fit and simply buys products from the other party which he then sells on his own account. The payment for clientele was said to be due because clients of the agent become clients of the principal. This, the Court held, was not the case under the exclusive distribution contract at issue which concerned the sale of **pest control machines**. The Court furthermore found that a rule such as set forth in Article 418u CO, which imposes an obligation on a party which has fulfilled all its obligations to make payments to the other party after the termination of the contract, was new and exceptional. This controversial innovation could not be extended to exclusive distribution contracts. The Court briefly touched upon the German legal situation, but refrained from going into it in-depth. It held that under special circumstances, payment for clientele could be due, but that the case at hand did not contain such elements.[1007] The judgment was an outflow of the **liberal contract theory** which in general has often informed the Federal Supreme Court's case law.[1008]

The Federal Supreme Court's judgment not only prompted Swiss lawyers to advise their clients that the agency law of the CO did not apply to other distributors. In view of the case law of the German Federal Supreme Court concerning § 89b of the Commerce Code, German principals adopted a policy of subjecting exclusive dealership agreements to Swiss law.

Swiss academic literature called on the Federal Supreme Court to change its attitude.[1009] 46 years later, the Court (First Civil Division) **overruled** the 1962 decision. In a judgment of 22 May 2008,[1010] it admitted that the analysis made in 1962 was a very formalistic one and emphasized that whether the clientele would stay with the principal depended on the attractiveness of the trademark which was the result of the distributor's efforts both under an agency contract as well as under an exclusive dealership contract. The contract in said case concerned the wholesale and retail of **cosmetic products**. The Court found that an exclusive dealer assumes a higher economic risk than an agent. In several sectors of the sale of goods, a legally and economically independent merchant who acts on his own behalf and for his own account gives way to a distributor who is

1007 ATF 88 II 169 consideration 7.

1008 See supra, C. IV. 2.

1009 See Carl Baudenbacher, Anspruch auf Kundschaftsentschädigung bei gesetzlich nicht geregelten Absatzmittlungsverträgen?, Rechtsvergleichende Betrachtungen unter Berücksichtigung des deutschen Rechts, JZ 1989, 919 ff., with further references.

1010 ATF 134 III 497.

permanently linked to the supplier and who is often reduced to obey the conditions dictated by the latter concerning the sale of the goods delivered. The Court went on to state that Article 418u CO was the model for a similar provision in German law, namely § 89b of the German Commercial Code, and based its finding, *inter alia*, on the case law of the **German Federal Supreme Court** which had long granted the exclusive dealer a right to compensation for clientele by analogous application of said provision. The Federal Supreme Court concluded that the question could not be treated in a dogmatic way. The exceptional character of Article 418u CO therefore did not exclude its analogous application to the exclusive dealership contract.[1011]

The interaction of said three legal orders also had an impact on the law of the **European Union**: § 89b of the German Commercial Code was the model for Article 17(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed **commercial agents**, which reads:

> «(a) The commercial agent shall be entitled to an indemnity if and to the extent that:- he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and – the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;
> (b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;
> (c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.»[1012]

4. Debt brake

On 2 December 2001, the Swiss people overwhelmingly voted in favor of a Federal Decision which introduced a new fiscal expenditure rule for the Federal Government, the so-called debt brake. The rule aims, one the one hand, «at a structurally balanced budget in the short-run by annually setting a cyclically adjusted expenditure ceiling». On the other hand, «it arrests the accumulation of public debt via corrections of future expenditure targets for past deviations from projected fiscal balances.»[1013] The Swiss debt brake was carefully studied

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1011 ATF 134 III 497, consideration 4.2.

1012 See the ECJ's judgment of 28 October 2010 in Case C-203/09 *Volvo Car Germany GmbH v Autohof Weidensdorf GmbH*, not yet reported.

1013 Stephan Danninger, A New Rule: «The Swiss Debt Brake», IMF Working Paper 02/18, International Monetary Fund 2002, <http://www.imf.org/external/pubs/ft/wp/2002/wp0218.pdf> visited 10 July 2012.

by the **Austrian Government** in 2005.[1014] In the course of the financial crisis of the last years, numerous foreign governments and central banks including the **U.S. Federal Reserve** appear to have drawn their inspiration from the Swiss initiative. The Chairman of the U.S. Federal Reserve, BEN BERNANKE, is reported to have said that the Swiss debt brake is particularly effective because it was approved by 85% of the voters, such broad support undoubtedly contributing to its success. If such a rule is merely adopted by the Parliament, there is a risk that the same Parliament will at the next opportunity abolish it again.[1015]

All this prompted Federal Councillor DIDIER BURKHALTER, then Head of the Department of Home Affairs (presently Head of the Department of Foreign Affairs), to proudly state in a speech given at the University of Zurich on 10 October 2011:

> «[Th]e instrument of debt brake is currently becoming a worldwide **export hit**. From Berlin to Madrid to Washington, it has been installed or is at least seriously debated. What sounds very technical – debt brake – is the essence of our economic culture: Disciplined use of scarce resources, pragmatism instead of demand inflation, a basic reflex that always puts the realistic and achievable over the maximal and ultimately utopian.»[1016]

5. Public procurement law

The quality-based multifactorial approach of the Swiss legislature in the definition of the award criteria appears to have an impact on the development of the law of the European Union. In a resolution of 25 October 2011 on modernisation of public procurement (2011/2048[INI]), the European Parliament took the view «that, in order to develop the full potential of public procurement, the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender, in terms of economic, social and environmental benefits – taking into account the **entire life-cycle costs** of the relevant goods, services or works» and stressed «that this would not exclude the lowest price as a decisive criterion in the case of highly standardised goods or services»[1017].

1014 See PETER BRANDNER/HELMUT FRISCH/BERNHARD GROSSMANN/EVA HAUTH, The Swiss Debt Brake: An Implementation Proposal for Austria, Working Paper Vienna, September 2005, <http://www.staatsschuldenausschuss.at/en/img/debt_brake_tcm164-43446.pdf> visited 14 March 2012.

1015 <http://www.direktedemokratie.com/2010/10/11/schuldenbremse-als-export/> visited 14 March 2012.

1016 <http://www.edi.admin.ch/dokumentation/00334/00858/index.html?lang=de&msg-id=41653> visited 14 March 2012, author's translation. – The last sentence could be added to the description of the Swiss character by MAX FRISCH, see supra, B.III.4.

1017 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0454&language=EN> visited 14 March 2012. MARC STEINER, Judge of the Swiss Federal Administrative Court, was heard as an expert by the Parliament's Committee on the Internal Market and

6. *Contingent capital instruments (CoCos)*

In 2011, Switzerland, when addressing the «too big to fail» problem, took the lead in prescribing large banks the holding of a certain percentage of their risk weighted assets in contingent capital instruments (CoCos). The CoCos are intended to serve as a buffer in a financial crisis. The Basel Committee on Banking Supervision refrained from setting such requirements on a global scale.[1018] One will not overlook in this context that unlike in the EU and the EEA, systemically relevant banks in Switzerland are not subject to state aid control.[1019]

III. International arbitration

Switzerland has, both in domestic and in international matters, by tradition favored arbitration over court adjudication.[1020] Arbitration does not aim at deciding for or against the plaintiff. Rather, it aims at creating peace.

Switzerland has a reputation for being one of the **most favored places** of international arbitration.[1021] This may be attributed to a variety of reasons such as the country's geographic location in the heart of Europe, its neutrality and political stability, its mercantile culture and the arbitration friendliness of the Swiss legal system.[1022] Numerous important arbitral proceedings have taken place in Switzerland. As far as **public arbitration** is concerned, the following cases may be mentioned: *Alabama Claims Arbitration*[1023]; *Beagle Channel Arbitration*[1024]; *Taba Arbitration*[1025]; *Rainbow Warrior Arbitration I*[1026]. Important **private arbitration** cases are, for example, the *Texaco Arbitration*[1027]; the *LIAMCO Arbitration*[1028]; the *Westacre Arbitration*[1029]; the *Areva v Siemens Ar-*

Consumer Protection on 24 May 2011, <http://www.europarl.europa.eu/document/activities/cont/201105/20110520ATT19888/20110520ATT19888EN.pdf> visited 13 March 2012.

1018 <http://www.risk.net/risk-magazine/news/2082036/basel-committee-impose-coco-requirement-sifis> visited 14 March 2012.

1019 See with regard to the legal situation in the EU and the EEA Carl Baudenbacher/Frank Bremer, Overcoming the financial crisis in the banking sector. The role of European Competition Policy, Concurrences No 2/2010, 45 ff.

1020 Supra, B.III.3; see also Helen Keller, Rezeption des Völkerrechts (fn 380), 292 f.

1021 See Mauro Rubino-Sammartano, International Arbitration: Law and Practice, 2nd ed., Netherlands 2001, 71 f.

1022 See Marc Blessing, Swiss Tradition and Legal Culture, in: Stephen V. Berti (ed.), International Arbitration in Switzerland: An introduction to and a commentary on Articles 176–194 of the Swiss Private International Law Statute, Basel 2000, 59.

1023 *United States v. Great Britain*, 1872, in: J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Washington 1898, Vol. I, 543.

1024 *Argentina v. Chile*, 1977, 17 ILM (1978), 634.

1025 *Egypt v. Israel*, 1988, 27 ILM (1988), 1421.

1026 *New Zealand v. France*, 1986, 26 ILM (1987), 1346.

1027 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of Libya* (1979) 53 ILR, 389.

1028 *Socialist Libyan Arab Popular Jamarihiya v. Libyan American Oil Co.*, 20 ILM (1981), 1.

1029 *Westacre v. Jugoimport*, ICC Case No. 7047 (1994), 13 ASA Bull. 301 (1995).

bitration.[1030,1031] As evidence of the above, the ICC Statistical Report 2009 confirmed Switzerland as the most popular place of ICC arbitration. Switzerland was chosen 119 times as a venue of arbitration (Geneva: 62, Zurich: 50, other Swiss cities: 7), narrowly edging out Paris in second place (113) with London already a distant third (73).[1032] However, Switzerland's role in international arbitration is not properly understood if it is merely conceived as a suitable *locus arbitri*. The country also features prominently in the selection of arbitrators and the choice of law. Due to their sound legal education and their perceived objectivity, Swiss arbitrators are much sought after. Swiss arbitrators accounted for 15.48 percent of all appointments and confirmations ahead of UK arbitrators with 15.02 percent and German arbitrators with 7.97 percent in ICC arbitrations in 2009.[1033]

In this sense, Switzerland may be described as a «reservoir of arbitrators».[1034] In fact, some of the **most influential arbitrators** in international law have been of Swiss nationality. Professor MAX HUBER acted as sole arbitrator in the often cited *British Claims in the Spanish Zone of Morocco arbitration* and the *Island of Palmas arbitration*.[1035] Other Swiss sole arbitrators in well-known cases were Professor EUGÈNE BOREL in the *Ottoman Debt arbitration*[1036], CHARLES EDOUARD LARDY in the *Timor arbitration*,[1037] Professor GEORGES SAUSER-HAL in the *Monetary Gold arbitration*[1038], Federal Supreme Court Judge PIERRE CAVIN in the *Sapphire International arbitration*.[1039] Professor PIERRE LALIVE was sole arbitrator in the *Dalmia Dairy Industries arbitration*[1040] and chairman in the *Loan Agreement between Italy and*

1030 The arbitral award is referred to in Commission Press Release Antitrust: Commission market tests commitments proposed by Siemens and Areva concerning nuclear technology markets, IP/12/243, 14 March 2012.

1031 On the distinction between public and private international arbitration, see CARL BAUDENBACHER/FRANK BREMER, Arbitration in Public International Disputes, in: Carl Baudenbacher (ed.), Dispute Resolution, Stuttgart 2009, 266.

1032 ICC Statistical Report 2009, ASA Bulletin, 2010 Volume 28 Issue 4, 891–892.

1033 ICC Statistical Report 2009 (fn 1032), loc. cit.

1034 RAYMOND R. PROBST, «Good offices» in the light of Swiss international practice and experience, Dordrecht 1989, 62.

1035 *Great Britain v. Spain*, 1924, 2 RIIA, 615; *United States v. Netherlands*, 1928, 2 RIIA, 829. From 1921 to 1930, HUBER acted as a judge and, from 1925 to 1927, as the President of the Permanent Court of International Justice (PCIJ) at The Hague. See with regard to him DIETRICH SCHINDLER, Max Huber – His Life, 18 EJIL, 81 ff. (2007); DANIEL-ERASMUS KHAN, Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations, 18 EJIL, 145 ff. (2007).

1036 *Bulgaria, Iraq, Palestine, Transjordan, Greece, Italy v. Turkey*, 1925, 1 RIAA 1 529.

1037 *Netherlands v. Portugal*, 1914, 11 RIAA, 481.

1038 *United States, Great Britain, France v. Italy*, 1953, 20 ILR, 441.

1039 *Sapphire International Petroleums Ltd v. National Iranian Oil Company*, 1967, 35 ILR, 136.

1040 *Dalmia Cement Ltd. v. National Bank of Pakistan*, ICC case No. 1512, 1976, 67 ILR, 611.

Costa Rica arbitration[1041]. It is worth noting that both the Federal Council[1042] and the Supreme Court[1043] were also involved in arbitration proceedings.

Not less important is the prevalence of **Swiss law** in international arbitration procedures. As already noted, Swiss law is often chosen as *lex causae*, the substantive law governing the arbitration.[1044] The attractiveness of Swiss law to some extent rests on the rather intuitive perception that Switzerland's political neutrality translates into the neutrality of its legal system guaranteeing an equal distance from the parties' domestic legal systems.[1045] Besides this, Swiss private law and in particular the Swiss Code of Obligation is widely considered as a concise and comprehensible legal instrument and appreciated for its **liberalism** when it comes to B-to-B relations and its deference to party autonomy.[1046] Moreover, the fact that Swiss law is available in the official languages of French, German and Italian as well as its civil law ancestry should not be overlooked as factors rendering it particularly suitable for cross-border dispute resolution.

With respect to the *lex arbitri*, Chapter 12 of the Private International Law Act (CPIL) constitutes a particularly **arbitration-friendly legal framework** recognizing, *inter alia*, the separability doctrine[1047], the arbitrators' competence-competence[1048], a broad concept of arbitrability[1049] as well as the parties' freedom to agree upon the applicable procedural and substantive law[1050]. Furthermore, Swiss courts largely refrain from interfering with the arbitration process, limiting their role to judicial cooperation in the granting of interim measures[1051], the taking of evidence[1052] and the appointment of the arbitral tribunal[1053] or the review of challenges to to the tribunal's composition.[1054] The right to seek judicial control of arbitral awards rendered in Switzerland is confined to

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1041 *Italy v. Costa Rica*, 1998, 25 RIAA, 23.

1042 *Colombia v. Venezuela*, 1922, 1 Annual Digest of Public International Law Cases (1919–1922), Case 54.

1043 See Raymond R. Probst, «Good offices» (fn 1034), 60.

1044 Thus, closely behind English law (14.3 percent), Swiss law was designated in 13.1 percent of all ICC cases in 2009 as the governing law.

1045 See Maren Heidemann, Methodology of Uniform Contract Law: The Unidroit Principles in International Legal Doctrine and Practice, Berlin 2007, 199; Emmanuel Gaillard/John Savage (eds.), Fouchard Gaillard Goldman On international commercial arbitration, The Hague 1999, 793.

1046 See Emmanuel Gaillard/John Savage (eds.), Fouchard Gaillard Goldman On International Commercial Arbitration (fn 1045), 843; Marc Blessing, Swiss Tradition and Legal Culture, (fn 1022), 61.

1047 Article 178 CPIL.

1048 Article 186 CPIL.

1049 Article 177 CPIL.

1050 Articles 182 and 187 CPIL.

1051 Article 183 CPIL.

1052 Article 184 CPIL.

1053 Article 179 CPIL.

1054 Article 180 CPIL.

restrictive statutory grounds[1055] and may altogether be waived if neither party is domiciled in Switzerland.[1056]

Swiss international arbitration law has inspired other jurisdictions, with some provisions becoming successful **legal transplants**.[1057] The impact of Switzerland on international arbitration can also be established from an institutional perspective. As an example, one may mention the Swiss Chambers' Court of Arbitration and Mediation (SCCAM)[1058], founded by the Swiss Chambers of Commerce.[1059] Through its seven secretariats, the SCCAM administers and monitors international arbitration proceedings[1060] under the Swiss Rules of International Arbitration[1061]. Other noteworthy arbitral bodies based in Switzerland are the Court of Arbitration for Sports (CAS) and the Arbitration Centre of the World Intellectual Property Organization (WIPO). Finally, while not an arbitral institution itself, the Swiss Arbitration Association (ASA) may be named, which successfully promotes the development of arbitration law and practice far beyond the borders of Switzerland. Although other countries have undertaken great efforts to promote themselves as places of arbitration and their law as appropriate *lex causae* and *lex arbitri*,[1062] Switzerland still claims a predominant position in international arbitration.[1063] Besides its favorable economic implications, this first and foremostly provides an invaluable gateway for Swiss legal thinking to be articulated and promulgated on an international stage.

IV. Investment law

As a consequence of the diminutive size of Switzerland's domestic market, the competitiveness of Swiss companies and, thus, the prosperity of the Swiss

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1055 Article 190 CPIL; see with regard to the notions of jurisdiction and ordre public supra, F. V. 4. d.

1056 Article 192 CPIL.

1057 See Emmanuel Gaillard/John Savage (eds.), Fouchard Gaillard Goldman On international commercial arbitration (fn. 1045), 77, 238; with regard to the notion of legal transplant supra, D. IV. 4.

1058 For a general overview see Pascale Gola/Claudia Götz Staehelin/Karin Graf (eds.), Institutional Arbitration: Tasks and Powers of different Arbitration Institutions, Zurich 2009, 235 ff.

1059 The Swiss Chambers of Commerce consist of the Chambers of Commerce of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich.

1060 Case statistics are available on the SCCAM website at <https://www.swissarbitration.org/sa/en/>.

1061 See Tobias Zuberbühler/Christoph Müller/Philipp Habegger (eds.), Swiss Rules of International Arbitration: Commentary, Zurich 2005.

1062 See, for example, the brochure issued by the Federal Chamber of German civil notaries, the German Bar Association, the German Notaries' Association, the German Federal Bar, the Association of German Chambers of Industry and Commerce, and the German Judges Association «Law – Made in Germany», 2nd edition, 2012, <http://www.lawmadeingermany.de/Law-Made_in_Germany.pdf> visited 10 July 2012; Siegfried H. Elsing, Porcedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds, SchiedsVZ 2011, 114 ff.

1063 See Marc Blessing, Swiss Tradition and Legal Culture, (fn 1022), 62.

economy at large is heavily dependent on the possibility of investments in foreign markets.[1064] In 2010, **foreign direct investment** (FDI) by Swiss companies amounted to CHF 67.6 billion with an outward FDI stock of CHF 877.7 billion.[1065] This makes Switzerland the seventh largest direct investor in the world behind the US, the UK, France, Germany, the Netherlands and Luxembourg.[1066] Conversely, foreign investment in Switzerland is an important source of capital for the Swiss economy which in 2010 attracted inward direct investments of CHF 21.3 billion with an inward FDI stock of CHF 525.5 billion.[1067]

It was mentioned above that in order to protect companies from typical risks involved in foreign investment such as unlawful expropriation or discriminatory treatment, to name but the most prominent, the availability of legal safeguards has moved high up on the political agenda of many states. This has led to a considerable proliferation of **bilateral investment treaties** (BITs).[1068] In the absence of a comprehensive multilateral agreement on the protection of foreign investments[1069] and with customary international law relating to the treatment of aliens only providing for minimum rules, BITs constitute the main legal framework.[1070] As one of the most active nations, Switzerland has concluded a tightly knit **web of BITs** which by May 2011 totalled 118[1071], only marginally short of Germany (136) and China (127).[1072] After the Germany-Pakistan BIT in 1959, which is commonly regarded as the first agreement of its kind, Switzerland was the second state to undertake the creation of a BIT network with

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1064 See Botschaft betreffend die Abkommen über die Förderung und den gegenseitigen Schutz von Investitionen mit Serbien und Montenegro, Guyana, Aserbaidschan, Saudi-Arabien und Kolumbien of 22 September 2006, BBl 2006 8473.

1065 See Swiss National Bank (ed.), Swiss National Bank Direct Investment 2010, Zurich/Berne 2011, 4, <http://www.snb.ch/en> visited 3 July 2012.

1066 See International Monetary Fund, Coordinated Direct Investment Survey (CDIS), <http://cdis.imf.org/> visited 3 July 2012.

1067 See Swiss National Bank (ed.), Swiss National Bank Direct Investment 2010 (fn 1065), 4.

1068 See supra, D. III. 1. a; further Muthucumaraswamy Sornarajah, The International Law on Foreign Investment, Cambridge 2010, 172. On the reasons underlying the conclusion of BITs, see Thomas Pollan, Legal Framework for the Admission of FDI, Utrecht 2006, 73 ff.

1069 However, various investment-related provisions are incorporated into other multilateral instruments such as the OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations, the WTO Agreements (in particular GATS, TRIMs, TRIPs, GPA and ASCM) and investment chapters of FTAs. See Ivo Kaufmann, Investitionsschutzabkommen – aktueller denn je, Die Volkswirtschaft 2006, 57; OECD Working Papers on International Investment, Relationships between International Investment Agreements, Number 2004/1, 4; Kenneth J. Vandevelde, Bilateral Investment Treaties; History, Policy, and Interpretation, Oxford 2010, 67 ff.

1070 Rudolf Dolzer/Margrete Stevens, Bilateral Investment Treaties, The Hague 1995, 1 ff.; Michael Schmid, Swiss Investment Protection Agreements: Most-Favored-Nation Treatment and Umbrella Clauses, Zurich 2007, 6 ff.

1071 A continuously updated list of Swiss BITs currently in force is available at: <http://www.seco.admin.ch> visited 3 July 2012.

1072 United Nations (ed.), UNCTAD World Investment Report 2011 – Non-Equity Modes of International Production and Development, New York 2011, Annex Table III.1., 213–215, <http://www.unctad.org> visited 3 July 2012.

the conclusion of the Switzerland-Tunisia BIT in 1961.[1073] As a result of its long-standing and extensive treaty practice, Switzerland, while originally influenced by Germany,[1074] has provided an important **impetus** to the emergence of international investment law and profoundly shaped its further development.[1075] In particular, the Swiss standard clauses for BITs,[1076] frequently cited in academic literature, are often reflective of a certain state practice[1077] or even the prevailing *opinio iuris* and as such have inspired various Model BITs of other states. It is fair to say that Switzerland has established itself as a main contributor to the promotion and protection of foreign investment.

V. The role of humanitarian international law

Switzerland is one of the most important contributors to the development of humanitarian international law. It all started with the foundation of the International Committee of the Red Cross (ICRC) in 1864 in Geneva. The emblem of the Red Cross is the reversed shape and colors of the Swiss flag. Further details are not important in the given context.[1078]

This is an accomplishment which speaks for itself. It is, as such, not diminished by the fact that there is another side to the medal: Switzerland was only able to stick to its policy of **splendid isolation** in international and European

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1073 Andrew Paul Newcombe/Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment, The Netherlands 2009, 42. For a list of the first 40 BITs, see Beth A. Simmons/Frank Dobbin/Geoffrey Garrett (eds.), The Global Diffusion of Markets and Democracy, Cambridge 2007, 225.

1074 Albrecht Weber, Investment Risks and International Law, in: Thomas Oppermann/Ernst-Ulrich Petersmann (eds.), Reforming the international economic order: German legal comments, Tübinger Schriften zum internationalen und europäischen Recht, Vol. 1, Berlin 1987, 37.

1075 Jean-Christophe Liebeskind, One-Hundred-Two Swiss Bilateral Investment Treaties: An Overview of Investor-Host State Dispute Settlement Clauses, 19 ASA Special Series 81 (2002), 123.

1076 For an overview of Swiss standard clauses see Jean-Christophe Liebeskind, The Legal Framework of Swiss International Trade and Investments – Part I: Promotion, The Journal of World Investment & Trade (JWIT) 2006, 337. It must be noted that because each BIT is adapted to the particular needs of the signatories, there is only limited uniformity.

1077 For example with regard to the placement of an umbrella clause, see OECD Working Papers on International Investment, No. 2006/3, Interpretation of the Umbrella Clause in Investment Agreements, 10, <http://www.oecd.org/dataoecd/3/20/37579220.pdf> visited 10 July 2012.

1078 See Hans Haug, Die Schweiz, das humanitäre Kriegsvölkerrecht und die Konventionen über Menschenrechte, in: Jörg Paul Müller (ed.), Recht als Prozess und Gefüge, Festschrift für Hans Huber zum 80. Geburtstag, Bern 1981, 577–593; Marco Sassòli, La Suisse et le droit international humanitaire – une relation privilégiée?, in Schweizerisches Jahrbuch für internationales Recht, Jubiläumsband 1989, 47–71; Hans-Peter Gasser, Humanitäres Völkerrecht: Probleme – Perspektiven, in: Schweizerisches Jahrbuch für Politische Wissenschaft: Aussenpolitik, Vol. 28, Berne 1988, 209–220; Daniel Thürer, Humanität und Neutralität – zum politischen und völkerrechtlichen Spannungsverhältnis zweier Grundprinzipien der schweizerischen Aussenpolitik, in: Yvo Hangartner und Stefan Trechsel (eds.), Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug, Berne/Stuttgart 1986, 279–308.

(economic) law matters because it took a very active, even world leading role in humanitarian international law. This became particularly obvious after World War II when Switzerland was not invited to participate in the founding conference of the United Nations. In order to improve its international prestige, the country had to resort to its well proven foreign policy principles by actively promoting the development of humanitarian international law through the financing of the ICRC and the setting up of several international conferences. During the Cold War, Switzerland was able to successfully sell the idea that its foreign policy was driven by three goals: neutrality, solidarity and universality.[1079]

All in all, Switzerland's one-sided approach to treaties has obviously been fostered and to a certain extent also camouflaged by the commitment to the development of international humanitarian law. The International Committee of the Red Cross (ICRC) and the Geneva Conventions laid down the standards, the humanitarian treatment of victims of war constituting the most important element. This was all the easier since the commitment to solidifying and expanding humanitarian law did **not affect Swiss legislation**.[1080]

VI. Direct democracy as an export hit?

1. General

In any democracy, the people are the sovereign, but in a direct democracy, the people not only have the right to elect their representatives who then enact the laws. They are actively involved in legislation as well as in the approval of international treaties and in the election of judges. The Federal Council tends to make reference to the fact that Switzerland is a direct democracy in several ways, be it that the argument is used as an excuse that the country cannot accept certain treaty obligations or that others are being lectured about the **alleged superiority** of the Swiss constitutional system. When Switzerland joined the United Nations in 2002, the government proudly pointed out that it was the first country whose UN membership had been determined by the people.[1081] It thereby obviously aimed at **camouflaging** the fact that Switzerland had been an extreme latecomer.

1079 Helen Keller, Rezeption des Völkerrechts (fn 380), 297 f.

1080 See Konrad Bünzli, Der Beitrag der Schweiz zum Zustandekommen universeller Kodifikationen des Völkerrechts, Diss. Zurich 1984, 310.

1081 See the information brochure of the Federal Department of Defence, Civil Protection and Sports in cooperation the Federal Department of Foreign Affairs «Die Neutralität der Schweiz», 4th ed., Berne 2004, 9.

2. *Lecturing the European Union?*

Some Swiss politicians do everything to hold up the mirror of direct democracy to the representatives of the European Union. To give an example, when former Foreign Minister MICHELINE CALMY-REY delivered her speech on the occasion of the 50th anniversary of the Swiss Mission in Brussels on 17 November 2010, she contrasted the Swiss model – which in her view is based on direct democracy and bilateralism – with the European model. Even though she did not elaborate on what the European model is in her view, it became clear to all those listening that it came off badly.[1082]

Publications on the so-called democracy deficit of the European Union are legion. When Swiss politicians and academics criticize this deficit and offer their own system as an alternative, they should be aware of the following:[1083] (1) The Member States are the masters of the treaties, but these Member States are all constitutional democracies. In many of them, the **rule of law** reaches further than in Switzerland. A country must not be a direct democracy in order to be a democracy. (2) The EU is characterized by a democracy deficit if compared with a democratic state like Germany, the U.S. or Switzerland. Its main defect lies in the fact that competences of the European Parliament are too small. In that respect, Switzerland can be a role model, but so can other democratic nation states. (3) It may well be that Switzerland's trademark, direct democracy, will also be of a certain relevance for the further shaping of the EU's model of governance. In fact, the Lisbon Treaty has introduced **elements** of direct democracy. One of the major steps forward in the Lisbon Treaty is the European Citizen's Initiative (ECI).[1084] But it is clear that a Union of the size and with the ambitions of the EU will never be able to function with the mechanisms of the small state Switzerland. There cannot be any doubt that the Union would not stand where it stands now had it been based on the same or a similar governance model as Switzerland. In other words, the restriction of democracy has been the price for the fast progress of integration. Still, it cannot be denied that politically, the direct democracy in Switzerland remains a thorn in the side of the EU. The sheer fact that popular votes take place on a regular basis in Switzerland on all levels of the state, i.e. federal, cantonal and communal, reminds EU citizens of the lack of such rights.

1082 <http://www.swissinfo.ch/fre/politique_suisse/La_Suisse_veut_exister_sur_l_ecran_radar_des_Europeens.html?cid=28812256> visited 14 March 2012.

1083 See for the following also WALTER R. SCHLUEP, Über die Verantwortung schweizerischer Boten (fn 12), 98 ff.

1084 See Articles 11(4) and 24(1) TFEU as well as Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the citizens' initiative (O.J. L 65/1 of 11 March 2011).

3. *Export of direct democracy to other nation states?*

Another question is whether direct democracy may be an attractive model for other European countries. It seems that there is an increasing respective interest in particular in Germany and Austria.[1085] However, the Swiss direct democracy is not free from problems. As far as domestic politics are concerned, **women** have been denied the right to vote for generations, and this based on arguments that were hard to beat in terms of simplemindedness.[1086] Some of the recent popular votes, e.g. the ones on the ban of the construction of minarets and on the deportation of criminal foreigners caused considerable frowns in foreign countries and in the European Union.[1087] It seems, however, that such verdicts are limited to **social issues** such as the wide-spread fear that the country could be flooded with immigrants. Much would be gained if legislation on party and campaign financing would be introduced.[1088]

In **economic law matters**, the people have in a high number of cases followed the solution approved by Parliament.[1089] To give an example, the recent rejection of an initiative to increase employees' annual minimum entitlement to paid holiday from four to six weeks has been commented on very favorably in the international press.[1090] As to the rest, much depends on how well a project is being explained to the voters. To give a historic example: One of the explanations of the 1882 rejection of the constitutional amendment, which would have given the Confederation the competence to legislate on the protection of inventions in the field of industry and agriculture as well as on the protection of designs and models, was that numerous voters had no direct interest in patent protection and had not at all understood what patents were about.[1091] Whether complex **international treaties** should be subject to popular vote is debatable, in particular because such projects are easy targets for populists. But the biggest fiasco of the more recent past, the rejection of the EEA Agreement, cannot be blamed on the people. It was caused by a misguided policy of the Federal Council.[1092]

1085 See NZZ International Edition of 4 July 2012, 29.

1086 Supra, C.X.1.

1087 See concerning the minaret ban, e.g., <http://www.nytimes.com/2009/11/30/world/europe/30swiss.html>; <http://www.nytimes.com/2009/11/30/world/europe/30swiss.html>, both visited 3 July 2012; concerning the deportation of foreigners convicted of crime <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112801706.html visited 3 July 2012>. – It may be added that up until now, the Swiss political mill has ensured that initiatives whose compatibility with international law is doubtful have not been implemented on a one-to-one scale.

1088 See supra, B. V. 1.

1089 See also supra, B. V. 2.

1090 See, e.g., <http://www.focus.de/politik/deutschland/grosse-ferieninitiative-ist-gescheitert-warum-sich-die-schweizer-gegen-mehr-urlaub-wehren_aid_723185.html> visited 3 July 2012.

1091 Gilles Brugger/Taro Haefeli (fn 225), 54, with reference to BBl 1986 II 521.

1092 Supra, E.VI.2.

H. Conclusions

I. Main characteristics of Swiss economic law

1. Complex system of governance

The Swiss system of governance is characterized by direct democracy, a pronounced federalism, a **weak federal government**, the militia system and a certain political paternalism over the judiciary. There has never been a Hegelian concept of state. In crucial fields of economic law, the Federal Supreme Court tends to rule – considered over time – according to the expectations of the parliamentary majority and the silent majority of the people. Generally speaking, the application of the rule of law shows overtones of politics. The Federal Supreme Court has no competence to review federal statutes (Article 190 FC). **Direct democracy** has helped develop and maintain a conservative fiscal policy and has prevented the emergence of an excessive welfare state. But direct democracy and the «beheading principle» have also led to a system of refined mediocrity in all branches of government. And it has come at a huge price in another field: Women's suffrage on the federal level was only introduced in 1971; men did not want to share their power. This is the main reason why traditional gender roles have been preserved to a greater extent in Switzerland than in other European countries. Nowadays, direct democracy risks to be distorted because of the lack of campaign financing legislation.[1093]

2. Liberal roots

Swiss economic law has historically been based on the ideas of **economic liberalism**. The Constitution guarantees the respective freedoms, in particular the freedom of property and of contract, the freedom of association, and the economic freedom including the freedom of investment. Compared to other European countries, the share of the state in economic activities has remained modest. On the statutory level, the liberal influence is apparent, in particular, in contract law, company law, labor law and IP law. A widespread mercantile attitude has, together with other factors, contributed to Switzerland becoming a preferred location for **arbitration**.[1094]

A specific feature of Swiss economic law is that both the legislature and the Federal Supreme Court tend to stick to the liberal model even when the preconditions of its application do not or no longer exist. The application of liberal law then becomes **dysfunctional**. Examples may be found in contract and corporate law. In the latter, the legislature and the judiciary tend to favor the well-being of the corporation itself over the interests of the shareholders. Furthermore, Parlia-

1093 See concerning the Swiss governance model supra, B.
1094 See supra, G. III.

ment and the Federal Supreme Court have been lagging behind international standards for consumer protection and gender equality law. Corrections were made in the last two decades under the influence of EU law. In labor law, the Swiss situation is characterized by a combination of modern industrial law, liberal contract law and a friendly relationship of the social partners. This has led to good results in the form of high wages and a flexible labor market with a relatively low unemployment rate.[1095]

3. Corporatism, cartelist tradition and federalism

Liberalism, however, has always been coupled with corporatism. Until the 1990's, Switzerland was a classic cartel country. Effective **competition legislation** was only introduced in 1995/2003, obviously under European and American influence. For decades, major Swiss firms had been targeted by the respective competition authorities and courts under the principle of extraterritorial application of the respective competition law rules. But competition law enforcement in Switzerland has remained controversial, particularly because five out of twelve members of the ComCo are lobbyists. The Federal Supreme Court, for its part, has weakened the CartA by disregarding its European roots and giving it an autonomous interpretation which is hardly competition-friendly.[1096]

The establishment of a Swiss **single market** has been impeded by a federal system which gives broad competences to the cantons. A Single Market Act was only created in 1995 under European influence. After only ten years, the act had to be amended because the Federal Supreme Court had tended to give priority to cantonal sovereignty over free movement of production factors. The Technical Barriers to Trade Act has also been construed in a conservative manner. Both acts have not been interpreted by the Federal Supreme Court in line with the intention of the legislature.[1097]

4. Negotiation as the preferred mechanism of domestic law shaping and law enforcement

Leonhard Neidhart has aptly described the Swiss political system as a «negotiated democracy». It is not only the setting of legal norms which is subject to broad and lengthy negotiation. Negotiation and friendly settlement are also the preferred mechanisms of dispute resolution. There are historic reasons for this. One may say, as a matter of principle, that negotiation and arbitration go before litigation (court adjudication). The aim is to create **legal peace** rather than to let one party win and the other party lose. It is probably no coincidence

1095 See with regard to the traditional cornerstones of Swiss economic law supra, C.
1096 Supra, F. V. 3. a. (3).
1097 Supra, F. V. 3. a. (1), (2).

that the gold medal which is presented by the Federal Supreme Court to its departing members and to chief justices of foreign supreme courts bears the words «lex», «justitia» and «pax». As far as litigation is concerned, access to justice has been limited by **restrictive rules** concerning *locus standi* for consumers and shareholders. When the consumer action for injunction was included in the 1943 Unfair Competition Act, *locus standi* was made dependent on the plaintiff proving that he had actually suffered damage. In the respective parliamentary deliberations the fear had been expressed that consumer actions would «contaminate the country with court proceedings».[1098]

All in all, the degree of juridification and judicialization of human relations has remained relatively low. To provide an example, Swiss financial market actors have always sought to avoid federal regulation by opting for self-regulatory mechanisms. Naturally, juridification and judicialization are also common in Switzerland, but they tend to unfold with a certain time lag. One of the few fields in which Switzerland has acted as a pioneer of regulation is the **law of sureties**. In 1941, the conclusion of suretyship contracts was restricted since particularly in rural areas, it was common to make respective pledges lightly. Suretyship contracts were even concluded in pubs, a custom which led to financial difficulties for families.[1099]

II. International and European law entering the Swiss legal order

There are four major entrance doors for international and European law into the Swiss legal order: Unilateral action of a foreign power; treaties; import by the legislature; import by the courts through judicial dialogue.

1. Unilateral action

As a small country with distinctive economic and legal features such as the cartelist tradition or the strong financial sector which since the 1930s has been based on strict bank secrecy rules, Switzerland has been and currently is being a popular target for unilateral action by foreign and international powers. Swiss firms were involved in **antitrust proceedings** before American and European authorities and courts, and Swiss managers were the first Europeans to be sent to U.S. prison for antitrust infringements. In early cases, the federal government intervened through diplomatic channels, but in *Empagran* it did not even submit an amicus curiae brief.[1100]

1098 See Bruno von Büren, Kommentar zum Bundesgesetz über den unlauteren Wettbewerb, Zurich 1945, 183; Carl Baudenbacher, Probleme der Rechtsverfolgung im schweizerischen Recht des unlauteren Wettbewerbs, GRUR Int. 1980, 344 ff., 347.

1099 See Botschaft des Bundesrates an die Bundesversammlung zur Revision des Bürgschaftsrechts of 20 December 1939, BBl 1939, 841, 844 ff.

1100 Supra, F. II.

In the last decades, the **U.S.** has targeted Switzerland and Swiss banks and has ultimately forced Switzerland to conclude certain agreements as well as to enact specific financial market legislation. Recently, the **OECD** and the **G20** have taken a similar approach. The **EU** has in the past refrained from embarking upon this path, but is reconsidering its approach in the context of the conflict over certain cantonal tax regimes.[1101]

2. *Treaties*

a. *General*

In the 19th century, Switzerland not only concluded a network of bilateral trade and residence treaties with the most important industrialized nations. It also was a founding member of the multilateral IP law treaties such as the Paris and the Berne Convention. In the first half of the 20th century, the country was among the founders of the Geneva Conventions establishing a Uniform Law for Bills of Exchange and Promissory Notes and on Cheques.

After World War II, Swiss foreign policy was driven by the absolute will to preserve neutrality and state sovereignty. The country was only prepared to enter treaty obligations under narrowly defined circumstances and with the means of classical **public international law**. Treaties were not supposed to affect neutrality and they had to be of inter-governmental character. In order to preserve its state sovereignty, Switzerland did not accept supranational decision-making structures – which meant, *inter alia*, that it was opposed to centralized surveillance and a common judicial mechanism – and reserved its consent to amendments. Moreover, treaties had to be redeemable. One may speak of a **common denominator**. This meant, in particular, that Switzerland was and is unable to join the supranational **EU** with its institutions. The fact that the application for EU membership of May 1992 – which came about under rather adventurous circumstances – has never been withdrawn, is not only absurd. It also inhibits any meaningful political discussion on the country's role in European integration because of the resulting political fears. An attempt to become a founding member of the quasi-supranational **European Economic Area** failed due to discord in the Federal Council.

On the other hand, Switzerland has, after overcoming its post-World War II hedgehog-position, become a member of the EFTA, OECD, GATT and later the WTO as well as of the Council of Europe and the European Human Rights Convention, the EPC, the Lugano Convention and the UN. In 1972, it entered into a Free Trade Agreement with the EEC, and after the EEA Agreement was rejected in a referendum, it concluded numerous bilateral sectoral agreements with the EU. One may say that the traditional post-World War II common de-

1101 See <http://www.tagesanzeiger.ch/wirtschaft/konjunktur/Die-Kantone-wehren-sich-gegen-ein-Steuerabkommen-mit-der-EU/story/10797645> visited 18 July 2012; also infra, H. II. 3. c.

nominator is **crumbling**. First, it may be deduced from Switzerland's accession to the UN in 2002 that neutrality is understood in a more flexible way today than some decades ago. Second, organizations that had been thought to be inter-governmental such as OECD have developed certain quasi-supranational features. That Switzerland may be forced to agree to amendments against its will has become clear in the context of the fight over the information exchange provision in the respective model tax convention (Article 26). It may also be argued that the case law of the ECtHR is at least factually supranational. Still, the ECtHR is not a foreign court because Switzerland has the right to nominate a judge.

The bilateral agreements concluded with the EU have led to a creeping **loss of sovereignty**. As far as substance is concerned, the agreements are largely based on the relevant EU *acquis*. The FMPA, the most important bilateral treaty, does not give Switzerland any co-determination competence when new EU *acquis* is enacted. Under the ATA, Switzerland has to a large extent transferred its sovereignty to organs of the EU, such as the European Commission and the ECJ. The Schengen and Dublin Association Agreements contain provisions which give Switzerland the right to participate in the shaping of new *acquis*. However, both agreements are deemed to be terminated if Switzerland refuses to take over a new act and no solution can be found in the Joint Committee.

Under both the FMPA and the ATA, the Federal Supreme Court is supposed to follow relevant ECJ case law rendered before the date of signature, i.e. 21 June 1999. The Court has adhered to this obligation. New ECJ case law is taken into account, meaning that in the majority of cases it is also adopted. There is, however, no guarantee for this, and the Federal Supreme Court does not have the right to request a preliminary ruling from the ECJ. Furthermore, there is no surveillance authority. In a major case concerning the question of whether helplessness allowance must be exported, a **judicial conflict** exists between the Federal Supreme Court on the one side and the ECJ and the EFTA Court on the other.[1102] At the end of the day, there is a pronounced **lack of legal certainty**. But there is also a transfer of state sovereignty. The government has a tendency of glossing over this. In the ongoing conflict over certain cantonal tax regimes, the government tries to conceal the truth by claiming that it refuses to conduct negotiations, but is prepared to enter a so-called «tax dialogue». The Federal Supreme Court for its part has created the appearance that it is free to deviate from ECJ case law when interpreting rules of the Lugano Convention by amply discussing the views of **Swiss legal authors**. This stands in a striking contrast to the sober approach of the Norwegian Høyesterett vis-à-vis the Brussels-Lugano regime. The Federal Supreme Court also refers to Swiss academic

1102 Supra, E. VI. 5. bb.

writers when preparing the ground for the taking over of ECJ case law rendered after the date of signature of the FMPA.

b. Strategic considerations

Switzerland's main motive for the conclusion of international treaties with economic law relevance is the wish to secure for its industry **discrimination-free access** to the markets of its partners. The main examples are the FTA and the other bilateral sectoral agreements with the EU, the bilateral FTA's concluded with many countries around the world mostly in the framework of EFTA, the OECD and the WTO agreements, the bilateral double taxation agreements and the bilateral investment treaties. Occasionally, **reputation** may also be a reason for the conclusion of an international treaty. This was, for example, the case when Switzerland joined the ECHR in 1974. Membership in the ECHR also allowed the Swiss to have the feeling of being part of Europe.

History shows, moreover, that in certain cases an international treaty was concluded or an organization joined because Switzerland was – due to internal or external factors – prevented from acceding to **another agreement**. To give some examples, the country for decades was unable to become a UN Member State, in particular because of its narrow definition of neutrality. That did not hinder the country to join the most important sub-organizations of the UN with economic law relevance. The decision to become a provisional member of GATT in 1958 was not least a consequence of the breakdown of the negotiations concerning the establishment of a large European free trade zone. The Council of Europe was joined in 1963 after the association negotiations with the EEC had come to an end. Both, the accession to the Council of Europe in 1963 and to the GATT in 1966 were, *inter alia*, a consequence of the transformation of the OEEC to the OECD. After the rejection of the EEA Agreement in the referendum of 6 December 1992, the Federal Council tried to provide the Swiss industry with access to the EU single market by negotiating and concluding bilateral sectoral agreements.

When negotiating international treaties, the federal government must not only bear in mind that it needs the consent of Parliament, but eventually also that of the people and the cantons. In some cases, this consent was only obtained because of the broad scope of the treaty which allowed the government to argue that certain bitter pills had to be swallowed because this was compensated by advantages in other fields. Successful **package deals** were made in the framework of the WTO Agreements and the first package of post-EEA bilaterals. For a long time, Switzerland had been keen on concluding agreements providing for the free movement of goods and capital and, to a certain extent, of services, but not for the **free movement of persons**. Moreover, free movement of goods was not to be extended to **agricultural products**. However, after the end of the Cold War, these policy goals had to be revised. When Switzerland sought to conclude bilateral sectoral agreements with the EU after the rejection of the EEA Agree-

ment, it had to give up its policy of regulating access to its labor market by way of fixing quotas for EU foreigners. This was the only way to conclude other bilateral agreements guaranteeing Swiss industry access to the EU single market. And upon becoming a WTO member, the country had to accept a liberalization of trade in agricultural goods which was said to be justified by the benefits WTO membership would bring for its goods manufacturers and service providers. These two examples are evidence that Switzerland may be prepared to give up restrictions on free movement of production factors if the benefits in other areas outweigh the disadvantages. However, they also show that the Swiss sometimes must be forced to their luck.

c. Tactics of negotiation

Swiss diplomats are notoriously famous for their negotiating skills. A favored method is to **slow down** the proceedings. Swiss negotiators are used to a slow tempo from their domestic politics. Federalism and popular rights play a role in this. This stands in contrast to the was the EU works. It took Swiss negotiators 16 years to conclude an insurance agreement with the EEC. Also today, one does not have the impression as if Switzerland were overly determined to make progress in the talks with the EU concerning the institutionalization of the relations between the two actors. In the absence of foreign pressure, Swiss negotiators tend to have plenty of time. The goal in many cases is to maintain **regulatory advantages** as long as possible. The only time in the history of European integration that Switzerland felt prompted to agree to a treaty it did not really support was the **EEA negotiations**. If those had been bilateral negotiations, Switzerland would probably have pulled out once it had become clear that the old Swiss dream of co-deciding in EU matters would not materialize. It goes without saying that Switzerland can be reproached for not really contributing to the construction of the EU. The Swiss tend to wait and see. But once the country has acceded to an international or European organization, they tend to play a rather active role. Examples are the ECHR, the Lugano Convention and GATT/WTO. It must also not be overlooked that Switzerland is contributing to the development of foreign, international and European law because certain of its achievements have been taken over by others, for example in the fields of arbitration and investment law.

If, however, a foreign power or an international/supranational organization uses economic or political force, the Swiss political and legal system may find ways and means to act **swiftly and decisively**, both when it comes to entering an international treaty and to adapting domestic legislation. Historically, the enactment of meaningful patent legislation upon pressure from Germany in 1907 may be mentioned. Recent examples concern the softening of the bank secrecy rules and the conclusion of the treaty with the U.S. regarding the handing over of bank client data. After having been put on a **grey list** of so-called **tax havens** by the OECD in the spring of 2009 – a step which was endorsed by the G20

London summit of 2 April 2009 – Switzerland decided to renegotiate its double taxation agreements with the most important countries, taking into account Article 26 of the OECD Model Tax Convention on information exchange. When the convention was updated in July 2008, Switzerland had (together with a few other countries) entered reservations to Article 26. However, in March 2009 it notified the OECD that it was withdrawing its reservations. On 25 September 2009, the then Head of the Department of Finance – who as late as August 2008 had called the Swiss bank secrecy rules «non-negotiable» – announced that he was proud that his country was off the international grey list of tax havens.[1103]

On 19 August 2009, Switzerland concluded a **treaty with the U.S.** under which it pledged to hand over the names of 4 450 American clients of the United Bank of Switzerland (UBS) to the American Internal Revenue Service. On 21 January 2010, the Federal Administrative Court upheld a complaint against the treaty which claimed that it lacked an adequate legal basis.[1104] After some difficulties which were motivated by internal Swiss politics, Parliament remedied the situation by approving a revised version of the treaty.[1105]

A favorite Swiss negotiation tactic is the use of the **referendum threat**. Partners are told that if Switzerland does not get its way with regard to a certain question or if it has to accept an unpopular solution, the treaty may well fail in a referendum. Such announcements seem, however, to have lost their persuasive power. It did not go unnoticed in Brussels, for example, that if a project has the support of the Federal Council, the cantons, the leading political parties and the most important associations, it will in all probability succeed in a referendum. As mentioned several times, the EEA project failed because the government did not have a unanimous position and because it made a huge tactical mistake. As to the rest, a large part of the Swiss elites supported the EEA only halfheartedly. Also, the EU has drawn quite a drastic consequence from the rejection of the EEA by insisting on the introduction of a **guillotine clause** in the first package of the bilateral sectoral agreements. This provision may well have prevented a referendum which was launched against the extension of the FMPA to Bulgaria and Romania from succeeding.

One must furthermore not overlook that others, too, have mechanisms at their disposal which, in a similar way as a referendum threat, restrict their freedom to make concessions. When arguing that it cannot agree to certain Swiss claims in the negotiations concerning the restriction of air noise at Zurich airport, the German government refers to **citizen movements** in the South German

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1103 <http://www.swissinfo.ch/eng/politics/foreign_affairs/Switzerland%20officially%20off%20OECD%20tax%20grey%20list.html?cid=4302> visited 15 July 2012.

1104 Division I, A-7789/2009.

1105 <http://www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2010/2010-06-17.html> visited 15 July 2012.

borderland. The EU, for its part, when negotiating an agreement with one or several third countries or international organizations, must take into account that any Member State, the European Parliament, the Council or the Commission may obtain the **opinion of the ECJ** as to whether the envisaged agreement is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement in question may not enter into force unless it is amended or the Treaties are revised (Article 218[11] TFEU). In the ongoing talks between Switzerland and the EU on a possible institutionalization of the bilateral agreements, this should be kept in mind. In view of the history of the EEA negotiations, but also of the failed attempt to establish a European and EU patent court, one will have to assume that whenever an agreement with a non-Member State foresees the establishment of a **new judicial mechanism**, the European Commission will be prompted to ask the ECJ for its opinion.

d. Status of international law in the Swiss legal order

Once a treaty has been concluded, the question arises whether its provisions may be relied on in domestic courts. According to its self-understanding, Switzerland is a monist country. However, monism suffered two serious setbacks in the 1970's: In *Schubert*, the Federal Supreme Court held that Swiss statutory law takes **precedence** over an earlier international treaty if the legislature has been aware of the conflict with international law and has eventually approved it.[1106] In *Omo* (as previously in *Stanley Adams*), the Court ruled that the 1972 FTA Switzerland-EEC was a pure trade agreement aiming only at establishing a free trade zone, but not containing any obligation to a mutual approximation of the EEC and Swiss norms and not providing for a court like the ECJ which could decide in a binding way on the direct applicability of individual norms. Provisions of the FTA could therefore **not be invoked** by citizens and economic operators before Swiss courts. The Court moreover held that the case law of the ECJ concerning analogous provisions of EEC law could not be transposed to the FTA.[1107] *Omo* and *Stanley Adams* came unexpectedly, in particular in light of the Federal Supreme Court's traditional liberal approach to direct effect of international law. This case law rendered the FTA partly ineffective. It had and continues to have negative consequences for Switzerland's relationship with the EU, in particular because *Omo* was never formally overruled. The transposition of the *Polydor* case law to the FMPA by the ECJ in *Grimme* and in subsequent cases is the latest response.[1108] Most Swiss observers hardly see these correlations when criticizing the ECJ for this.

The Federal Supreme Court's jurisprudence concerning the FTA stands in stark contrast to the friendly approach taken *vis-à-vis* the **EHRC** and the

1106 Supra, E. II. 2.
1107 Supra, E. V. 7.
1108 Supra, E. VI. 5. b. bb.

ECtHR. The provisions of the Convention produce direct effect in the Swiss legal order, and the judgments of the ECtHR have so far been scrupulously followed. The Court may even be tempted to use the ECHR in order to free itself from the straightjacket of Article 190 FC. As noted, many provisions of the ECHR are of primordial **economic law relevance**.[1109]

e. Dispute resolution

The Swiss model of state and of governance in general has an impact on the country's attitude towards international and European law. There is a **predilection for negotiations** not only when it comes to adopting international or European law, but also with regard to dispute resolution. Switzerland prefers diplomatic means and arbitration over adjudication by an international court, meaning that here, too, political mechanisms are preferred over legal solutions. This is particularly visible in the **relationship with the EU**.[1110] According to Swiss understanding, conflicts should be resolved by joint committees meeting behind closed doors which decide according to the consensus principle. As compared to court proceedings, such mechanisms lead to delay, there is no duty to decide and there is no transparency nor are there any guarantees of procedure. Access to these committees is restricted to government officials and representatives of associations.

On the other hand, Switzerland has accepted the jurisdiction of the **ECtHR** in 1974. However, few people would have imagined at the time that this Court would become as powerful as it has. Another example of an international court, the **WTO judicial mechanism**, has not gained a comparable degree of public awareness. This could, however, change if another WTO Member, for instance the EU, were to bring cases against Switzerland.

3. Import/export of foreign and international law

Foreign and international law may finally enter the Swiss legal order by way of export by a foreign country or organization or by voluntary import. There are no clear boundaries between the two mechanisms. The main exporter of economic law after World War II was the U.S., the most influential economic law concepts being antitrust, corporate governance, compliance, bookkeeping and accounting principles, modern types of contract law, strict liability, and the framework conditions for public, private and criminal law enforcement. Today, the EU is the most important idea-giver, but one must not overlook that EU law, too, has been majorly influenced by American law. Foreign ideas may be imported by the **legislature**, by **administrative authorities** such as the ComCo

1109 Supra, E. V. 9.

1110 See with regard to arbitration also DIETER FREIBURGHAUS, Königsweg oder Sackgasse? (fn.463), 107.

or the **courts**. The Federal Supreme Court has always been an active participant in the international judicial dialogue.

If a new legal concept has been **forced** on Switzerland, it may well be that the Swiss legislature drafts implementing legislation in a way which limits the concept's practical impact. The courts may stick to this narrow approach. A classic example of this is the law criminalizing **insider trading** which has generally been perceived as «Lex Americana». The General Prosecutor of the Confederation, MICHAEL LAUBER, stated in a recent interview with the daily newspaper *Tagesanzeiger* that it is almost impossible under the current law to supply proof of insider trading in criminal cases and that more effective legislation is desirable.[1111]

A seminal enterprise is the Federal Council's **autonomous implementation of EU law program** which was launched in 1988 and codified in Article 141 of the Parliament Act in 2002. Autonomous implementation constitutes the second pillar of bilateralism. It aims above all at providing the Swiss industry with the same legal framework it faces in the EU. As long as it continues to follow the bilateral path, Switzerland has, as a matter of principle, little choice when it comes to the question of whether EU law should be taken over or not. However, two souls are dwelling in the legislature's breast. In order to maintain **regulatory advantages**, it may occur that Switzerland decides not to adopt certain parts of EU law or to do so with delay. Examples can be found in the law of unfair general conditions of trade, consumer protection law, product safety law, company law or maternity protection law. On the other hand, there cannot be the slightest doubt that **important reforms** of Swiss law have only been possible because lawmakers had the European model in their sight. In crucial areas of economic law, in particular in competition law, single market law, the law of general conditions of trade, labor law, equal rights law or the law of maternity protection, Swiss law was far behind the times and progress could only be made under European influence. In their retrospection on the passing of the Gender Equality Act, the parliamentary services stated that since the draft law corresponded to EU law, Switzerland was able to **catch up** with its neighbors.[1112] It may be that the European legislature does not come up with convincing solutions in every case.[1113] The attempt to downgrade EU legislation by calling the Europeanization of Swiss economic law «contamination»[1114] is, however, odd, to say the least.

Swiss legal literature sees the application of autonomously implemented EU law by the courts primarily as a **methodological issue** and thereby as a problem

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1111 http://www.tagesanzeiger.ch/schweiz/standard/Ich-habe-keinen-deutschen-Unterhaendler-getroffen/story/19408847 visited 15 July 2012.

1112 <http://www.parlament.ch/poly/rueckblick/d/retro01/93024.HTM> visited 15 March 2012.

1113 See, e.g., the criticism of the 2005 Unfair Commercial Practices Directive, supra, F. V. 3. a. ee.

1114 HEINRICH HONSELL, 100 Jahre Schweizerisches Obligationenrecht (fn 134), 105.

of the internal separation of powers. The main issues in this discourse are whether Swiss courts are obliged to follow ECJ case law concerning the parallel provisions of EU law, whether they should even take over ECJ case law which has rewritten the parallel provisions of EU law and how Swiss courts should proceed if they face a new legal question which has not been addressed by the ECJ so far. In light of the fact that Switzerland is, through its web of bilateral agreements, part of the European single market, autonomous implementation is, however, rather a problem of **creating and maintaining a level playing field**. The goal of securing a level playing field requires Swiss courts to go as far as possible in interpreting law which has been taken over from the EU in accordance with the latest ECJ practice. But autonomous implementation will always remain a **half-measure** because it is not subject to any surveillance and Swiss courts do not have the right to request a preliminary ruling from the ECJ. In fact, there is **no unité de doctrine** in the Federal Supreme Court when it comes to the interpretation of autonomously implemented EU law. What is more, autonomous implementation equals total surrender as far as state sovereignty is concerned. If the Swiss legislature or the courts decide to deviate from the European model, this does not really lead to state sovereignty being regained. It just creates **legal uncertainty**.

IV. Reverse discrimination or: Justice comes from abroad

Reverse discrimination in international matters arises when – due to a contractual obligation – the citizens and economic operators of a foreign country or organization obtain a **more favorable treatment** in a given jurisdiction than nationals. After a while, the nationals will no longer accept the discrimination and the legislature or the courts will be prompted to change the law so that equal treatment is secured. The history of international treaties is full of respective examples.

As far as Switzerland is concerned, early examples can be found in **IP law**. In 1864, Switzerland in treaties with France granted protection to French works of art and of literature, trademarks and design, while Swiss operators did not enjoy this kind of protection. This discrimination strengthened the efforts to transfer the competence for IP law to the Confederation.[1115] Another early case concerned the admission of foreign, in particular Russian, **women to Swiss universities**. Swiss women then successfully argued that they, too, deserved to be allowed in.[1116]

Reverse discrimination was also a driving force of progress when the **Single Market Act** was adopted in 1995. The dispatch of the Federal Council empha-

1115 See Gilles Brugger/Taro Haefeli, Die Geschichte des Patentrechts nach 1800 (fn 225), 37 ff., 41.

1116 C. X. 2.

sized that under the free movement of goods provisions of the 1972 FTA the Confederation was obliged to grant unrestricted access to foreign products to the whole Swiss market and that this obligation was also binding on the cantons. Inter-cantonal restrictions therefore resulted in a more favorable treatment of foreign products than of domestic ones. The same problems arose with regard to the requirement of equal treatment of foreign and domestic products under the (old) GATT.[1117] The 1995 Single Market Act was amended in 2005, *inter alia*, because on 1 June 2001 the FMPA with the EU entered into force. This created the risk of discrimination of Swiss nationals in the field of the **recognition of vocational qualifications**.[1118]

As mentioned above, discrimination of Swiss operators has prompted the Federal Council to amend Article 8 of the Unfair Competition Act, the norm addressing the use of **unfair general conditions of trade**, in 2011. Swiss business operators offering goods and services in the EU market were obliged to comply with the more stringent rules of the relevant European Directive whereas they could lawfully put Swiss consumers at a disadvantage.[1119]

In a certain sense, the lack of the competence of the Federal Supreme Court to review the **constitutionality of federal statutes** under Article 190 FC could also be mentioned in this context. One could argue that Swiss judges are discriminated against because they don't have this competence unlike their colleagues from the ECtHR. Indeed, the National Council decided, upon a proposal of its Legal Affairs Committee, to delete Article 190 from the Constitution in December 2011. However, in June 2012, the State Council rejected the idea.[1120] It appears as though Parliament will continue to give precedence to political over judicial decision-making in this field.

1117 Botschaft des Bundesrates zu einem Bundesgesetz über den Binnenmarkt (Binnenmarktgesetz, BGBM), BBl 1995 I 1213, 1229 f., 1243 ff.

1118 Botschaft über die Änderung des Binnenmarktgesetzes of 24 November 2004, BBl 2004, 465, 483.

1119 F. V. 3. a. bb.

1120 See, e.g., http://www.nzz.ch/aktuell/schweiz/schweiz-staenderat-nationalrat-verfassungsgerichtsbarkeit-1.17185199 visited 15 July 2012.