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Dealing with International Law and European Law: Overview of the «Swiss Approach»

Am 26./27. April 2012 fand aus Anlass des «30 Jahre-Jubiläums» des Schweizerischen Instituts für Rechtsvergleichung (SIR) in Lausanne eine Internationale Konferenz statt. Das Tagungsthema lautete: «The Impact of Foreign and International Law on National Legal Systems – Comparisons in Legal Development». Entsprechende Rechtsfragen erweisen sich als besonders bedeutsam für einen Kleinstaat wie die Schweiz (nicht zuletzt in Bezug auf die Europäische Union) – es besteht denn auch ein eigentlicher «Swiss Approach». Im Folgenden findet sich der Text, welcher dem Autor als Grundlage für sein Referat gedient hat.

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I. Introduction

[Rz 1] The subject matter of this presentation is extremely important for *Switzerland* as a *small nation* with only about 8 million inhabitants. I will attempt to answer the question: «How is Switzerland dealing with international law and foreign law, respectively, and with European law in particular?» Traditionally, Switzerland has an *excellent reputation* for comparative law¹ and for taking a comparative approach in its legal system.²

[Rz 2] The *legal relevance* of such a comparative approach in Switzerland *cannot be overestimated*. In fact, «looking across the border»,³ and thus learning about legal developments abroad, is an *economic, political and diplomatic necessity* for the well-being of any country. Switzerland was (and still is) successful in this regard for a variety of reasons:⁴ Switzerland's *multilingual background*, the fact that many Swiss lawyers pursue *post-graduate* legal studies abroad, and perhaps

¹ In the following, the terms «*comparative law*» and «*international law*» are used as *synonyms*.

² This is true on both the policymaking and adjudicative front. The Swiss Institute of Comparative Law (SR 425.1), a world-renowned institute established 30 years ago and the Swiss Federal Supreme Court, both located in Lausanne, are largely responsible for this well-earned reputation.

³ Regarding the basis of comparative law, *see, inter alia*, KONRAD ZWIEGERT/HEIN KÖTZ, *Einführung in die Rechtsvergleichung* (3rd edition Tübingen 1996) p. 2; PETER V. KUNZ, *Einführung zur Rechtsvergleichung in der Schweiz*, recht 24 (2006) p. 37; in general: OTTO SANDROCK, *Praktische Rechtsvergleichung – Eine Skizze, verbunden mit dem Versuch einer Systematisierung*, in: *Rechtsvergleichung als zukunftssträchtige Aufgabe* (Münster 2004) p. 31 et seq.

⁴ In general, *see* GERHARD WALTER, *Die Rechtsvergleichung in der Rechtsprechung des Schweizer Bundesgerichts*, recht 22 (2004) p. 92 and KUNZ (footnote 3) p. 44.

even the Swiss population's *general curiosity* regarding foreign cultures are paving the way in support of comparative law and its national influence.⁵ Finally, the teaching and research of comparative law is growing at Swiss universities (e.g. at the University of Bern Law School).⁶

[Rz 3] Over the last few years, Switzerland has come under regular political and diplomatic attacks for (alleged) «*anti-foreigner legislation*» («*ausländerfeindliche Rechtssetzung*»), particularly regarding popular referenda, such as the 2009 referendum which inserted a prohibition in the Federal Constitution regarding the construction of minarets (now Article 72 para. 3). While a popular initiative that gains 100,000 signatures can be brought for a vote on a Constitutional Amendment, and we Swiss vote on a surprising number of these constitutional referenda annually, Swiss «*nativism*» is still relatively rare. In my view, for example, a regulation like the «*Save our State Amendment*», which attempted to ban the use of *Sharia law* or *international law* by courts and which gained 70% of the vote in Oklahoma in 2010 (but which is currently blocked by an injunction by the U.S. 10th Circuit Court of Appeals issued in January 2012),⁷ would be unthinkable in Switzerland.

II. Switzerland and the «Swiss Approach»

A. Legal Transplants

a) Switzerland as a «Legal Exporter»

[Rz 4] Switzerland was a major and influential «*legal exporter*» in the civil law arena in the late 19th and early 20th centuries. At the end of the 19th century, for example, Japan adopted parts of the then cantonally-based Swiss civil law.⁸ Furthermore, the *Swiss Code of Obligations* (CO)⁹ of 1883

⁵ *Education abroad* may influence Swiss students' later legal outlook: WOLFGANG WIEGAND, *Die Rezeption amerikanischen Rechts*, ZBJV 124bis (1988) p. 229 et seq.

⁶ The *University of Bern Law School* has a *long tradition* regarding comparative law (*see* the references in a dispatch of the Federal Council: BBI 1976 I p. 810 footnotes 1/2 and p. 811; in general: EUGEN BUCHER, *Bericht zum Projekt eines gesamtschweizerischen Instituts für Rechtsvergleichung* [Zürich 1965] *passim*); initially, *Bern* was considered as potential location for the Swiss Institute of Comparative Law.

⁷ The actual wording of the amendment read (in part), «This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using *Sharia Law*.»

⁸ For details, *see* NANA OZAWA, *Louis Adolphe Bridel – Ein Schweizer Professor an der juristischen Fakultät der Tokyo Imperial University* (Frankfurt 2010) p. 33 et seq.

⁹ *Swiss Code of Obligations* of 30 March 1911: SR 220.

influenced some parts of the German Civil Code («Bürgerliches Gesetzbuch»: BGB)¹⁰ of 1900. Moreover, the *Swiss Civil Code* (CC)¹¹ of 1907 became an impressive legislative «export success» at the beginning of the 20th century, when in an unparalleled move, Turkey adopted it in 1926.¹² This move created close ties between Switzerland and Turkey in the following decades, which unfortunately, have been weakened over the last few years due to Turkey's recent focus on the European Union, because of its membership aspirations. Swiss civil law may be detected in other jurisdictions as well (e.g. in democratic China at the beginning of the 20th century, still in today's Taiwan, Peru, Italy, and Greece, as well as in many other countries in the Middle East and in Northern Africa which have been influenced by Swiss civil law).¹³

[Rz 5] Swiss legislation is generally liked abroad due to its democratic basis and the simplicity of its wording and structure (an example is Article 1 para. 1 CC, which reads, «Every person has legal capacity»). Therefore, from time to time, the Swiss civil laws are mentioned as possible role model(s)¹⁴ for a harmonized *European Civil Code* («Europäisches Zivilgesetzbuch») which is, indeed, a future goal within the European Union. In my view, however, the creation of a European Civil Code seems unlikely.

b) Switzerland as a «Legal Importer»

[Rz 6] In the role of «legal importer», Switzerland has often made an effort to harmonize its laws with other nations and legal systems. The general preference has been to draw from the law of other civil law countries, particularly with a preference for its neighbour countries (e.g. Germany, France, Italy and Austria)¹⁵ when it comes to foreign legal influences.

[Rz 7] In addition, Switzerland and its legal system, respectively, are strongly influenced by *international organizations* on one side and by *general international developments* on the other side (this is particularly true for economic law).¹⁶

[Rz 8] Since World War II, U.S. economic law has dominated Swiss economic law, hence, an «*Americanization*» took place in Switzerland¹⁷ (as it did in many other countries).¹⁸ At the end of the 20th century, the European Union became more important for Switzerland, thus its legal system nowadays faces an «*Europeanization*» of Swiss legislation¹⁹ as well as of Swiss adjudication²⁰. For the future, in my view, a further «*Internationalization*» is likely – although not merely through U.S. or European Union imports but on a broader, more global basis.²¹

B. The Influence of International Law

[Rz 9] In general, the *major influence of international law* in today's Switzerland is indisputable – for the reasons mentioned above – on the level of enacting laws and applying them either by courts or by governmental agencies. However, when a closer look is taken it becomes clear, in my view, that some important *distinctions* must be made.

[Rz 10] Primarily, Swiss *Federal laws* take comparative law into account, while *cantonal legislation* regularly ignores international law²². In addition, most Swiss courts do not consider comparative law in the interpretation of legislation²³ – the exception being the *Federal Supreme Court* as well as other courts on the Federal level (e.g. the Federal Administrative Court in Bern/St. Gallen)²⁴. Finally, the *governmental agencies* – on all state levels – *generally neglect* the consideration

¹⁰ EUGEN BUCHER, Die Entwicklung des deutschen Schuldrechts im 19. Jahrhundert und die Schweiz, ZEuP (2003) p. 353 et seq. and p. 365 et seq.

¹¹ Swiss Civil Code of 10 December 1907: SR 210.

¹² See, *inter alia*, ERNST E. HIRSCH, Das Schweizerische Zivilgesetzbuch in der Türkei, SJZ 50 (1954) p. 337 et seq.; J. Michael Rainer, Europäisches Privatrecht – Die Rechtsvergleichung (Frankfurt 2002) p. 233 f.; ZWEIFERT/KÖTZ (footnote 3) p. 175 f.

¹³ See, for an overview, EUGEN BUCHER, Das Schweizerische Obligationenrecht – ein Markstein und ein Vorbild, NZZ Nr. 132 (2006) p. 31.

¹⁴ For the discussion, see, *inter alia*, ERNST A. KRAMER, Der Stil eines zukünftigen europäischen Vertragsgesetzes – die schweizerische Privatrechtskodifikation als Vorbild?, ZBJV 144 (2008) p. 905 et seq.

¹⁵ PETER V. KUNZ, Instrumente der Rechtsvergleichung in der Schweiz bei der Rechtssetzung und bei der Rechtsanwendung, ZVglRWiss 108 (2009) p. 37 and p. 45 («Nachbarländer-Komplex»); the comparative approach is also important in these countries, in particular, in Germany and in France with its long tradition: KURT HANNS EBERT, Rechtsvergleichung – Einführung in die Grundlagen (Bern 1978) p. 35.

¹⁶ Details: PETER V. KUNZ, Amerikanisierung, Europäisierung sowie

Internationalisierung im schweizerischen (Wirtschafts-)Recht, recht 30 (2012) p. 37 et seq.

¹⁷ Regarding Swiss adjudication: HEINZ AEMISEGGER, Die Bedeutung des US-amerikanischen Rechts bzw. der Rechtskultur des common law in der Praxis schweizerischer Gerichte (...), AJP 17 (2008) p. 18 et seq.

¹⁸ Dominance of the the *U.S. legal system succeeded the German legal system*, which was dominant in the 19th century: OTTO SANDROCK, Über das Ansehen des deutschen Zivilrechts in der Welt – Von der «Weltstellung» des deutschen zur «Hegemonie» des U.S.-amerikanischen Rechts, ZVglRWiss 100 (2001) p. 3 et seq.

¹⁹ See below IV. B.a.

²⁰ See below IV. B.b.

²¹ In the *20th century*, European law was regularly exported to Asia (e.g. China): HYEONG-KYU LEE, Die Rezeption des europäischen Zivilrechts in Ostasien, ZVglRWiss 86 (1987) p. 158 et seq.; in the *21st century*, though, we may expect legal imports from Asia and, in particular, from *China*; furthermore, the relevance of international organizations (e.g. IMF, OECD, WTO) in rulemaking and standard setting will grow as well.

²² Since the *26 Swiss cantons* (similar to states or provinces) have (nearly) *no legislative authority* regarding cross-border or international matters, this is not surprising; exceptions: MARTIN PHILIPP WYSS, Europakompatibilität und Gesetzgebungsverfahren im Bund, AJP 16 (2007) p. 717 et seq.

²³ The majority of the courts in Switzerland are *cantonal courts*, however, they do *apply Federal legislation*; hence, I see it as a surprise that they do not usually use a comparative approach for their work – in general, all the courts use the same method of adjudication: See below III. B.

²⁴ See, *inter alia*, WALTER (footnote 4) p. 91 et seq.; PATRIK R. PEYER, Zur zunehmenden Bedeutung der Rechtsvergleichung als Hilfsmittel der Rechtsfindung, recht 22 (2004) p. 104 et seq.

of foreign law; I see no legal reason or justification for this negligence by governmental agencies.

III. International Law

A. Swiss Legislation

a) Formal Approach

[Rz 11] Legislation is started and guided by a political process. Yet, a specific technique has to be observed. When *drafting Federal laws*, the Swiss Government must *formally* explain their context within international law. There is no legal obligation whatsoever, though, to bring Swiss laws in line with foreign laws, thus the *Swiss Parliament stays free* to determine the content.²⁵

[Rz 12] Regarding technique, in particular, *Article 141 Parliament Act (ParlA)*²⁶ provides: «The Federal Council shall submit its bills to the Federal Assembly together with a dispatch. In the dispatch, the Federal Council shall provide justification for the bill and if necessary comment on the individual provisions. In addition, it shall explain (...) the relationship with European Law (...). In my view, the meaning of the term «*European law*» is quite broad.

[Rz 13] Following this statutory provision, two additional non-binding *Federal «Guidelines for Legislation»* emphasize that not only «*European Law*», in particular, but international law, in general, shall provide the context for Swiss legislation.²⁷ Hereby, it becomes clear that Switzerland is – and shall be – an «*international country*».

b) Pressure, Eclecticism and References

[Rz 14] Not all legislative acts in Switzerland contain international law aspects. Nevertheless, a variety of what I call «*door openers*» («*Einfallstore*») exist, which allow comparative or international law to be considered in Swiss legislation.²⁸ Sometimes, more than one international reference may

be found in one law;²⁹ this is, for instance, the case with the Swiss Collective Investment Schemes Act.³⁰

[Rz 15] In Switzerland, *many different legislative mechanisms* or «*door openers*» exist (causing different consequences for the adjudication). In the following, I will discuss *three important examples*: international pressure, eclecticism and statutory references.

[Rz 16] Legislation in Switzerland is sometimes initiated (or «*forced*»)³¹ by *international pressure* – examples are the new Swiss Code of Obligations auditing rules and the Swiss law on audit supervision³² as «*lex Americana*»³³ following the U.S. Sarbanes Oxley Act³⁴ on one side and the various new Double Taxation Treaties in accordance with the recommendations of the OECD on the other side.³⁵ Legislation often represents and contains *voluntary eclecticism* – Swiss economic law shows many examples³⁶ (e.g. the Swiss Merger Act³⁷ and the Swiss Stock Exchange Act³⁸).

[Rz 17] Another «*door opener*» for comparative law may be *statutory references* to international law («*Gesetzesverweisungen*»)³⁹, e.g. to «*international standards*» – two examples: *Article 7 para. 2 letter d Financial Market Supervision Act* provides that the Swiss Financial Market Supervisory Authority «takes account in particular of (...) the international minimum standards»⁴⁰; *Article 8 para. 3 Stock Exchange Act* provides for the self-regulatory Listing Rules of Swiss Exchanges to «take into account internationally recognized standards».⁴¹

²⁵ Kunz (footnote 15) p. 40 et seq.; in fact, *transparency* and not «*legislative conformity*» is the main goal – however, references to the international context often result in such conformity; in general, see EMILIE KOHLER, *Influences du droit européen sur la législation suisse (...)*, Jusletter of 31 August 2009.

²⁶ Parliament Act of 13 December 2002: SR 171.10; see, *inter alia*, KUNZ (footnote 15) p. 34 et seq.

²⁷ References: KUNZ (footnote 3) p. 45.

²⁸ I call these legislative mechanisms «*door openers*» (into Swiss law); for a detailed explanation and overview, see KUNZ (footnote 15) *passim*.

²⁹ THOMAS COTTIER/DANIEL DZAMKO/ERIK EVTIMOV, *Die europakompatible Auslegung des schweizerischen Rechts*, in: *Schweizerisches Jahrbuch für Europarecht* 2003 (Bern 2004) p. 364; this is particularly important in case of the *legal adjudication consequences* of a certain «*door opener*».

³⁰ Swiss Collective Investment Schemes Act («*Kollektivanlagengesetz*»/«*KAG*») of 23 June 2006: SR 951.31; see PETER V. KUNZ, *Recht der KMU (...)* (Bern 2008) p. 13 footnote 76 and KUNZ (footnote 15) 55.

³¹ For details regarding the «*door opener*» of *international pressure*: KUNZ (footnote 15) p. 42 et seq.

³² Swiss Law on Audit Supervision («*Revisionsaufsichtsgesetz*»/«*RAG*») of 16 December 2005: SR 221.302.

³³ HANS PETER WALTER, *Das Revisionsaufsichtsrecht als Lex Americana?*, ST 82 (2008) p. 854.

³⁴ See, *inter alia*, HANS CASPAR VON DER CRONE/KATJA ROTH, *Der Sarbanes-Oxley Act und seine extraterritoriale Bedeutung*, AJP 12 (2003) p. 133 et seq.; PETER F. WEIBEL, *SOX zwingt zum Schulterchluss (...)*, ST 80 (2006) 106 et seq.

³⁵ In general: PETER V. KUNZ, *Tax War(s) against Switzerland*, Jusletter of 19 April 2010, notes 25 et seq.

³⁶ For details regarding the «*door opener*» of *eclecticism*: KUNZ (footnote 15) p. 44 et seq.

³⁷ Swiss Merger Act of 3 October 2003: SR 221.301.

³⁸ Swiss Stock Exchange Act of 24 March 1995: SR 954.1.

³⁹ For details regarding the «*door opener*» of *statutory references*: KUNZ (footnote 15) p. 67 et seq.

⁴⁰ KUNZ (footnote 15) p. 62 re legislation (and p. 67 et seq. re adjudication).

⁴¹ See ANDREAS KELLERHALS, *Von der gesetzlichen Pflicht zur Internationalisierung des schweizerischen Wirtschaftsrechts – Der Verweis auf*

B. Swiss Adjudication

a) Informal Approach

[Rz 18] There is *not a formal approach* to comparative law in Swiss adjudication.⁴² Even the Federal Supreme Court – at best – considers foreign law only *informally* when interpreting Swiss laws.⁴³ The bottom line is that Swiss courts seem to engage in some sort of «cherry picking» method («Rosinen picken»), i.e. *without a clear concept* of comparative law,⁴⁴ one gets the impression that international quotes used in a case depend on the particular law clerks' reference library.

[Rz 19] The *adjudication method* in Switzerland – as in other jurisdictions worldwide – is primarily based on various «pragmatic» elements («pragmatischer Methodenpluralismus»),⁴⁵ for example, the wording of the provision; there is no hierarchy between the elements. In any case, Swiss courts have *no legal obligation* to take a comparative approach when construing laws; on the other hand, it is also unclear whether or not they are *generally entitled* to do so.

b) Is there a «Method of Comparison»?

[Rz 20] Sometimes the applicable law contains a *statutory gap* («echte Gesetzeslücke»)⁴⁶, i.e. in the absence of a provision, the court must fill this gap as if it were a legislative body. Hence, the judge must decide «in accordance with the rule that it would make as a legislator» (Article 1 para. 2 CC)⁴⁷. Since the legislature enacts laws *taking foreign law into account*, of course, the same should hold true for the *courts* when applying those laws.⁴⁸

[Rz 21] Nobody disputes that courts have no general obligation to take international law into account. There is a dispute among commentators, however, about *whether the courts*

are allowed to consider foreign law in the absence of a statutory gap.⁴⁹ I reject such judicial authority.⁵⁰

[Rz 22] In my view, the court *must not generally take foreign law into account* and should do so only in case of a legislative «door opener» (e.g. statutory gaps, a reference to «international standards»,⁵¹ or an international treaty⁵²). The classic *elements of interpretation* – for example, the wording and the history of the applicable provision – do not need to be added by a *general «comparative law element»* («rechtsvergleichendes Auslegungselement») in Switzerland.⁵³

IV. European Law

A. European Union

a) Focus of Swiss Foreign Policy

[Rz 23] Traditionally, Switzerland is actively involved in many *international organizations* (e.g. the U.N., IMF, OECD, and WTO). Yet, twenty years ago, the Swiss people rejected membership in the *European Economic Area* or EEA («Europäischer Wirtschaftsraum»/«EWR»)⁵⁴. The multilateral EEA would have been a wide-open legislative «door opener» for the entry of EU law into Swiss law⁵⁵ and, in particular, Swiss economic legislation would have been largely affected⁵⁶.

[Rz 24] Today, Switzerland is *not a member state of the European Union* (EU)⁵⁷. While membership may be the Government's long-term goal,⁵⁸ it has faced and will continue to face many political obstacles. Nevertheless, Switzerland

international anerkannte Standards gemäss Art. 8 Abs. 3 BEHG, in: FS für D. Zobl (Zürich 2004) p. 375 et seq.

⁴² For example, Article 141 ParlA does not apply to courts.

⁴³ In general, see KUNZ (footnote 15) p. 36.

⁴⁴ *Inter alia*, see KUNZ (footnote 3) p. 44 and KUNZ (footnote 15) p. 35 and p. 47.

⁴⁵ For an overview, see, HANS PETER WALTER, Der Methodenpluralismus des Bundesgerichts bei der Gesetzesauslegung, recht 17 (1999) p. 157 et seq.; EDWARD E. OTT, Die Beurteilung von Interessen bei der Gesetzesauslegung, in: FS für E.A. Kramer (Basel 2004) p. 228 et seq.

⁴⁶ In general, see MARIE THERESE FÖGEN, Wer zieht die Grenzen des Rechts? Eine Anmerkung zum «rechtsfreien Raum», in: FS für H.P. Walter (Bern 2005) p. 71 et seq.

⁴⁷ *Inter alia*, see WALTER R. SCHLUEP, Der Richter in der Maske des Gesetzgebers und die Notwendigkeit der Demaskierung, in: FS für H.P. Walter (Bern 2005) p. 199 et seq.

⁴⁸ See ARTHUR MEIER-HAYOZ, Berner Kommentar – Einleitung: Artikel 1-10 ZGB (Bern 1962) note 368 ad article 1 CC; WALTER R. SCHLUEP, Einladung zur Rechtstheorie (Bern 2006) notes 1635 et seq.; references: KUNZ (footnote 15) p. 69 et seq.; famous decision by the Federal Supreme Court: BGE 126 III p. 143 et seq. reasoning 7 (i.e. the *Kodak* decision).

⁴⁹ *Inter alia*, HANS PETER WALTER, Das rechtsvergleichende Element – Zur Auslegung vereinheitlichten, harmonisierten und rezipierten Rechts, ZSR 125 I (2007) p. 259 et seq.; SCHLUEP (footnote 48) notes 1620 et seq.; MARC AMSTUTZ, Interpretation multiplex (...), in: FS für E.A. Kramer (Basel 2004) p. 67 et seq.

⁵⁰ KUNZ (footnote 15) p. 64 et seq.

⁵¹ See above III. A. b.

⁵² See below IV. A. b.

⁵³ It is different in the *Principality of Liechtenstein* where the «comparative element» is recognized as the «5th method of interpretation»: LES 2003, p. 71 – for reference, see ERNST A. KRAMER, Sentenzen zu Gesetz, Richter und Methode, in: FS für H.P. Walter (Bern 2005) p. 96 footnote 70, KUNZ (footnote 15) p. 65.

⁵⁴ In general: ASTRID EPINEY/ANDREAS FELDER, Europäischer Wirtschaftsraum und Europäische Gemeinschaft: Parallelen und Divergenzen in Rechtsordnung und Auslegung, ZVglRWiss 100 (2001) p. 425 et seq.

⁵⁵ Specifically the «*Acquis Communautaire*» – e.g. in the area of stock exchange legislation.

⁵⁶ Even today, some argue that the EEA might be a *political option for Switzerland in the future* – e.g. FRANZ BLANKART, Erwägungen zum EWR, NZZ No. 101 (2012) p. 21.

⁵⁷ In general, see KUNZ (footnote 15) p. 78 et seq.

⁵⁸ Europabericht 2006 of 28 June 2006: BBI 2006 p. 6843 et seq.; latest approach (on private basis) for a solution somewhere in between: ANDREAS KELLERHALS, Verhandeln wir doch über eine EU-Mitgliedschaft lighth, NZZAS of 6 May 2012, p. 19.

has de facto «arrived» in «Europe» (although not necessarily in the EU) a long time ago.⁵⁹ The *legal ties* of Switzerland to the EU – be they formal or informal – are growing both in terms of legislation⁶⁰ and in terms of application of EU laws by courts and authorities.

[Rz 25] In fact, the EU has become the *main focus of Swiss foreign policy* over the last few years. Accordingly, the legal importance of European law in general and of EU law in particular has steadily grown – and an end is not in sight. Informally, Switzerland tries to align its legal system with EU law, although, it seeks to keep certain «Swiss Finishes» (advantages vis-à-vis the EU) for competition reasons. The present cornerstone of *Switzerland's EU policy* is the concept of (*bilateral*) *international treaties*, i.e. a major legislative «door opener».⁶¹

b) Bilateral Treaties («Bilateralism»)

[Rz 26] The EU is important for Switzerland (and in my view, this holds true vice versa). Instead of a state membership, a *contractual network* of currently more than 120 treaties including 18 core agreements («Bilaterals I» and «Bilaterals II») is the main cornerstone of Switzerland's foreign policy with the EU;⁶² with perhaps «Bilaterals III» in the future.

[Rz 27] However, the relationship between Switzerland and the EU, be it on the political, on the diplomatic or on the legal level, is not without tensions, quite the contrary. Some have characterized it as «rocky» or «hostile». This seems particularly true regarding the open issues of *interpretation and development* of said treaties and the *automatic adoption of EU law* by Switzerland. The main political and diplomatic question which remains today is: «Who, if anyone, will move, and in which direction?» The former EU Ambassador to Switzerland pointedly remarked:

[Rz 28] «Die Schweiz sitzt auf Grund ihrer Verflechtungen mit der Union im gleichen Boot, Ruderboot wenn Sie mir das Bild erlauben: Ein kräftiger Schlag bringt das Boot rascher weiter, als nur das Eintauchen des Ruders. Teamgeist ist bei der Krisenbekämpfung hilfreich, trotz Interessensgegensätzen und Konkurrenzsituationen. Einen «Wirtschaftskrieg» kann ich nicht erkennen».⁶³ In my view, however, it sometimes appears that the EU and Switzerland are sitting face-to-face in this figurative rowboat and rowing in opposite directions.

⁵⁹ See PETER V. KUNZ, «Sonderfall Schweiz?» – die Schweiz ist längst in «Europa» angekommen, EWS Heft 3/2009, Die erste Seite.

⁶⁰ *Inter alia*, see EMILIE KOHLER, Influences du droit européen sur la législation suisse: analyse des années 2004 à 2007, in: Jusletter 31 August 2009.

⁶¹ See below IV. A.b.

⁶² KUNZ (footnote 15) p. 79; ANNE-CATHRINE TANNER/NATHANAEEL HUWILER, Der bilaterale Weg der Schweiz, in: Schweiz und Europa (...) (Bern 2011) p. 3 et seq.; THOMAS PFISTERER, Der bilaterale Weg (...), ZBl 112 (2011) p. 294 et seq.

⁶³ MICHAEL REITERER, Wirtschaftsforum Südostschweiz, Chur, September 11, 2009 («Mehr Staat, mehr Kooperation, mehr EU?»), p. 5.

B. Various «Door Openers»

a) Swiss Legislation

[Rz 29] *European law* is not synonymous with *European Union law* – nevertheless, the latter legal system with countless EU Regulations («EU Verordnungen») and EU Directives («EU Richtlinien») leads the growing influence of international law in Switzerland, too. Overall, European Law and EU law, respectively, are more important in *Swiss legislation* than in Swiss adjudication.

[Rz 30] The *first* «door opener» for EU law is the existence of the many *bilateral international treaties* with Switzerland.⁶⁴ Furthermore, the Swiss government must always explain the relationship between every Swiss bill and «European Law» (specifically its proof of EU Compatibility: «Prüfung der EU-Kompatibilität»)⁶⁵, thus, *Article 141 ParIA* is the *second* «door opener» into Swiss legislation.⁶⁶

[Rz 31] Finally, the *third* «door opener» is a Swiss peculiarity which is called «*autonomous adoption of EU law*» («autonomer Nachvollzug von EU-Recht»),⁶⁷ i.e. a contradiction *per se*.

[Rz 32] Most of the time, when Swiss legislation resembles EU legislation, it is mere *eclecticism* (hence, without legal consequences for its adjudication). In rare cases, however, it is something more, i.e. the Swiss legislature *intentionally incorporates EU law* into Swiss legislation.⁶⁸ Swiss laws enacted through this mechanism of «autonomous adoption of EU law» are called «*Leges Europaeae*», which has direct legal consequences for their adjudication.⁶⁹

b) Swiss Adjudication

[Rz 33] Not only regarding international law, in general,⁷⁰ but also with respect to *European law*, in particular, the core

⁶⁴ KUNZ (footnote 15) p. 57 et seq.

⁶⁵ For details regarding this «door opener», see KUNZ (footnote 15) p. 49 et seq.; *transparency* is the main goal: BRUNO SPINNER/DANIEL MARITZ, EG-Kompatibilität des schweizerischen Wirtschaftsrechts. Vom autonomen zum systematischen Nachvollzug, in: FS für R. Zäch (Zürich 1999) p. 129; see, in general, CHRISTINE BREINIG-KAUFMAN, Deregulierung und Europaverträglichkeit als Maximen der Gesetzgebung im Wirtschaftsrecht, in: Aspekte des Wirtschaftsrechts, FG Schweizerischer Juristentag 1994 (Zürich 1994) p. 441 et seq.; PIERRE WIDMER, Rechtsvergleichung und Gesetzgebung, Leges 3/2003, p. 9 et seq.

⁶⁶ See above IV. A.a.

⁶⁷ For details regarding the «door opener» of *autonomous adoption of EU law*: KUNZ (footnote 15) p. 53 et seq.; SPINNER/MARITZ (footnote 65) p. 127 et seq.; WOLFGANG WIEGAND, Zur Anwendung von autonom nachvollzogenem EU-Privatrecht, in: FS für R. Zäch (Zürich 1999) p. 171 et seq.; PETER FORSTMOSER, Der autonome Nach-, Mit- und Vorrückzug europäischen Rechts: das Beispiel der Anlagefondsgesetzgebung, in: FS für R. Zäch (Zürich 1999) p. 523 et seq.

⁶⁸ Examples: KUNZ (footnote 15) p. 54/55.

⁶⁹ See below IV. B.b.

⁷⁰ See above III. B.

question remains: «Do Swiss courts consider foreign law while applying Swiss legislation?» This is an open, and often discussed, issue for other jurisdictions as well.⁷¹ The question may be answered for Switzerland as follows.

[Rz 34] If the courts in Switzerland are allowed to *generally* take into account foreign law in the interpretation of Swiss laws, of course, European law and mostly EU law would play a major role; yet, I *disagree* with this «comparative adjudication method.»⁷²

[Rz 35] However, in cases of where EU law already has a real foothold in Swiss legislation – in particular, through the «door openers» of an international treaty on one side or a «Lex Europaea» on the other side – the *interpretation* of the agreement or the law, respectively, *must be in accordance with EU law* («europarechtskonforme Auslegung»: e.g. BGE 129 III 350 reason 6; BGE 130 III 190 reason 5.5.1)⁷³. In my view, thus, an autonomous adoption of EU law by the Swiss legislature *necessarily leads* to an interpretation of Swiss law in line with EU legislation.

V. Concluding Remarks

[Rz 36] In general, the *legal relevance* of international law and the comparative approach is indisputable⁷⁴. RUDOLPH V. JHERING pointed this out a long time ago: «Die Frage von der Rezeption fremder Rechtseinrichtungen ist nicht eine Frage der Nationalität, sondern eine einfache Frage der Zweckmäßigkeit, des Bedürfnisses. Niemand wird von der Ferne holen, was er daheim ebenso gut oder besser hat, aber nur ein Narr wird die Chinarinde aus dem Grund zurückweisen, weil sie nicht auf seinem Kautacker gewachsen ist»⁷⁵.

[Rz 37] In my view, Swiss people are by nature rather curious about foreign people and their cultures, thus, the general interest in comparative law. Moreover, the «fundamentals» for a positive approach to comparative law are very sound in this country. Lately, however, the general citizenry of Switzerland sees itself as being «*under attack*» from abroad (particularly in connection with the attacks on the world-famous Swiss banking system and the «tax wars» emanating from abroad.⁷⁶

[Rz 38] International law and European law – in particular the law of the European Union – play a major, and ever growing, role in *Switzerland*, namely in legislation and in adjudication. The practical aspects of the comparative approach are predominant.⁷⁷ The worldwide reputation for this approach is well established due to the Federal Supreme Court and the Swiss Institute for Comparative Law. Both in Swiss legislation and in Swiss adjudication, unfortunately, the most often used «method» is «cherry picking». To counteract this tendency, *comparative legal education at Swiss Universities* should be strengthened.

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⁷¹ For a recent overview, see, *inter alia*, SABINO CASSESE, Legal Comparison by the Courts, No. 9/2010 Piélagus (Neiva/Columbia) p. 21 et seq. with worldwide references.

⁷² See above III. B.b.

⁷³ For details (and further examples of precedents): KUNZ (footnote 15) p. 72 et seq.

⁷⁴ In general: GUDULA DEIPENBROCK, Legal Transplants? – Rechtsvergleichende Grundüberlegungen zum technischen Rechtsnormtransfer?, ZVGRWiss 107 (2008) p. 343 et seq.; EVA LEIN, Legal Transplants in European Private Law, in: Legal Engineering and Comparative Law (Zürich 2008) p. 69 et seq.; JAN VON HEIN, Rezeption, Die Rezeption US-amerikanischen Gesellschaftsrechts in Deutschland (Habil. Hamburg 2006) p. 57 et seq.

⁷⁵ Quote: ZWEIGERT/KÖTZ (footnote 3) p. 16.

⁷⁶ See PETER V. KUNZ, Roger Federer, Swiss Banking Will Both Come Back, Bloomberg News (Op-ed) of 30 April 2012.

⁷⁷ *Inter alia*, see ARNOLD F. RUSCH, Methoden und Ziele der Rechtsvergleichung, in: Jusletter 13 February 2006, note 10.