The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities

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Lee Faircloth Peoples

INTRODUCTION

In her article inspiring this symposium, Lyonette Louis-Jacques observed "[w]hile citation analyses exist for American legal materials, there are none for foreign and international law." The opinions of the Advocates General of the Court of Justice of the European Communities (hereinafter Court or ECJ) are fertile ground for such an analysis yet they have "almost never been the subject of statistical analysis."2

Citations to foreign law can be found in Advocates General's opinions.3 The citation of United States law in Advocates General's opinions has been the subject of two previous studies. Peter Herzog's 1998 article United States Supreme Court Cases in the Court of Justice of the European Communities looked at ten Advocates General's opinions from 1980 through 1995.4 Dr. Carl Baudenbacher's 2003

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3. The EC was created by the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. The EC is commonly referred to as the "first pillar" of the European Union. The first pillar includes the free movement of goods, workers, services, and capital. The European Union was created by the Maastricht Treaty and includes the "first pillar" as well as the "second pillar" of common foreign and security policy and the "third pillar" of police and judicial cooperation in criminal matters. See DR. KLAUSE-DIETER BORCHARDT, THE ABC OF COMMUNITY LAW (1999), available at http://europa.eu/eur-lex/en/about/abc_en.pdf (last visited Feb. 27, 2008).

4. Peter Herzog, United States Supreme Court Cases in the Court of Justice of the European Communities, 21 HASTINGS INT'L & COMP. L. REV. 903 (1998).
article Judicial Globalization: New Development or Old Wine in New Bottles? looked at references in eight opinions from 1985 through 1998, including several opinions mentioned in Herzog’s article.5

Both articles only discuss the Advocates General’s citation to the law of the United States. To date, no study has looked beyond citations to United States law when examining the use of foreign law in Advocates General’s opinions. With this study I intend to “mind the gap” and examine references in Advocates General’s opinions to the laws of all non-Member States. This study will also update the Herzog and Baudenbacher articles by examining citation to foreign law in opinions from 1998 through 2007.

This gap in the legal literature should surprise many Americans who are accustomed to a fervent discussion over foreign law citation. The practice of American judges citing foreign law has been the subject of congressional hearings6 and resolutions7 and was discussed during the recent confirmation hearings for Supreme Court Justices Roberts and Alito.8 The citation of foreign law has become a substantial issue in American legal scholarship9 and recently Supreme Court Justices Breyer and Scalia debated the issue for over an hour in a nationally televised forum.10 Debates over the practice have spilled over into both


the political discourse and the popular press.

In contrast, the spirited debate over judges citing foreign law is not found in other jurisdictions. In particular, the Advocates General have never "been attacked in the legal literature or popular press for having cited the law of non-Member States." A detailed discussion of the lack of opposition to foreign law citation in Advocates General's opinions is beyond the scope of this article but several obvious explanations can be offered. First, Advocates General's opinions are not the Court's judgments as the Court is free to agree with an Advocate General's opinion or disregard it entirely. Second, Europeans are accustomed to the ECJ and Advocates General using foreign law in certain contexts discussed infra.

Part I of this article discusses opinions citing U.S. law over the past decade and compares those opinions with the opinions identified in the Herzog and Baudenbacher articles. The theories posited in the Herzog and Baudenbacher articles are examined in light of the past decade of citation to U.S. law in Advocates General's opinions. Part II explores the citation of non-Member State jurisdictions other than the United States in Advocates General's opinions. Part III critically analyzes the citation of foreign law by Advocates General. This section explores why Advocates General cite foreign law, why they typically provide complete numerical citations when referring to U.S. law, and why they devote more textual space to discussing U.S. law. The study concludes with predictions for the future.

**Methodology**

The Advocates General's opinions examined in this study were selected by searching the Westlaw database (EU-CS) using the query:

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14. E-mail from Jos Kuerten, Law Librarian & Principal Administrator, Library of the Court of Justice of the European Communities, to Lee Faircloth Peoples, Associate Law Library Director, Director of International Programs, Assistant Professor of Law Library Science, Oklahoma City University School of Law (Oct. 16, 2007, 04:23 CST) (on file with author).

15. See *infra* note 17.
DT(OPINION) & DA(AFT 1997) & "insert non-Member State name."
Both the singular and plural forms of the name of each non-Member
State were included in the search. The CIA's World Factbook was used
to supply the names of the non-Member States.16 An additional search
in the LexisNexis EUR-Lex database was performed to locate opinions
that included only a numerical citation to a regional or federal U.S.
reporter because these citations did not appear in the Westlaw search
results. Only opinions written in English were included in this study.17

This study examines Advocates General's opinions citing foreign
law. Foreign law has two discrete elements. The first is "foreign,"
which for the purposes of this study is defined as the law of any country
not a Member State of the European Union.18 The date range of
opinions included in the study ranges from 1998 through 2007. The
year 1998 was selected as the starting point to include opinions released
after the publication of the Herzog article. During this time period
twelve countries acceded to the European Union.19 Opinions citing the
law of these countries were excluded from this study.

The second element of foreign law is "law." For the purposes of
this study, "law" includes citations to both primary authority (cases,
statutes, regulations) and secondary authority (treatises, law review
articles, doctrines).20 Opinions that cited foreign law because it was
directly at issue in the case were excluded.21 Opinions including

16. See generally CIA, WORLD FACTBOOK (2008), available at
17. Advocates General's opinions may be written in any of the Court's five official
languages: English, French, German, Italian, or Spanish. ANTHONY ARNELL, THE
EUROPEAN UNION AND ITS COURT OF JUSTICE 14, 14 n.74 (2d ed. 2006) (citing Francis G.
Jacobs, Recent and Ongoing Measures to Improve the Efficiency of the European Court of
Justice, 29 EUR. L. REV. 823, 828 (2004)). I was able to determine the approximate number
of opinions published in each of these languages for the time period covered in this article
using the following Westlaw query: DT(OPINION) & BIB("authentic language" W/2
"insert language name") & DA(AFT 1997). The results were English 475, French 549,
German 558, Italian 325, and Spanish 275. No claim is made that the results of this study
demonstrate a causal relationship. The relatively small number of opinions examined in this
study compared with the total opinions produced from 1998-2007 rules out a causal
relationship with any statistical significance.
18. A list of Member States is available from Past Enlargements, available at
http://ec.europa.eu/enlargement/enlargement_process/past_enlargements/index_en.htm (last
19. Id.
20. Legal doctrine is a "subsidiary source" of law in the EC JOSERRAMON
(opinion of Advocate General Leger) (discussing U.S. legislation because it is an issue in
the case over the transfer of air passenger records).
references to foreign practices, history, culture, or other things foreign but not law were excluded. References to international law were excluded but references to national law relevant to international law were included.

*The Advocates General and the ECJ*

The ECJ is the judicial organ of the European Communities (hereinafter Community or EC). The Court was created by the Treaty Establishing the European Coal and Steel Community (ECSC), known as the Treaty of Paris, the Treaty Establishing the European Atomic Energy Community (EAEC), and the Treaty Establishing the European Economic Community (EEC Treaty now amended and referred to as the EC Treaty). The EAEC and EC Treaties are collectively referred to as the Treaties of Rome. The role of the Court, as stated by Article 220 of the EC Treaty, is to "ensure that in the interpretation and application of this Treaty the law is observed." Scholars have commented that the Treaty's reference to "the law" is not limited to the Treaty itself but must be defined more broadly to include the Platonic "Idea of Law," which sits above the law of the Treaty and "must guide the Court as the polar star guides sailors."

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23. Although international law is a source of law in the EC, opinions citing these sources were excluded. Bengoetxea, *supra* note 20, at 70. See Case C-524/04, Test Claimants in the Thin Cap Group Litig. v. Comm’r of Inland Revenue, 2007 E.C.R. I-2107, para. 9 (opinion of Advocate General Geelhoed) (referring to Double Taxation Conventions of Luxembourg, Japan, Germany, Spain, and Austria).


27. *Id.* EC Treaty art. 220.

The Court’s jurisdiction is defined by the treaties cited above and several subsequent treaties. The Court hears several types of actions. Member State courts may seek preliminary rulings for clarification on a point of Community law. The majority of the opinions examined in this study were written in response to requests for preliminary rulings. The Court also hears several types of “direct actions” including actions involving the failure of a Member State to fulfill an obligation, actions to annul a measure adopted by a Community institution, and actions against Community institutions for failing to act. The Court hears appeals of judgments and orders of the Court of First Instance.

The ECJ “uses the comparative method frequently” and has been called “a working laboratory for comparative law.” The ECJ uses the comparative method in a variety of contexts. Certain treaty provisions compel the ECJ to look at the law of Member States. To comply with its obligation under Article 220 of the EC Treaty to ensure that “the law is observed,” the Court may look at the laws of Member States and non-Member States. The Court also uses the comparative method to “interpret vague notions or fill lacuna in written law.”

The Court is composed of twenty-seven Judges and eight Advocates General. The Court issues its rulings in the form of judgments. The judgments have been described as “somewhat bland and general and to cite, in addition to the Court of Justice’s own case law, only Community materials.” The format of the judgments was for many years very similar to the style of judgments issued by civil law courts. The format of the Court’s judgments will be discussed in more detail in the section An Evolution in Judicial Style, infra.

30. Id.
31. Id.
32. Id.
35. Article 288 of the EC Treaty requires the ECJ to rectify damage caused by Community institutions or servants “in accordance with the general principles common to the laws of Member States.” Kakouris, supra note 28, at 270.
36. Id. at 273.
37. Id. at 269.
39. Herzog, supra note 4, at 904.
In performing its functions the Court is assisted by the Advocates General. The Advocates General have no direct counterpart in common law jurisdictions. They are not the partisan *amicus curiae* well known to American lawyers. They “have no axe to grind and are there merely to enlighten the Court of Justice by giving it a view untainted by the necessary partisan approach of the parties’ counsel.” The official function of the Advocates General as stated in Article 222 of the EC Treaty is to “[act] with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice in order to assist the Court in the performance of the task assigned to it in Art. 220.”

Advocates General write opinions in most cases except those involving no new issues of law. The opinions are known for:

1. Containing a more detailed explanation of the facts at issue and arguments of the parties than what is found in ECJ judgments;
2. Making use of comparative law methodology;
3. Raising issues not raised by the parties;
4. Citing sources never cited in ECJ judgments including law review articles and foreign law;
5. Commenting on the development of the law in the area at issue; and
6. Proposing a solution to the Court.

Direct references to the laws of non-Member States are rarely found in the Court’s judgments but, as this study will demonstrate, are found in Advocates General’s opinions. Advocates General’s opinions were clearly the best source to examine for the purposes of this study. One scholar described ECJ judgments as camels and Advocates General’s opinions as “jurisprudential racehorses, galloping directly to the finish line decked out in vivid colours.”

44. For points 1–4 see Ritter, *supra* note 2, at 758.
46. HIlf, *supra* note 34, at 558.
I. ADVOCATES GENERAL’S OPINIONS CITING U.S. LAW

The Herzog\(^{48}\) and Baudenbacher\(^{49}\) articles examined eighteen opinions from 1980 through 1998. The majority of those opinions cited U.S. law in the areas of antitrust and discrimination. The remaining Advocates General’s opinions discussed in the previous articles cited U.S. law in the areas of restraints on commerce\(^{50}\) and intellectual property.\(^{51}\) Over the past decade, Advocates General have continued to look to U.S. law in some of these areas, have expanded their references to U.S. law in other subject areas, and have decreased references to U.S. law in some areas. The following sections examine Advocates General’s opinions citing U.S. law over the past decade. Opinions are organized according to the legal subject they address.

A. Antitrust

There is a great deal of comparison between the United States and European Community in the area of antitrust, or competition law, as it is


49. The opinions identified in Baudenbacher’s article for their citation of U.S. Supreme Court cases in the area of antitrust include: Joined Cases C-89, C-104, C-114, C-116, C-117 & C-125 to C-129/85, Osakeyhtio (opinion of Advocate General Darmon); Case C-333/94, Tetra Pak Int’l (opinion of Advocate General Colomer). See Baudenbacher, supra note 5. The opinions identified in Baudenbacher’s article for their citation of U.S. Supreme Court cases in the area of discrimination include Case C-13/94, P. v. S. & Cornwall County Council, 1996 E.C.R. I-2143 (opinion of Advocate General Tesauro); Case C-450/93, Kalanke (opinion of Advocate General Tesauro). See Baudenbacher, supra note 5.


51. Both the Herzog and Baudenbacher articles discuss these opinions for their citation of U.S. Supreme Court cases in the area of intellectual property: Case 65/86, Bayer v. Sullhofer, 1988 E.C.R. 5249 (opinion of Advocate General Jacobs); Case C-412/93, Sociiti d’importation Idouard Leclerc-Siplec (opinion of Advocate General Jacobs). See Herzog, supra note 4; Baudenbacher, supra note 5.
known in Community parlance. The influence of the American Sherman Antitrust Act on Community competition law is cited as one of the clearest cases of “historic cultural phenomena” influencing Community law.\(^{52}\) Efforts have been underway in recent years to harmonize U.S. and EC laws in this subject area.\(^{53}\) Several bilateral treaties are in place between the U.S. and EC regarding competition law.\(^{54}\)

Herzog’s article discusses several Advocates General’s opinions citing American antitrust law and concludes the influence of U.S. Supreme Court and lower court cases was “most pronounced in the area of competition law.”\(^{55}\) According to Herzog, it was only “natural to look for guidance in the interpretation of Community competition rules to a body that had much longer experience with such rules.”\(^{56}\) Baudenbacher also devotes a substantial portion of his article to an examination of Advocates General’s opinions citing American antitrust law.\(^{57}\)

It is no surprise that out of all of the opinions citing U.S. law examined in this study, thirty percent cite U.S. law in the area of antitrust.\(^{58}\) Interestingly, most of the specific competition law issues first explored in Advocates General’s opinions mentioned in the Herzog and Baudenbacher articles resurfaced in the Advocates General’s opinions included in this article.

Both the Herzog and Baudenbacher articles cite the Advocate General’s opinion in the Wood pulp Case\(^{59}\) for its robust discussion of

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52. BENGOTXEA, supra note 20, at 65.
55. Herzog, supra note 4, at 918.
56. Id.
58. Twenty-six Advocates General’s opinions discussed in this study cite to U.S. law. Nine out of these twenty-six are competition cases.
the application of American antitrust laws beyond national borders. 60 Since the publication of the Herzog and Baudenbacher articles another Advocate General’s opinion has cited American antitrust laws relevant to the impact of a sovereign’s actions beyond national borders. In Compagnie Maritime Belge Transports SA v. Commission the appellants, members of an African shipping line, appealed the Commission’s finding of an abuse of dominant position in relation to a shipping agreement. 61 Appellants’ argued that their conduct should be characterized as an attempt to lobby government authorities to fulfill a State concession and therefore be exempt from competition laws under the act of state doctrine. Advocate General Fennelly’s opinion discussed the act of state doctrine as developed in the American courts as holding that “acts of inducement or persuasion (even unlawful ones) of a foreign sovereign power fall outside of the scope of the antitrust rules.” 62 The act of state doctrine is a concept found in American antitrust case law and has not been established in Community law. The ECJ discussed the act of state doctrine in its judgment and appeared open to applying it to reverse the finding of abuse of dominant position but refused to apply the doctrine because the appellant’s conduct went beyond mere lobbying. 63

In a similar vein as the Compagnie Maritime Case, the opinion in Cipolla v. Fazari discussed the U.S. law state action exemption to antitrust rules that applies to a sovereign’s actions within national borders. 64 The case originated as a fee dispute between an Italian lawyer and his client but reached the ECJ on a reference for a preliminary ruling from the Italian Corte d’appello di Torino on the issue of whether Articles 10 and 81 of the EC Treaty precluded a Member State from adopting a law drafted by a professional society fixing attorneys fees. In his opinion, Advocate General Maduro referenced the U.S. antitrust law state action doctrine and the Supreme Court case of Parker v. Brown. 65 The U.S. state action doctrine is an exception to the Sherman Act that applies to legislative measures that are clearly stated to be state measures and are implemented with state

60. Baudenbacher, supra note 5, at 519; Herzog, supra note 4, at 911.
63. Case C-395/96, Compagnie Maritime Belge Transports SA, para. 83 (judgment).
65. Id. (citing Parker v. Brown, 317 U.S. 341 (1943)).
supervision. Advocate General Maduro argued that the law fixing attorneys’ fees was similarly exempt from Articles 10 and 81 of the EC Treaty.

The ECJ agreed with Advocate General Maduro, holding that Articles 10 and 81 of the EC Treaty did not preclude the Italian government from adopting the law fixing attorneys’ fees.66 The Court’s decision did not explicitly reference Parker v. Brown or the state action doctrine, but it did devote several paragraphs to a discussion of how the facts in the Cipolla Case met the requirements of the state action doctrine. Specifically, the Court noted how the law drafted by the Italian professional society was simply a draft and did not enter into force until approved by the Italian Minister of Justice who must obtain opinions from two other governmental entities first. The Court also noted how Italian courts were free to depart from the law in special situations. Both of these examples were evidence of how the Italian law in question was implemented with state supervision as required under the U.S. state action doctrine.

Several Advocates General’s opinions cite American antitrust law for modern economic principles and practices. These references confirm the statements Mario Monti made as European Commissioner for Competition Policy in 2001 at an American Bar Association Conference.67 Monti discussed the specific areas where convergence has been occurring between the U.S. and EC on antitrust issues and his goal of “increasing the emphasis of sound economics in the application of EC antitrust rules.”68 He cited several examples including market specific guidelines that are very similar to the U.S. Federal Trade Commission and Department of Justice Guidelines, an economic approach that weighs “the positive and negative effects of agreements against each other,” and the essential facilities doctrine, which he termed the U.S.’s most successful export to the EC in the 1990s.69 Monti also called on European courts to expand the private rights of action available to parties in antitrust disputes similar to the private rights of action already available in the U.S.70 The debate over making American private rights of action in antitrust the norm in EC law continued after Monti left the position of European Commissioner for Competition Policy. His successor Neelie Kroes began a public

66. Case C-94/04 & C-202/04, Cipolla, para. 54 (judgment).
67. Monti, supra note 53.
68. Id.
69. Id.
70. Id.
consultation on the subject in 2005. The following Advocates General’s opinions illustrate the influence of U.S. antitrust law’s modern economic principles and practices on EC competition law.

The case of J.C.J. Wouters, J.W. Savelbergh and Price, Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse demonstrates convergence between the EC and U.S. in the use of modern economic principles in antitrust cases. This reference for a preliminary ruling sought to determine, among other issues, whether Dutch regulations forbidding lawyers from entering into multidisciplinary partnerships with accountants had among its objectives the prevention, restriction, or distortion of competition. In his opinion, Advocate General Leger argued that the Court should stick to the rule of reason as restricted to the competition balance sheet method as developed in American law and subsequently applied by the ECJ. The Court did not explicitly engage in a discussion of the rule of reason or competition balance sheet method in its judgment. Interestingly, the U.S. Supreme Court’s adoption of the rule of reason approach was cited in the Advocate General’s opinion in Ministere Public v. Tournier discussed in the Herzog article.

The Herzog and Baudenbacher articles identify several Advocates General’s opinions citing U.S. antitrust law for specific principles designed to curb market domination. The trend of Advocates General referring to U.S. antitrust law for these principles continued in the opinions examined in this study. The origin of the essential facilities doctrine in U.S. antitrust law was discussed in detail in the Advocate General’s opinion in the Oscar Bronner case, originally cited in the Baudenbacher article. Under the essential facilities doctrine the holder of a dominant market position in control of an essential facility has an obligation to make the facility available without discrimination.

References to the essential facilities doctrine in U.S. antitrust law


75. Baudenbacher, supra note 5, at 519.

76. 54 AM. JUR. 2d Monopolies and Restraints of Trade § 65 (2007).
can be found in several Advocates General’s opinions published since the opinion in *Oscar Bronner*. Advocate General Tizzano’s opinion in *IMS Health GmbH & Co. OHG v. NDC Health* included a reference to the essential facilities doctrine in U.S. law as discussed in the Advocate General’s opinion in *Oscar Bronner*.\(^{77}\) The essential facilities doctrine in U.S. law is also mentioned in the opinion in *KPN Telecom BV v. Onafhankelijk* where Advocate General Maduro cited the opinion in the *Bronner* case and the U.S. Supreme Court case of *Verizon Communication v. Law Offices of Curtis V. Trinko, L.L.P.*\(^{78}\) for the present state of the doctrine in U.S. law.\(^{79}\) These brief mentions of U.S. law do not appear to have influenced the ECJ’s judgments in either of these cases.

U.S. law is referenced in another case involving antitrust law and the abuse of a dominant position. In *Synetairismos v. Glaxo Smith Kline*, the Greek Competition Commission sought a preliminary ruling from the ECJ that Glaxo Smith Kline had per se abused its dominant position by refusing to fill orders.\(^{80}\) Advocate General Jacobs proposed “the factors which go to demonstrate that an undertaking’s conduct in refusing to supply is either abusive or otherwise are highly dependent on the specific economic and regulatory context in which the case arises.”\(^{81}\) He cited the U.S. Supreme Court decision in *Verizon Communication v. Law Offices of Curtis V. Trinko, L.L.P.*\(^{82}\) to demonstrate that the U.S. had recently taken the position that “antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.”\(^{83}\) The ECJ did not reach the issue raised by Advocate General Jacobs and dismissed the case on jurisdictional grounds.\(^{84}\) Interestingly, the reference to U.S. law in the *Synetairismos* opinion is yet another example of specific antitrust issues identified in the previous articles resurfacing. Herzog’s article discussed the concept of abuse of a


\(^{80}\) Case C-53/03, Synetairismos v. GlaxoSmithKline, 2005 E.C.R. I-4609, para. 1 (judgment).

\(^{81}\) Case C-53/03, Synetairismos, para. 68 (opinion of Advocate General Jacobs).

\(^{82}\) Verizon, 540 U.S. 398.

\(^{83}\) Case C-53/03, Synetairismos, para. 68 n.40 (opinion of Advocate General Jacobs).

\(^{84}\) Case C-53/03, Synetairismos, para. 38 (judgment).
dominant position through predatory pricing in U.S. law as discussed in the Advocate General’s opinion in Tetra Pack.85

The availability of a private right of action in European Community competition law is explored in the preliminary ruling handed down in Courage Ltd. v. Crehan.86 In this case, the English Court of Appeals sought direction from the ECJ on several questions including whether a party to an agreement prohibited under European Community competition law could bring a private right of action against the other party to the agreement and, if so, could recover damages. Under English law no private right of action could be brought because of the illegality of this type of agreement. The English Court of Appeals and Advocate General Mischo’s opinion both cite the U.S. Supreme Court case of Perma Life Mufflers Inc. v. International Parts Corp.87 for the proposition that parties to an anti-competitive agreement may bring actions for damages when they are at an economic disadvantage.88 The ECJ followed the Advocate General’s opinion, cited the U.S. case, and held that parties to agreements liable to restrict or distort competition under Community competition law may bring private actions and may recover damages, but Member States may impose limits on the damages recoverable by parties responsible for distorting competition under these types of agreements.89

Interestingly, the question of whether an individual has standing to bring a cause of action in EC competition law was originally discussed in an Advocate General’s opinion mentioned in the Baudenbacher article.90 The opinion in Zunis v. Commission,91 issued in 1993, cited the U.S. Clayton Act and several U.S. cases when discussing the prerequisite conditions for an individual to have standing to bring an antitrust action.92 This represents yet another area where competition law issues discussed in the previous articles have resurfaced in Advocates General’s opinions citing U.S. law over the past decade.

Exempting trade unions from competition law was explored in the case of Albany International BV v. Stichting Bedrijfspensioenfonds
In this case, a Dutch court sought a preliminary ruling to determine if Article 85(1) (now Article 81(1)) of the EC Treaty was infringed by a requirement that all employees in a particular sector of the economy participate in a specific pension fund. Because of the "novelty and potentially far-reaching implications" of the decision, Advocate General Jacobs included a lengthy examination of the antitrust systems of the U.S. and various Member States in his opinion. The opinion explored both the statutory and case law exemptions that U.S. trade unions enjoy from antitrust laws and the limits on those exemptions. The Sherman and Clayton Acts were cited as examples of statutory exemptions. Several U.S. cases were discussed including *U.S. v. Hutcheson*, which provides unions with an exemption from antitrust laws conditioned on several factors, including unions not combining with non-labor groups. *United Mine Workers of America v. Pennington* was also mentioned as a case where an antitrust exemption was denied for a trade union because its agreement with employers eliminated competition from the market and was "not the kind of restraint Congress intended the Sherman Act to proscribe."

Advocate General Jacobs's opinion proposed three conditions that must be met for European trade unions to enjoy immunity from Community competition laws. There are parallels between two of these conditions and the limitations discussed in the U.S. cases cited. First, Jacobs proposed that immunity would only exist for agreements made between both sides of an industry. This is similar to the limitation discussed in *U.S. v. Hutcheson* where the exemption from antitrust laws was not extended to unions if they combined with employers or other

95. *Id.* paras. 96–107.
non-labor groups. 102 Second, Jacobs limited immunity to the core subjects of collective bargaining and not to agreements that “directly affect[] relations between employers and third parties, such as clients, suppliers, competing employers, or consumers.” 103 This limitation is analogous with the U.S. case of United Mine Workers of America v. Pennington where an antitrust exemption was not allowed where it eliminated competition from the market. 104 The ECJ’s judgment reached the same result as Jacobs’s opinion but did not specifically reference U.S. statutory or case law exemptions. 105

B. Intellectual Property

The Herzog and Baudenbacher articles identified only two opinions where Advocates General looked to U.S. law on intellectual property issues. Since the publication of those articles, Advocates General have looked to U.S. law more frequently in this subject area. Seven Advocates General’s opinions issued over the past decade have referenced U.S. law in the area of intellectual property.

The majority of references to U.S. law in the area of intellectual property have occurred over the subject of trademarks. A number of similarities exist between the United States and the European Community in the field of trademarks. American federal and state trademark law and practice is roughly similar to the law and practice of the European Community and of individual EC Member States. 106 There are, however, a number of differences between trademark law and practice in Europe and America. One significant distinction is that, in the United States, use of a trademark qualifies the mark for legal protection while registration is required under Community law. 107 This distinction has been explored in several of the Advocates General’s opinions referencing United States law over the past decade.

In most of these cases, national courts are seeking preliminary rulings from the ECJ to determine if national legislation comports with Council Directive 89/104. 108 The Directive “seeks to harmonize some

102. Hutcheson, 312 U.S. at 232.
104. United Mine Workers of Am., 381 U.S. 657.
105. Case C-67/96, Albany Int’l (judgment).
aspects of EU trademark law, but not trademark registration procedures. As a directive, its provisions are intended to be implemented by legislation in each of the Member States. It covers, among other things, the grounds for refusing to register a trademark, defines the rights conferred in a trademark, and explains the consequences of refusing to register a trademark. Article 2 of the Directive provides the technical definition of what a trademark may consist of:

any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

Ralf Sieckmann v. Deutsches Patent involved an attempt to trademark a scent. The applicant deposited a written chemical description of a scent and a vial containing a sample of the scent, and described it as “balsamically fruity with a slight hint of cinnamon” in support of his application. The German Patent and Trade Mark Office refused the application and the German Federal Patents Court sought a preliminary ruling to determine whether an odor can be registered as a trademark and, if so, how the odor should be represented. In his opinion, Advocate General Colomer referenced the law of the United States, Australia, and other Member States as he explored whether odors could be trademarked under Community law. He cited the Lanham Act as the basic United States federal trademark law which defines trademarks as signs that distinguish “goods or services of one undertaking from those of another.”

As the Opinion progresses, Advocate General Colomer referenced American law again to demonstrate a distinction between Community trademark law and American trademark law. The opinion cited the registration of the “fragrance of fresh flowers reminiscent of mimosa” in the United States as a trademark for sewing and embroidery thread.

112. Id. para. 13.
113. Id. paras. 25, 56.
114. Case C-273/00, Sieckmann (opinion of Advocate General Colomer).
116. Case C-273/00, Sieckmann, para. 16 n.9 (opinion of Advocate General Colomer).
117. Id. paras. 30–31. See note 40 of the Colomer opinion referencing the registration
After referencing the United States' acceptance of scents for trademark registration, Advocate General Colomer contrasted the United States requirements from Community requirements. He pointed out that in the United States, unlike in Community law or in Member States, a particular sign may become a trademark if it is distinctive in character, has been used exclusively and for an uninterrupted time period, and consumers recognize it as a trademark. Advocate General Colomer also noted that registration of odors as trademarks in the United States is perhaps more widespread because, unlike in the Community system, graphical representation is not required for registration. The practices of the United Kingdom, France, and Benelux, where odors may be registered as trademarks under their national laws, were also referenced. The opinion concluded with the proposition that odors cannot be represented graphically "in a full, clear and precise way which is comprehensible to manufacturers and consumers generally" and "therefore cannot constitute trade marks in accordance with Article 2." 

The ECJ briefly mentioned the practices of the United States and Member States allowing the registration of odors but ultimately agreed with the Advocate General's opinion that olfactory signs cannot be registered as trademarks. Although the Court refused to recognize odors as trademarks, its judgment clarified what is required for the graphical representation of trademarks not capable of visual perception. According to the Court, these non-traditional trademarks may be represented graphically "particularly by means of images, lines or characters, and that the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective." 

The Ralf Sieckmann judgment is significant because it represents a shift in Community law. Only three years before the Ralf Sieckmann case came before the ECJ, the Office for Harmonization in the Internal Market had "allowed the registration of the smell of freshly-cut grass as a trade mark for tennis balls." Advocate General Colomer dismissed

of "the smell of cherries to identify synthetic lubricants for racing cars or motor vehicles for motor shows" in America and the fact that 14 olfactory trademark applications are pending in America. Id. para. 30 n.40.

118. Id. para. 31.
119. Id. para. 35 n.50.
120. Id. paras. 33-34.
121. Case C-273/00, Sieckmann, para. 47 (opinion of Advocate General Colomer).
122. Case C-273/00, Sieckmann, ruling para. 2, para. 59 (judgment).
123. Id. ruling para. 1.
124. Case C-273/00, Sieckmann, para. 32 (opinion of Advocate General Colomer).
this previous registration of an odor in his opinion, noting, "[t]his seems to be a pearl in the desert, however, an individual decision which is unlikely to be repeated."\(^{125}\)

The registration of sounds as trademarks in the EC is addressed in the case of *Shield Mark v. Joost Kist*.\(^{126}\) In this case, the Dutch Hoge Raad der Nederlanden Court sought a preliminary ruling to determine if sounds could be trademarked and, if so, how they should be represented graphically. Advocate General Colomer, who wrote the opinion in the previous case examining odor, proposed that sounds could be trademarked and their graphical representation must meet the same standards for odors in that it "must be clear, precise, self-contained, easily accessible, intelligible, durable and objective."\(^{127}\) Representations in the form of a musical stave are generally sufficient, but plain written descriptions are not.\(^{128}\) Advocate General Colomer referenced the American system of describing sounds with words for the purposes of trademark registration and specifically the American registration of Tarzan’s cry and Time Warner’s registration of the “Merry Melodies” jingle used in the Hanna and Barbera cartoons.\(^{129}\) He concluded this type of description “is not admissible in a system such as that of the [Community] Directive, where ownership of a trade mark is acquired by registration and not by use [as it is in the United States].”\(^{130}\)

The ECJ agreed with Advocate General Colomer in its judgment, holding that “representation by detailed musical notation on a stave divided into bars and showing clefs, rests, pitch, and duration” is a sufficient graphical representation.\(^{131}\) In its holding, the ECJ rejected the practice of describing sounds using written description used in the United States.\(^{132}\)

In yet another reference for a preliminary ruling from the Dutch Supreme Court, Hoge Raad der Nederlanden, the ECJ was presented with a unique question of trademark law. The issue in the case known as *Libertel* was whether color per se, without shape or contour can constitute a trademark for goods and services under Article 2 of Directive 89/104.\(^{133}\) Advocate General Leger’s opinion wrestled with

\(^{125}\) *Id.*
\(^{126}\) Case C-283/01, Shield Mark BV v. Joost Kist, 2003 E.C.R. I-14313 (judgment).
\(^{127}\) Case C-283/01, *Shield Mark*, para. 29 (opinion of Advocate General Colomer).
\(^{128}\) *Id.* para. 47.
\(^{129}\) *Id.* para. 46 n.59.
\(^{130}\) *Id.* para. 46.
\(^{131}\) Roth, *supra* note 107, at 482–83 (citing Case C-283/01, *Shield Mark*).
\(^{132}\) *Id.*
\(^{133}\) Case C-104/01, Libertel Groep BV v. Benelux-Merkenbureau, 2003 E.C.R. I-
the question of whether colors per se are capable of meeting the fundamental requirement of the Directive that a trademark must possess a distinctive characteristic.\textsuperscript{134} He referenced the United States Supreme Court case of \textit{Qualitex} wherein the Supreme Court first held that color marks could be protected.\textsuperscript{135} In the \textit{Qualitex} case it was not the particular color shade that was recognized as a mark but the shade as applied to the surface of the product.\textsuperscript{136} \textit{Qualitex} held that "a colour cannot be registered as a trade mark unless it is established that it has acquired over time 'a secondary meaning,' that is to say that consumers recognize it as indicating a products origin."\textsuperscript{137}

Advocate General Leger concluded that "a colour per se, without shape or contour, does not constitute a sign capable of being represented graphically and of distinguishing the goods or services of one undertaking from those of other undertakings."\textsuperscript{138} The ECJ did not adopt the Advocate General's position but instead held that a color meets the graphic representation requirements of Article 2 of Directive 89/104 when it is represented in a way that meets the description standard set out in \textit{Ralf Sieckmann} and is designated using "an internationally recognized identification code."\textsuperscript{139} The Court also concluded that colors per se that were perceived by the public as being "capable of identifying the product or service for which registration is sought as originating from a particular undertaking and distinguishing that product or service from those of other undertakings" met the distinctive character requirements of Article 3 of Directive 89/104.\textsuperscript{140} The ECJ's willingness to rely on public perception for colors to qualify as trademarks is similar to the United States' Supreme Court holding in \textit{Qualitex} that colors recognized by consumers as indicative of products may be registered as trademarks.

In the three trademark cases discussed above, Advocates General cite United States law to distinguish it from the Community legal system. This technique was referred to by Baudenbacher in his article as the "dialectic function," mentioning foreign law but concluding that the ECJ should not adopt it in the case before the Court.\textsuperscript{141} Since the

\begin{footnotesize}
03793, para. 61 (judgment).
134. Case C-104/01, \textit{Libertel} (opinion of Advocate General Leger).
137. \textit{Id.} para. 94 n.81.
139. Case C-104/01, \textit{Libertel}, para. 37 (judgment).
140. \textit{Id.} para. 7.
141. Baudenbacher, \textit{supra} note 5, at 516.
\end{footnotesize}
decisions in these three cases, several scholars have argued that other countries should adopt the positions taken by the ECJ in these cases. The authors of *Protecting Colour Marks in Canada* contend that Canada should adopt the position taken in the EC and "adopt the much needed protection for colour *per se* trade-marks." Another article contends that the European Community's requirements for the registration of non-traditional trademarks "provides legal certainty and accessibility" and "if adopted in the United States, would greatly benefit United States trademark law." Specifically, the author argues the U.S. should require a "detailed musical notation" for the registration of sounds similar to the ECJ's requirement in the *Shield Mark* case, color registration in the U.S. should follow the EC requirement of description according to an international code as set forth in the ECJ judgment in *Libertel*, and calls for the U.S. to adopt a stricter standard for the registration of odors.

Departing from sights, sounds, and smells, the ECJ addressed the registration of a service mark in relation to the sale of goods in the *Praktiker Bau* case. In his opinion, Advocate General Leger referenced the laws of various Member States, the United States, Japan, Norway, and Switzerland that "allow services provided in relation to the retail sale of goods to be covered by a mark." Advocate General Leger proposed that services provided in connection with retail sales may be registered as a service mark under Article 2 of Directive 89/104. The ECJ concurred with Advocate General Leger and mentioned the practices of the various Member States but did not reference the law of other countries in its judgment.

Whether a trademark in the language of one Member State could be registered as a trademark in another Member State was explored in the *Matratzen* case. In this request for a preliminary ruling, Advocate General Jacobs referenced the law of the United States, Australia,
Canada, and Member States to support the proposition that words in another language may not be registered if they are understood by the targeted consumer.\textsuperscript{150} The ECJ essentially agreed with the Advocate General but did not refer to any of the non-Member State jurisdictions cited in the Advocate General’s opinion.\textsuperscript{151}

Another Advocate General’s opinion citing U.S. law in the area of intellectual property deals with trademark dilution. The concept of trademark dilution was developed in Europe and first introduced in the U.S. in a 1927 Harvard Law Review article.\textsuperscript{152} In the Adidas case, the Dutch Supreme Court, Hoge Raad der Nederlanden, asked the ECJ whether under Article 5(2) of the Directive 89/104 Member States may provide protection to the holder of a trademark against a “similar sign which takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.”\textsuperscript{153} Advocate General Jacobs quoted the seminal 1927 Harvard Law Review article by Schechter for historical background when discussing the concept of trademark dilution.\textsuperscript{154} His opinion also referenced the Federal Trademark Dilution Act of 1995,\textsuperscript{155} legislation at the state level, and U.S. courts which “have added richly to the lexicon of dilution, describing it in terms of lessening, watering down, debilitating, weakening, undermining, blurring, eroding and insidious gnawing away at a trade mark.”\textsuperscript{156} Advocate General Jacobs concluded that Member States must, under Article 5(2) of the Directive 89/104, provide protection to trademark holders against infringement through the use of an identical or “similar sign which takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.”\textsuperscript{157} The ECJ agreed with the

\textsuperscript{150} Case C-421/04, Matratzen Concord (opinion of Advocate General Jacobs).
\textsuperscript{151} Case C-421/04, Matratzen Concord, paras. 31–32 (judgment).
\textsuperscript{153} Case C-408/01, Adidas-Salomon AG v. Fitnessworld Training LTD, 2003 E.C.R. 0000, 2003 WL 101343, para. 2 (opinion of Advocate General Jacobs).
\textsuperscript{154} Id. para. 37.
\textsuperscript{156} Case C-408/01, Adidas-Salomon, para. 37 (opinion of Advocate General Jacobs) (citing T. Martino, Trademark Dilution 43–46(1994)).
Advocate General but did not mention U.S. law in its judgment.\textsuperscript{158} The protection U.S. intellectual property law offers to research centers is mentioned in Advocate General Leger's opinion in the \textit{Massachusetts Institute of Technology} case.\textsuperscript{159} In this case, the German Bundesgerichtshof sought a preliminary ruling to determine if a combination of certain ingredients fell within the protections of Council Directive 1768/92,\textsuperscript{160} which provides supplementary protection for medicinal products under development.\textsuperscript{161} In his opinion, Advocate General Leger explored the policy considerations of encouraging research and development that are behind the Council Directive granting protection.\textsuperscript{162} Advocate General Leger argued that if Community law did not provide this type of protection, research centers would be more likely to relocate to a jurisdiction where research received better protection.\textsuperscript{163} His opinion cited the laws of United States and Japan which offer greater protection to research activities.\textsuperscript{164} The ECI held the combination of ingredients was not protected under the Directive for other reasons and did not address the policy considerations raised by Advocate General Leger nor mention U.S. or Japanese law.\textsuperscript{165}

Given the many similarities between trademark law in the United States and the European Community, it is not surprising that U.S. law was cited in a number of Advocates General's opinions. What is surprising is the lack of reference to U.S. law on the subject of geographical indication of origin. Most gourmands and oenophiles are familiar with this subject. Simply put, geographical indications of origin are, as defined by the World Trade Organization's (WTO) Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, "indications which identify a good as originating in the territory of a Member or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."\textsuperscript{166} Examples include Roquefort cheese,

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\textsuperscript{158} Case C-408/01, \textit{Adidas-Salomon}.
\textsuperscript{159} Case C-431/04, \textit{Mass. Inst. of Tech.}, 2006 E.C.R. I-4089, para. 6 n.9 (opinion of Advocate General Leger).
\textsuperscript{160} 1992 O.J. (L 182) 1 (EC).
\textsuperscript{161} Case C-431/04, \textit{Mass. Inst. of Tech.} (judgment).
\textsuperscript{162} Case C-431/04, \textit{Mass. Inst. of Tech.} (opinion of Advocate General Leger).
\textsuperscript{163} \textit{Id.} para. 60.
\textsuperscript{164} \textit{Id.} para. 6 n.9.
\textsuperscript{165} Case C-431/04, \textit{Mass. Inst. of Tech.} (judgment).
\end{flushleft}
Idaho potatoes, Parma prosciutto, or Brunello wine. The WTO’s TRIPS Agreement created worldwide protection for geographical indications. Both the U.S. and EC are WTO Members and signatories to the TRIPS Agreement, but they disagree over geographic indications. The disagreement between the “old world” position taken by Europe in favor of greater protection and the “new world” position taken by the United States opposed to greater protection has split the WTO over the issue.

Despite numerous law review articles comparing the approach to geographic indications taken by the U.S. and EC, no Advocate General’s opinion examined in this study cited U.S. law on the subject of geographic indication of origin. The mere fact that U.S. law takes a different position on geographic indication than EC law is not a logical explanation for the absence of citations to U.S. law in an Advocate General’s opinion on the subject. In the three Advocates General’s opinions discussing trademark registration of sights, sounds, and smells, U.S. law is cited for the purpose of distinguishing it from the Community legal system. The lack of citations cannot be blamed on the ECJ’s lack of jurisdiction over the issue. The ECJ has jurisdiction to enforce the TRIPS Agreement and Community law on the subject of geographic indication. Perhaps a future Advocate General’s opinion will cite U.S. law in the area of geographic indication of origin.

C. Federal State Relations and the Commerce Clause

At the time his study was published, Herzog questioned why “the American experience in the field of federal-state relations in connection with the ‘commerce clause’” had not been more influential in the EC as


169. Id. at 315.


171. Baudenbacher, supra note 5, at 523 (referring to this as a “dialectic” method of mentioning a contrary position taken in a foreign judgment but concluding that it should not be adopted).

172. Montén, supra note 168, at 325.
it dealt with similar issues.\textsuperscript{173} One possible explanation Herzog offered is that the ECJ is "often concentrated on quite narrow and precise issues, rather than on broad problems of Member State-Community relations for which American precedents might have been useful."\textsuperscript{174}

The U.S. commerce clause was "intended to prevent Balkanization and to encourage creation of a national market."\textsuperscript{175} It seems only natural that Advocates General would look to U.S. law in this area as the EC common market was developing. Numerous recent law review articles have compared the American Commerce Clause and the European Common Market.\textsuperscript{176} Several Advocates General’s opinions published since the Herzog article have drawn inspiration from U.S. law in the area of federal-state relations and the commerce clause. These opinions cite to U.S. law in the context of Member State-Community relations contrary to Herzog’s prediction that U.S. law might be ignored on these issues because it is too broad.

Herzog identified several Advocates General’s opinions in his article that cite to U.S. law in the area of restraint on the free flow of goods.\textsuperscript{177} Specific citations in Advocates General’s opinions to U.S. law in the area of free flow of goods have not continued since Herzog’s article appeared. However, U.S. law is frequently referenced for the closely related subjects of the freedom of establishment,\textsuperscript{178} the freedom of movement of persons,\textsuperscript{179} and the relation between the federal and state governments, which often involves restraints on interstate commerce and the movement of goods and capital across state borders.\textsuperscript{180}

\textsuperscript{173} Herzog, supra note 4, at 919.

\textsuperscript{174} Id.

\textsuperscript{175} Thomas Lundmark, Guns and Commerce in Dialectical Perspective, 11 BYU J. PUB. L. 183, 195 n.82 (1997).


\textsuperscript{178} See, e.g., Case C-212/97, Centros Ltd. v. Erhvervs- og Selskabsstyrelsen, 1999 E.C.R. I-01459 (opinion of Advocate General La Pergola).

\textsuperscript{179} See, e.g., Case C-327/02, Panayotova v. Minister voor Vreemdelingenzaken en Integratie, 2004 E.C.R. I-11055 (opinion of Advocate General Maduro).

\textsuperscript{180} See, e.g., Case C-41/02, Comm’n v. Netherlands, 2004 E.C.R. I-11375, para. 34
The American Commerce Clause is found in Article I § 8 of the U.S. Constitution, which plainly states that Congress has the power to "regulate commerce . . . among the several states." The Supreme Court and other inferior federal courts have expounded on Congress’s authority to act under the Commerce Clause including the power to limit "state or local laws related to interstate commerce." Nowak and Rotunda's treatise observes that the result of the U.S. Constitution’s grant of Commerce Clause power to Congress "would be more competition, like a free trade zone — about two centuries before the creation of the European Common Market."

The European Common Market is at the heart of the first pillar of the European Union and includes the "four basic freedoms (free movement of goods, free movement of workers, freedom to provide services and free movement of capital and payments)." The legal basis of the Common Market is found in Article 2 of the EC Treaty and has been expanded by subsequent treaties, regulations, and the case law of the ECJ. Several Advocates General's opinions have turned to the American Commerce Clause and its interpretation in U.S. courts for insight into the European Common Market.

In *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, the Danish Supreme Court sought a preliminary ruling to determine if the Danish Companies Board’s rejection of an application to register a branch of a company previously registered in another Member State violated Articles 52, 56, or 58 (now Articles 43, 46, or 48) of the EC Treaty. The Danish Companies Board rejected the application on the grounds that the company intended to conduct its primary business in Denmark but had previously registered in the United Kingdom where the minimum capital requirements were more favorable to the company than the Danish requirements. The provisions of the EC Treaty at issue in the case guarantee the freedom of establishment which is central to the concept of the European Common Market.

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n.54 (opinion of Advocate General Maduro).
183. *Id.* at 162.
184. BORCHARDT, supra note 3, at 20.
185. Herzog, supra note 4, at 919.
187. *Id.* para. 7.
188. BORCHARDT, supra note 3, at 26.
(now Article 43) of the EC Treaty guarantees the rights of Member State nationals to establish themselves in another Member State and be treated the same as "nationals of that State."189 Under Article 58 (now Article 48) the "right of establishment also includes the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to do business in another Member State through a secondary establishment."190 Article 56 (now Article 46) permits Member States to restrict the establishment rights of foreign nationals only on the grounds of "public policy, public security or public health" but not "in support of economic aims."191

In his opinion, Advocate General La Pergola contended that the decision of Centros to benefit from the lower capital requirements of the United Kingdom "is the logical consequence of the rights guaranteed under the Treaty" and "is consistent with the objective behind the inclusion of the freedom of establishment in the Treaty, namely the need to promote the free movement of persons (and capital) and, by the same token, the achievement of a common market."192 Advocate General La Pergola concluded that Centros' decision to "take advantage of the flexibility of United Kingdom company law . . . must be viewed" in the context of the Community legal system and by analogy not the national legal system of Denmark.193 The opinion called for freedom in the competition of corporate rules in the absence of harmonization.194 La Pergola did not believe competition between the rules will "degenerate[] into a kind of 'Delaware Effect'" common in the United States where new companies flock to U.S. states like Delaware or New Jersey because they offer little protection to creditors or investors.195 He contended that Member States can guard against the "Delaware Effect" by harmonizing company laws under Article 54(3)(g) (now Article 44(2)(g)) of the EC Treaty.196

Advocate General La Pergola's opinion concluded that Denmark's denial of Centros' application is "contrary to the Treaty provisions on

189. Case C-212/97, Centros, para. 12 (opinion of Advocate General La Pergola).
190. Id.
191. Id. para. 14. Denmark claimed these exceptions applied but neither the Advocate General nor ECJ accepted this claim. See id. paras. 21–22; Case C-212/97, Centros, paras. 31–38 (judgment).
192. Case C-212/97, Centros, para. 20 (opinion of Advocate General La Pergola).
193. Id.
194. Id.
195. Id. para. 20 n.48.
196. Id.
freedom of establishment.”

The ECJ agreed with La Pergola’s opinion but did not explicitly refer to the Opinion or to the American “Delaware Effect.” The ECJ’s judgment did address La Pergola’s argument about the “Delaware Effect” in Europe by stating, “the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, on the basis of the powers conferred upon it by Article 54(3)(g) [now Article 44(2)(g)] of the EC Treaty, to achieve complete harmonisation.”

La Pergola’s reference to the “Delaware Effect” is an example of Herzog’s prediction that the “American experience in the field of federal-state relations in connection with the ‘commerce clause’” could be useful in the EC. There is an entire line of cases under the American commerce clause relevant to issues like those explored in the Centros case. Numerous American cases have applied commerce clause analysis to state laws regulating the ability to incorporate a business entity within the state’s borders. Nowak and Rotunda’s treatise explains that in areas where “Congress has enacted no legislation on the subject, the Court interprets Congressional silence and, in effect, assumes, in general, that Congress intends that we operate under a common market, with no state being able to enact laws that discriminate against commerce because of its interstate origins or destination.” The Supreme Court has used the commerce clause to strike down “state regulations impairing the free mobility of citizens” and “the free movement of persons within our national common market.” In an interesting parallel with EC Article 46, American law has recognized exceptions to the dormant commerce clause for states to act to protect the health of its citizens, the environment, and other factors.

American law was also cited in another Advocate General’s opinion in the field of EC and member state relations regarding the right of establishment. In Panayotova v. Minister voor Vreemdelingenzaken, a Dutch court sought a preliminary ruling to determine whether Dutch legislation permitting the rejection of residence permits was lawful under Association Agreements between several eastern European

197. Case C-212/97, Centros, para. 16 (opinion of Advocate General La Pergola).
198. Case C-212/97, Centros, para. 28 (judgment).
199. Herzog, supra note 4, at 919.
201. NOWAK & ROTUNDA, supra note 182, at 160.
202. Id. at 192.
203. Id. at 163–70.
countries and the EC. Advocate General Maduro focused part of his opinion on the tension between the EC right of establishment enjoyed by nationals of Associated States and Member States’ immigration legislation applicable to those nationals. His opinion explained that Member States’ restrictions on the rights of third country nationals must be “consistent with the fundamental rights and general principles of law the observance of which the Court ensures.” Advocate General Maduro turned to American law to emphasize that “the judicial protection of fundamental rights is particularly important with regard to the treatment accorded to third country nationals, since the latter constitute ‘discrete and insular minorities.’”

The phrase “discrete and insular minorities” comes from the famous footnote number four of the U.S. Supreme Court case of United States v. Carolene Products Co. Carolene Products on its face is a case about the shipment of milk products in interstate commerce in violation of the federal Filled Milk Act. The Appellee in the case unsuccessfully argued that the Filled Milk Act violates the Tenth Amendment because it invades a “field of action said to be reserved to the states.” The case is significant not for its holding on the Commerce Clause issue but for the “more searching judicial inquiry” the Court would now apply to claims of “prejudice against discrete and insular minorities” in legislation before the Court.

In the Panayotova case, Advocate General Maduro did not just cite the U.S. case merely for its choice phrasing. In a footnote he referenced a treatise analyzing the consequences of the doctrine announced in Carolene Products on “the exercise of judicial review.” Immediately after quoting the Carolene Products language, he proposed a standard of review for Member State restrictions on the association rights of nationals of Associated States. This standard of review is similar to

205. Id.
206. Id. para. 46.
207. Id. para. 47 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).
208. Carolene Prods., 304 U.S. at 152 n.4.
209. See id.
210. Id. at 146.
211. Id. at 152 n.4. See NOWAK & ROTUNDA, supra note 182, at 233–34.
212. Case C-327/02, Panayotova, para. 47 n.34 (opinion of Advocate General Maduro) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST (1981)).
213. Id. paras. 47–48.
the standard used by the U.S. Supreme Court in cases involving discrimination against discrete and insular minorities after the Carolene Products case:

(1) they must be based on objective criteria that can be known in advance by applicants and are susceptible to review by the courts;

(2) they must not affect the very substance of the right of establishment (they are acceptable so long as they are appropriate to pursue the objective of controlling immigration for purposes other than establishment and so long as they do not make the exercise of the right of establishment impossible or excessively difficult); and

(3) they must be consistent with the fundamental rights and general principles of law to which Member States are subject when acting within the scope of Community law.\textsuperscript{214}

The ECJ did not explicitly reference Advocate General Maduro's opinion or his citation to U.S. law. The Court adopted part, but not the entire, three-part test he proposed as a standard of review for Member State restrictions on the association rights of nationals of Associated States.\textsuperscript{215}

In \textit{R (on the Application of British American Tobacco Investments Ltd.) v. Secretary of State for Health}, the U.K. High Court of Justice sought a preliminary ruling on the validity of a Directive of the European Parliament and of the Council "concerning the manufacture, presentation and sale of tobacco products."\textsuperscript{216} One issue presented in the request for a preliminary ruling was whether the Community legislature in enacting legislation for the establishment and functioning of the internal market under Article 95 of the EC Treaty also has the power to adopt rules to protect public health.\textsuperscript{217} Advocate General Geelhoed took the position in his opinion that the Community legislature not only has the power to enact the legislation in question but is under an obligation "with regard to the establishment and functioning on the internal market" to do so under Article 2 of the EC Treaty and the purpose, in this case the protection of public health, is irrelevant.\textsuperscript{218}

Advocate General Geelhoed analogized the Community's power to

\textsuperscript{214} \textit{Id.} para. 48.
\textsuperscript{215} Case C-327/02, \textit{Panayotova}, para. 1 (judgment).
\textsuperscript{217} \textit{Id.} para. 6.
\textsuperscript{218} \textit{Id.} paras. 107–08.
that "enjoyed by the federal authorities in the United States in regard to inter-State trade."219 Advocate General Geelhoed interspersed his arguments about the power of the Community legislature under EC law with quotations to the U.S. Supreme Court case of Oklahoma, ex rel. Phillips v. Guy F. Atkinson Co.220 "It makes no difference if the extraneous objective in our case: public health is the principal or dominant objective of the federal measure in our case: the EC Directive so long as a legitimate objective in our case: the internal market is sufficiently served."221

In Oklahoma, ex rel. Phillips v. Guy F. Atkinson Co., the State of Oklahoma asked the U.S. Supreme Court to declare an Act of Congress providing for the construction of a reservoir unconstitutional.222 Oklahoma’s arguments, similar to the arguments raised in R (on the Application of British American Tobacco Investments Ltd.) v. Secretary of State for Health, were that in enacting the legislation Congress violated the Tenth Amendment to the U.S. Constitution and exceeded the power granted to Congress by the Constitution.223 The Supreme Court rejected these arguments finding that the legislation was a valid exercise of Congress’s Commerce Clause powers.224

The ECJ’s judgment in R (on the Application of British American Tobacco Investments Ltd.) v. Secretary of State for Health upheld the validity of the Directive in question for several reasons including that it did have a legal basis in Article 95 of the EC Treaty.225 The judgment did not specifically cite to the Advocate General’s opinion or the U.S. Supreme Court case cited therein but did mention that the Directive had a legal basis under Article 95 of the EC Treaty because its objective was the improvement of the internal market and the objective of protecting public health is not a bar to its validity.226

Another reference to American law is found in Advocate General

219. Id. para. 108.
220. Id. (citing Oklahoma, ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941)).
223. Id.
224. Id. at 516.
225. Case C-491/01, R (on the Application of British American Tobacco Investments), para. 99 (judgment).
226. Id. para. 75.
Maduro’s opinion in the case of *Commission v. Netherlands.*\(^{227}\) In this case, the Commission contended the Netherlands violated provisions of the EC Treaty prohibiting restrictions on the free movement of goods through a national law and administrative decisions denying certain foods entry into the national market of the Netherlands without first presenting evidence of the foods’ danger.\(^{228}\) In its defense, the Netherlands contended it was justified in excluding the foods in question based on the precautionary principle which allows restrictions on the free movement of goods if the goods are likely to cause harm to citizens’ health.\(^{229}\)

The opinion proposed that, prior to adopting national measures intending to protect health, a quality scientific study must be presented.\(^{230}\) Advocate General Maduro compared this practice with “the deferential attitude adopted by the US judicature with regard to studies conducted by the regulatory authorities” and cites two cases in support of this comparison.\(^{231}\) The ECJ agreed with Advocate General Maduro that the Netherlands violated the free movement provisions in question and could not justify their actions by referencing the precautionary principle because the Netherlands did not assess the health risk posed by the product based on reliable scientific data.\(^{232}\) The ECJ did not cite the Advocate General’s opinion or the American cases to support this conclusion, but, instead, it cited its own previous judgment in *Commission v. Denmark.*\(^{233}\)

**D. Criminal Law**

Over the past decade the Advocates General have branched out and begun making references to U.S. law in the areas of criminal law and procedure. No references to U.S. criminal law were found in the opinions examined in the Herzog and Baudenbacher articles.\(^{234}\) The privilege against self-incrimination has provided fertile ground for previous scholarly comparisons between the U.S., the EC, and

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228. Id. para. 1.
229. Id. para. 29.
230. Id. para. 34.
232. Case C-41/02, Comm’n v. Netherlands, para. 53 (judgment).
233. Id. para. 9 (citing Case C-192/01, Comm’n v. Denmark, 2003 E.C.R. 1-9693).
234. See Baudenbacher, supra note 5; Herzog, supra note 4.
individual EU member states.\textsuperscript{235} A corporate entity’s privilege against self-incrimination was explored in the case of \textit{Commission v. SGL Carbon}.\textsuperscript{236} In this case, the Commission appealed the decision of the Court of First Instance which reduced fines imposed on SGL Carbon for actions prohibited by community competition laws.\textsuperscript{237} SGL Carbon argued the Commission violated its privilege against self-incrimination by attempting to extract a confession through requests for information and documents submitted by the Commission.\textsuperscript{238} In his opinion, Advocate General Geelhoed explored the privilege against self-incrimination as it applies to undertakings, or corporations in the parlance of U.S. law.\textsuperscript{239} Advocate General Geelhoed criticized the Court of First Instance for extending the privilege as it exists in EC law to documents.\textsuperscript{240} He cited the Fifth Amendment to the United States Constitution\textsuperscript{241} and the Supreme Court case of \textit{United States v. White}\textsuperscript{242} for the principle that the privilege against self-incrimination should not be extended beyond natural persons to corporations in the context of producing documents.\textsuperscript{243} The ECJ agreed with Advocate General Geelhoed, holding that undertakings do not enjoy a privilege against self-incrimination when producing documents but did not discuss the law of the United States cited in the Advocate General’s opinion.\textsuperscript{244}

Another foundational criminal law concept is explored from a comparative perspective in \textit{Gasparini}.\textsuperscript{245} In this case, the Provincial Court of Malaga, Spain sought a preliminary ruling on whether the principle of \textit{ne bis in idem} (double jeopardy) applied to prevent prosecution of a defendant where a Portuguese court previously determined that prosecution under Portuguese law was time barred.\textsuperscript{246}

In discussing the principle underlying \textit{ne bis in idem}, Advocate General

\begin{itemize}
  \item \textsuperscript{236} Case C-301/04, Comm’n v. SGL Carbon, 2006 E.C.R. I-5915 (judgment).
  \item \textsuperscript{237} Id. para. 1.
  \item \textsuperscript{238} Id. para. 20.
  \item \textsuperscript{239} Case C-301/04, Comm’n v. SGL Carbon, para. 63 (opinion of Advocate General Geelhoed).
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} U.S. Const. amend. V.
  \item \textsuperscript{242} United States v. White, 322 U.S. 694 (1944).
  \item \textsuperscript{243} Case C-301/04, Comm’n v. SGL Carbon, para. 63 (opinion of Advocate General Geelhoed).
  \item \textsuperscript{244} Case C-301/04, Comm’n v. SGL Carbon, paras. 22, 48 (judgment).
  \item \textsuperscript{245} Case C-467/04, Gasparini, 2006 E.C.R. I-9199 (judgment).
  \item \textsuperscript{246} Case C-467/04, Gasparini, paras. 1–3 (opinion of Advocate General Sharpston).
\end{itemize}
Sharpston’s opinion referenced the U.S. doctrine of double jeopardy.\textsuperscript{247} Sharpston’s opinion cited the Fifth Amendment to the United States Constitution\textsuperscript{248} and the Supreme Court case of \textit{Green v. United States}.\textsuperscript{249} Sharpston’s opinion quoted Justice Black’s majority opinion in the \textit{Green} case:

\begin{quote}
[T]he underlying idea . . . is that the State with all [of] its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal, compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.\textsuperscript{250}
\end{quote}

Advocate General Sharpston concluded that the doctrine of \textit{ne bis in idem} should be limited to cases where the first proceedings considered the merits of the case and were not simply decided on procedural grounds.\textsuperscript{251} The ECJ’s judgment did not mention U.S. law, disagreed with Advocate General Sharpston’s Opinion, and found that \textit{ne bis in idem} applies where prosecution of an offense is time barred.\textsuperscript{252}

The final reference to U.S. criminal law and procedure appeared in Advocate General Geelhoed’s opinion in \textit{Commission v. Cresson}, which referred to the impeachment procedure provided for by Article II \textsection 4 of the U.S. Constitution.\textsuperscript{253} The reference was made in the context of a case involving official wrongdoing of a member of the Commission.\textsuperscript{254} The ECJ’s judgment agreed with Geelhoed’s opinion but did not reference the U.S. Constitution.\textsuperscript{255}

\textbf{E. Prohibitions Against Gender Based Discrimination}

Prohibiting discrimination based on sex is an area where U.S. law has historically influenced EC law.\textsuperscript{256} The Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment, subsequent cases

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} para. 72.
\item \textit{Id.} para. 72 n.59 (citing U.S. \textsc{Constitution} amend. V).
\item \textit{Id.} para. 72 n.60 (citing \textit{Green v. United States}, 355 U.S. 184, 187–88 (1957)).
\item \textit{Id.}
\item Case C-467/04, \textit{Gasparini}, para. 160 (opinion of Advocate General Sharpston).
\item Case C-467/04, \textit{Gasparini}, para. 58 (judgment).
\item Case C-432/04, \textit{Comm’n v. Cresson}, 2006 E.C.R. I-06387, para. 69 n.9 (opinion of Advocate General Geelhoed) (citing U.S. \textsc{Constitution} art. II, \textsection 4).
\item \textit{Id.} para. 1.
\item \textit{Id.} para. 1.
\item \textit{Comm’n v. Cresson}, para. 70 (judgment).
\end{enumerate}
\end{footnotesize}
interpreting the provision, and other state and federal laws prohibit
discrimination based on sex. The ECJ “recognizes a general principle
of non-discrimination or equality as ‘one of the fundamental principles
of Community Law.’” Equality based on sex is also enshrined
in Article 141 of the EC Treaty, which requires equal pay for men and
women.

Both the Herzog and Baudenbacher articles discuss the affirmative
action aspects of sex discrimination as an area where it made sense for
the ECJ to look to U.S. law and “profit from the American
experience.” Herzog and Baudenbacher included three Advocates
General’s opinions in their articles that cited U.S. law in the area of
prohibitions against sex discrimination. The trend of citation to U.S.
law in the area of sex discrimination identified in the Herzog and
Baudenbacher articles has not continued.

In the decade since the publication of their articles, only two
Advocates General’s opinions have looked to U.S. law in the area of
prohibitions against discrimination based on gender. U.S. law was cited
in the context of discrimination against third country nationals in the
Advocate General’s opinion in Panayotova v. Minister voor
Vreemdelingenzaken discussed supra. In the case of Lindorfer v.
Council, an Austrian woman employed by the Council of the E.U.
challenged actuarial factors in the Council’s pension scheme that
allegedly disadvantaged women. She claimed a violation of the
general principle of equality and specific Council rules implementing

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257. Nowak & Rotunda, supra note 182, at 457–75.
258. Arnulf, supra note 17, at 533 (citing Centre for European Studies, The
Principle of Equal Treatment in EC Law (Alan Dashwood & Siofra O’Leary eds.,
1997)).
340) art. 141 (as in effect 1957) (now article 119). The ECJ has even extended the
protections of Article 141 to transsexuals. Arnulf, supra note 17, at 602.
260. Herzog, supra note 4, at 918–19.
E.C.R. I-1889 (opinion of Advocate General Van Gerven); Kalanke v. Freie Hansestadt
Bremen, 1995 E.C.R. I-3051 (opinion of Advocate General Tesaurio); P. v. S. & Cornwall
262. Case C-327/02, Panayotova v. Minister voor Vreemdelingenzaken en Integratie,
263. Case C-227/04, Lindorfer v. Council, 2007 E.C.R. 00 (opinion of Advocate
General Sharpston). Reference to the law of the U.S. in Advocates General’s opinions in
discrimination cases involving actuarial methods used in pensions is not uncommon. See
Case C-109/91, Gerardus Cornelis Ten Oever v. Stichting Bedrijfspensioenfonds, 1993
the pension. In his opinion, Advocate General Jacobs referenced the U.S. Supreme Court case of *Manhart* to support his conclusion that the actuarial method in question is based entirely on sex and is not justified on factors unrelated to sex discrimination. The *Manhart* case was a natural comparison as it held a pension scheme requiring women to make larger contributions than men to be in violation of U.S. equal rights law. The ECJ agreed with the conclusion reached by the Advocate General but did not cite his opinion or the U.S. case.

**F. References to American Law in Other Subject Areas**

Over the past decade, Advocates General have referenced U.S. law in a number of new subject areas not mentioned in the Herzog or Baudenbacher articles. The openness of United States law to claims for compensation of non-material damage is referenced in Advocate General Tizzano’s opinion in *Leitner v. Tui Deutschland*. In this case, an Austrian court sought a preliminary ruling to determine if a package holiday tour provider could be held liable for non-material damages for a tourist’s loss of enjoyment. The ECJ agreed with the Advocate General’s opinion, holding there could be compensation for non-material damages but did not reference the opinion or the extent of non-material damages available in the United States.

United States law was referenced in yet another Advocate General’s opinion involving a European’s holiday gone wrong. In *Owusu v. Jackson*, a British national, injured while diving into the waters near his rented Jamaican villa, brought suit in England against Jackson, the individual who rented out the villa. Jackson raised the doctrine of *forum non conveniens* as a defense, arguing that Jamaica was a more appropriate forum. Advocate General Leger briefly referenced the establishment of the doctrine of *forum non conveniens* in the United States and other common law countries in his opinion.

266. *Manhart*, 435 U.S. at 711.
269. Id. para. 1.
272. Case C-281/02, *Owusu*, para. 48 (opinion of Advocate General Leger).
273. Id. para. 23.
The opinion concluded the doctrine of *forum non conveniens* did not apply, and the ECJ agreed but did not reference American law in its judgment.²⁷⁴

American law is referred to in Advocate General Maduro’s opinion in the case of *Ordre des Barreaux Francophones*.²⁷⁵ In this case, several bar associations sought a preliminary ruling to determine if a directive requiring lawyers to reveal, in certain situations, facts that might indicate money laundering violated fundamental rights, including the protection of lawyers’ professional duty of secrecy.²⁷⁶ In distinguishing between activity protected and not protected by the attorney-client privilege, Advocate General Maduro referenced the case-by-case analysis taken in several U.S. decisions.²⁷⁷ His opinion concluded with the suggestion that the Directive is valid as long as it is interpreted so that there are exceptions to the requirement of revealing information “obtained before, during or after judicial proceedings or in the course of providing legal advice.”²⁷⁸ The Court agreed with Advocate General Maduro and found that the Directive in question did not violate fundamental rights for a number of reasons including the exception discussed in Maduro’s opinion.²⁷⁹ The Court did not refer to Advocate General Maduro’s opinion or any of the U.S. case law he cited.

**G. Conclusion**

What conclusions can be drawn from comparing the Advocates General’s opinions identified in the Herzog and Baudenbacher articles with the Advocate General’s opinions identified in this study? The trend of Advocates General looking to U.S. law in the area of competition law identified by Herzog and Baudenbacher has continued over the past decade. The instances of Advocates General citing to U.S. law in the area of intellectual property have grown in the past decade. It will be interesting to monitor future intellectual property opinions to see if any cite U.S. law in the area of geographical indication of origin.

²⁷⁴ *Id.* para. 281; Case C-281/02, *Ovusu* (judgment).
²⁷⁶ *Id.* para. 1.
²⁷⁷ *Id.* para. 71 n.54 (citing *Upjohn Co.* v. United States, 449 U.S. 383 (1981); *In re Grand Jury Investigation* (Schroeder), 842 F.2d 1229 (11th Cir. 1988); United States v. Horvath, 731 F.2d 557, 561 (8th Cir. 1984); United States v. Davis, 636 F.2d 1028 (5th Cir. 1981)).
²⁷⁸ *Id.* para. 83.
²⁷⁹ Case C-305/05, *Ordre des Barreaux Francophones*, para. 24 (judgment).
Herzog was prophetic in his puzzlement over why the U.S. experience with federal-state relations and the Commerce Clause had not been more influential to the Advocates General. In the past decade, Advocates General have in fact turned to U.S. law for inspiration in the area of federal-state relations. Neither author predicted Advocates General’s references to U.S. law over the past decade in the areas of criminal law, compensation for non-material damages, *forum non conveniens* doctrine, attorney-client privilege, or deference to administrative agencies. Finally, Advocates General have not continued to look to U.S. law in the area of discrimination with the same frequency identified by Herzog and Baudenbacher. The next section examines Advocates General’s opinions citing the laws of non-Member State jurisdictions other than the United States. Opinions are organized according to the legal subject they address.

II. ADVOCATES GENERAL’S OPINIONS CITING OTHER FOREIGN JURISDICTIONS

A. Health & Environmental Law

A Community regulation prohibiting the marketing of cosmetics tested on animals was challenged by the French government in *French Republic v. European Parliament*. The French government argued the regulation should be annulled because, among other reasons, it created legal uncertainty over the number of substances that can be used in the cosmetics industry. Advocate General Geelhoed’s opinion restated the argument put forth by the French government that legal certainty is required to maintain the competitiveness of the European cosmetics industry. France argued that China, Japan, Korea, and the United States already require proof that cosmetics are safe for animals before imports are allowed and the uncertainty caused by the regulation will harm European companies who trade with these countries. The ECJ did not specifically address France’s argument about legal uncertainty or cite the regulations of foreign countries but did agree with Advocate General Geelhoed that the action should be dismissed.

In *Plato Plastik*, the Austrian Landesgericht Korneuburg sought a
preliminary ruling to determine if plastic bags were considered "packaging" within the meaning of Council Directive 94/62, among other questions. In his opinion, Advocate General Leger noted that considerable pollution caused by plastic bags has lead Taiwan and Corsica to prohibit their use. The ECJ agreed with Advocate General Leger's conclusion that plastic bags were considered "packaging" within the meaning of the Directive but did not specifically cite the prohibitions enacted in Taiwan or Corsica.

The final reference to foreign law in the context of health and the environment is found in the Advocate General's opinion in R (on the Application of British American Tobacco Investments Ltd.) v. Secretary of State for Health, discussed above. Advocate General Geelhoed made a passing reference to Canadian regulations on health warnings on tobacco products "being significantly stricter than the provisions proposed in the Directive" but did not specifically cite the Canadian regulations. The ECJ's judgment in this case upheld the Directive in question but did not refer to the Canadian regulations or appear to be influenced by the reference to them in the Advocate General's opinion.

B. Intellectual Property

Several of the Advocates General's opinions examined in this study cite to foreign jurisdictions other than the United States in intellectual property cases. In each of these cases, however, the opinions cite U.S. law along with the law of other foreign jurisdictions. Canadian and Australian trademark registration rules for foreign language trademarks are mentioned, along with the U.S. rules, in the Matratzen opinion discussed above. Japanese law is mentioned, along with U.S. law, for the protection it provides to medicinal products under development in the Massachusetts Institute of Technology

286. Case C-341/01, Plato Plastik, para. 24 (opinion of Advocate General Leger).
287. Case C-341/01, Plato Plastik, para. 53 (judgment).
289. Id. para. 72.
290. Case C-491/01, R (on the Application of British American Tobacco Investments) (judgment).
opinion discussed above.\textsuperscript{292} The Advocate General's opinion in the \textit{Ralf Sieckmann} case discussed above cites the Australian Trade Marks Act along with the U.S. Lanham Act for the basic definition of a trademark.\textsuperscript{293} The fourth and final reference to foreign law is found in the Advocate General's opinion in the \textit{Praktiker Bau} case discussed above.\textsuperscript{294} In that case, Advocate General Leger's opinion cites to numerous jurisdictions that allow the registration of services as marks in relation to the sale of goods including various Member States, the United States, Japan, Norway, and Switzerland.\textsuperscript{295}

None of the foreign laws cited in any of the Advocates General's opinions dealing with intellectual property issues were explicitly or implicitly referred to in the ECJ's judgments in those cases.\textsuperscript{296} The ECJ followed the Advocates General's suggestions in all of the intellectual property cases except for the \textit{Massachusetts Institute of Technology} case. However, the Court's judgments in these cases did not appear to be influenced in any way by the discussion of foreign law in the Advocates General's opinions.

\textbf{C. Prohibitions Against Gender Based Discrimination}

In \textit{Sirdar v. The Army Board}, the United Kingdom's Industrial Tribunal sought a preliminary ruling to determine if a policy of excluding women from combat service in the Royal Marines was outside of the scope of Community anti-discrimination laws.\textsuperscript{297} Advocate General La Pergola's opinion addressed, among other questions, whether excluding women from service in the Royal Marines was justified under Article 2(2) of Directive 76/207.\textsuperscript{298} According to Article 9(2) of the Directive, Member States must examine activities not covered by the Directive to determine if they are justified in continuing

\begin{itemize}
\item \textsuperscript{292} Case C-431/04, Mass. Inst. of Tech., 2006 E.C.R. I-4089, para. 6 n.9 (opinion of Advocate General Leger).
\item \textsuperscript{293} Case C-273/00, Sieckmann v. Deutches Patent- und Markenamt, 2002 E.C.R. I-11737, para. 16 n.9(g) (opinion of Advocate General Colomer).
\item \textsuperscript{294} Case C-418/02, Praktiker Bau- und Heimwerkermarkte AG v. Deutsches Patent- und Markenamt, 2005 E.C.R. I-5873 (opinion of Advocate General Leger).
\item \textsuperscript{295} \textit{Id.} para. 55 n.29 (citig Marianne Grabrucker, \textit{Marks for Retail Services—An Example for Harmonising Trade Mark Laws}, 34 INT'L REV. INDUS. PROP. & COPYRIGHT L. 503, 511–13 (2003)).
\item \textsuperscript{296} \textit{Supra} notes 111, 145, 149, 159.
\item \textsuperscript{297} Case C-273/97, Sirdar v. Army Bd., 1999 E.C.R. I-7403, para. 10 (judgment). The applicable provisions of Community law include Article 224 of the EC Treaty and Article 2(2) of Directive 76/207. \textit{Id.} paras. 14, 21.
\item \textsuperscript{298} Case C-273/97, Sirdar v. Army Bd., 1999 E.C.R. I-7403 (opinion of Advocate General La Pergola).
\end{itemize}
the activities. Advocate General La Pergola concluded that in conducting this examination, the Member State should look beyond its own borders and consider the trend in the “world of the armed forces” where there has been a gradual opening up of activities to women. La Pergola cited a judgment of the Canadian Human Rights Tribunal and to the experience in Canada where women have successfully served with men on an experimental basis since the 1980s. La Pergola’s opinion also briefly mentioned the success of the American armed forces in the racial integration of soldiers but did not reference American law on the subject. The ECJ agreed with La Pergola’s conclusion that excluding women from service in the Royal Marines is justified under Article 2(2) of Directive 76/207 but did not cite the Canadian case or the American experience.

D. Freedom of Expression

The tobacco advertising case of Germany v. Parliament & Council was cited in the Baudenbacher article for Advocate General Fennelly’s reference to foreign law in the subject area of statutory construction. Advocate General Fennelly’s opinion briefly mentioned Canadian, American, and Austrian case law for the proposition that a “total prohibition of advertising is a particularly grave interference with freedom of expression and with the choices of others.” Arguments about the compatibility of the Advertising Directive 98/43 with the protections of commercial speech found in Article 10 of the European Convention on Human Rights and Community law were raised by the German government. Advocate General Fennelly concluded that a particular part of the Directive relating to the advertising of non-tobacco goods and services should be annulled because it infringed freedom of expression. The ECJ agreed that the Directive should be annulled but not on the grounds of freedom of expression.

299. Id. para. 44.
300. Id. para. 45.
303. Case C-273/97, Sirdar, para. 32 (judgment).
306. Id.
307. Id. para. 181.
E. Remedies

In *Commission of the European Communities v. Hellenic Republic*, the Greek government attempted to have penalties imposed against them dismissed on the grounds that they were penal and subject to criminal law principles. In this case, the Commission sought to have periodic payment penalties imposed against Greece for failing to comply with a previous decision of the ECJ ordering Greece to clean up waste. In his opinion, Advocate General Colomer explored why the payment penalties in question were intended to compel Greece to comply with the ECJ’s previous decision and were not penalties designed to punish Greece and, therefore, not subject to criminal law principles. His opinion cited a Mexican treatise for the proposition that fines are imposed by courts “in order to compel the person liable to perform his principle obligation.” Advocate General Colomer was careful to note in his citation of the Mexican treatise that it has been subsequently cited by a Spanish author. His reference to a Mexican treatise, even without reference to its citation by a Spanish author, is a common comparative law practice among countries sharing a common legal tradition. The ECJ agreed with the position taken in the Advocate General’s opinion that the penalty payment was not a penal sanction but did not mention the Mexican treatise.

III. Analysis of the Use of Foreign Law by the Advocates General

A. Which Foreign Jurisdictions Are Cited and Why

The most obvious conclusion that can be drawn from Advocates General’s references to foreign law over the past decade is that U.S. law is referenced more frequently than any other jurisdiction. Out of the thirty-one opinions examined in this study, twenty-one cited only U.S. law, five cited U.S. law and the law of another foreign jurisdiction, and five cited a foreign jurisdiction other than the U.S. The most popular

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310. *Id.* para. 33.
312. *Id.* para. 30 (citing N. ALCALA-ZAMORA Y CASTILLE, CUESTIONES DE TERMINOLOGIA PROCESAL 54 (Universidad Nacional Autonoma De Mexico 1972)).
313. *Id.* para. 30 n.8.
jurisdictions after the U.S. were Canada and Japan, referred to in three opinions each, and Australia, referenced in two opinions.

Why do Advocates General cite the laws of a particular jurisdiction? The most straightforward answer is because of a jurisdiction's experience in a particular subject matter area. Advocates General turn to these jurisdictions because they find their experience with certain subjects insightful or because Community law has historically borrowed individual doctrines or entire legal concepts from specific jurisdictions. For example, Advocates General's cite to U.S. law for its experience in the areas of competition law, federal-state relations and restraints on trade, and intellectual property law as discussed in the previous section. The most popular jurisdictions after the U.S. are Australia, Canada, and Japan. These jurisdictions are cited for their experience in specific subject matter areas including discrimination, intellectual property, freedom of expression, and health and environmental issues.  

One possible explanation for the dominance of citations to U.S. law in Advocates General's opinions is the relative ease with which U.S. materials may be obtained compared with the varying levels of difficulty in obtaining law from other jurisdictions, especially emerging ones. Nearly ten years ago Jeanne Rehberg and Mirela Roznovschi, two prominent foreign and international law librarians, observed "there is no single, coordinated system for publishing all the laws of the nations, nor is there any comprehensive index for identifying them." Lyonette Louis-Jacques wrote, in the article that inspired this symposium, that LexisNexis and Westlaw contained foreign law materials from only a few countries and that most print and electronic foreign law sources only focused on major jurisdictions and select topics including business law.  

Despite the rapid growth of the internet, digitization projects, and the addition of some new jurisdictions to LexisNexis and Westlaw, the observations of Rehberg, Roznovschi, and Louis-Jacques are still an accurate description of the state of the art in foreign law research.

Most American lawyers and law students spoiled by the wealth of

315. See Mark C. Miller, A Comparison of Two Evolving Courts: The Canadian Supreme Court and The European Court of Justice, 5 U.C. DAVIS J. INT'L L. & POL'Y 27 (1999) (discussing the confrontation of similar issues by the Canadian Supreme Court and European Court of Justice over the past several decades).
317. Louis-Jacques, supra note 1, at 104.
information available from LexisNexis, Westlaw, and other databases are surprised to learn that lawyers in other jurisdictions do not have the luxury of using similar systems. Electronic legal research systems exist in other jurisdictions but seldom do they contain as much content or allow the sophisticated searching that is possible on the American versions of LexisNexis and Westlaw. It is also surprising to most lawyers hailing from the common law tradition that the complex indexing, digesting, and updating tools they are accustomed to are not found in civil law jurisdictions.\footnote{318}

Numerous free and reliable Web sites provide access to U.S. cases, statutes, and regulations to anyone in the world. Examples include GPO Access and Thomas.gov for legislative and administrative law research and Cornell’s Legal Information Institute and Findlaw for statutory and case law research.\footnote{319} Additionally, all federal district and appellate courts are required to provide free electronic access to their written opinions under the E-Government Act of 2002.\footnote{320} Most individual states provide access to their statutes and constitutions through Web sites and several states have embarked on ambitious projects to provide free comprehensive access to the decisions of their highest courts.\footnote{321}

Beyond primary sources of law, there are an abundance of U.S. law secondary sources easily accessible online for free. The Social Science Research Network’s (hereinafter SSRN) Legal Scholarship Network and the Berkeley Electronic Press have revolutionized the dissemination of legal scholarship in America. To a limited extent,


\footnote{321} For example, the Oklahoma State Courts Network and the Wyoming State Supreme Court both provide extensive and free online access to official versions of judicial decisions from their states’ courts. \textit{See} The Oklahoma State Courts Network, \textit{available at} http://www.oscn.net/applications/oscn/start.asp (last visited Feb. 25, 2008); Wyoming State Supreme Court, \textit{available at} http://www.courts.state.wy.us (last visited Feb. 25, 2008).
scholars from other jurisdictions have also used SSRN and Bepress to widely disseminate their ideas. The Google Book project is a potential future source of scholarly monographs on law.\textsuperscript{322}

Movements to provide free access to the laws of other countries have been underway for several years. The most prominent result of these movements is the World Legal Information Institute (hereinafter WorldLII) formed in the early part of the twenty-first century from several national Legal Information Institutes to cooperate in the promotion and support of providing free access to legal information throughout the world.\textsuperscript{323} Currently, laws from 123 countries are accessible via WorldLII.\textsuperscript{324} Graham Greenleaf, co-director of AustLII and WorldLII, recently noted that “ten years after the creation of the first LII’s there are still only a minority of jurisdictions around the world that have developed comprehensive free access to essential legal information.”\textsuperscript{325} Greenleaf also observed that most “LII’s have developed in Anglophone and common law countries” and as a result laws from this tradition are more readily available than laws from countries with civil law and other legal traditions.\textsuperscript{326}

The relatively narrow scope of jurisdictions referred to in Advocates General’s opinions cannot be blamed entirely on the limitations of LII’s. Advocates General have numerous legal research resources at their disposal beyond those available through LII’s. They have access to the ECJ’s Research and Documentation Service and the resources of the ECJ’s extensive law library at their disposal.\textsuperscript{327}

\begin{footnotesize}
\begin{enumerate}
\item[322.] Google Books, \textit{available at} http://books.google.com/ (last visited Feb. 27, 2008). The project was initially criticized for being overly Anglo-centric but has since expanded its scope to include jurisdictions from around the world. Many libraries have partnered with Google to scan their collections. \textit{See} Google Books, \textit{available at} http://books.google.com/googlebooks/partners.html (last visited Feb. 27, 2008). Jean-Noel Jeanneney, President of France’s Bibliothèque Nationale, has perhaps been the most vocal critic of the project’s original narrow focus on American institutions and works in the English language. \textit{See} Jean-Noel Jeanneney, \textsc{Google and Myth of Universal Knowledge: A View from Europe} (2007).
\item[323.] Declaration on Free Access to Law, \textit{available at} http://www.worldlii.org/worldlii/declaration/ (last visited Feb. 27, 2008).
\item[324.] \textit{See supra} note 319.
\item[326.] \textit{Id.}
\item[327.] E-mail from Jos Kuerten, Law Librarian & Principal Administrator, Library of the Court of Justice of the European Communities, to Lee Faircloth Peoples, Assistant Professor of Law Library Science, Associate Law Library Director, and Director of International Programs, Oklahoma City University School of Law (June 6, 2007, 05:08 CST) (on file
\end{enumerate}
\end{footnotesize}
ECJ's library provides the Advocates General with access to a number of electronic resources including the United Nations Treaty Collection, Guide to European VAT Directives, IBFD JuriPro, L'information Juridique, Westlaw Denmark, Karnov-EU On Line, LexisNexis JurisClasseur, Thomson Fakta: EU-Rätt On Line RDB - Die Rechtsdatebank, and other databases. Additionally, each Advocate General has the research services of three law clerks at their disposal.

A casual observer might conclude that the Advocates General's heavy citation of U.S. law is evidence of them succumbing to what Karl Llewellyn called the "threat of the available." Llewellyn, writing in 1931, described this as "the almost inevitable tendency in any thinking, or in any study, first to turn to the most available material and to study that—to study it exclusively—at the outset; second, having once begun the study of the available, to lose all perspective and come shortly to mistake the merely available, the easily seen, for all there is to see." This conclusion is not applicable to the Advocates General for two reasons. First, if law from other jurisdictions is simply not "available" it is not fair to conclude that Advocates General have resorted to citing only what is easily at hand. Second, given the extensive resources and research support available to the Advocates General, it is safe to conclude, in theory at least, that their heavy citation to U.S. law is not because it is all that turns up in their Google searches. The Advocates General at least have the means to be sophisticated legal researchers.

1. Testing Theories Advanced in Previous Articles

The abundance of citation to U.S. law in the Advocates General's


329. E-mail from Jos Kuerten, Law Librarian & Principal Administrator, Library of the Court of Justice of the European Communities, to Lee Faircloth Peoples Assistant Professor of Law Library Science, Associate Law Library Director, and Director of International Programs, Oklahoma City University School of Law (June 6, 2007, 09:49 CST) (on file with author).


opinions examined in this study is interesting when viewed in light of two observations made in Baudenbacher's article. Baudenbacher posited that U.S. Supreme Court rulings are not as influential as they once were because U.S. courts have excluded themselves "from the global conversation." A review of the foreign law citation patterns in the Advocates General's opinions over the past decade reveals that Baudenbacher's prediction, at least in terms of citation to U.S. Supreme Court cases by the Advocates General, are not sustained. U.S. Supreme Court cases were specifically referenced more than any other foreign law source in the opinions of the Advocates General over the past decade. Figure 1 details which specific foreign law sources were mentioned in the opinions of the Advocates General examined in this study. A "specific reference" includes a complete numerical citation described infra as well as references that are not complete numerical citations but describe the jurisdiction and type of authority cited. For example Advocate General Jacobs' reference to the U.S. Sherman and Clayton Acts in the Albany International opinion would qualify as a specific reference.

**Figure 1**

**Specific References to Foreign Law Sources in Advocates Generals' Opinions**

<table>
<thead>
<tr>
<th>Specific Foreign Law Source</th>
<th>Number of References in Advocates Generals' Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Supreme Court Cases</td>
<td>17</td>
</tr>
<tr>
<td>Statutes*</td>
<td>11</td>
</tr>
<tr>
<td>Case Law*</td>
<td>9</td>
</tr>
<tr>
<td>Secondary Sources*</td>
<td>7</td>
</tr>
<tr>
<td>Constitutions*</td>
<td>3</td>
</tr>
<tr>
<td>Administrative Regulations*</td>
<td>3</td>
</tr>
</tbody>
</table>

(*) indicates all jurisdictions combined)

Baudenbacher's second observation is that, in the past, courts that looked for inspiration from the decisions of foreign courts were mainly

333. Id. at 526.
334. The Opinions examined in this study contained the following number of specific numerical citations to sources: U.S. Supreme Court cases: 17; Statutes: 11; Secondary Sources: 7; Other Cases: 5; Constitutions: 3; Administrative Regulations: 3.
focused on judgments from “neighboring or powerful countries.”  
Baudenbacher predicts that in the future “every jurisdiction in the globe is, as a matter of principle, eligible as a resource.”  
Baudenbacher’s prediction has not yet become reality, at least in terms of the last decade of Advocates General’s opinions citing foreign law. Opinions citing foreign law over the past decade refer to just a handful of jurisdictions and not the multitude as predicted by Baudenbacher. It will be interesting to monitor the developments of the free access to law movement and WorldLII to determine if access to a wider range of materials translates into their citation in Advocates General’s opinions.

B. U.S. Law is Used Differently Than the Law of Other Jurisdictions in Advocates General’s Opinions

1. Citation

Upon closer examination, the Advocates General’s opinions citing foreign law over the last decade treat U.S. law differently from the law of other jurisdictions. When Advocates General cite U.S. law they are more likely to provide a complete numerical citation to the authority cited. Fifty-four percent of citations to U.S. law in the Advocates General’s opinions in this study were complete numerical citations. In contrast only twenty-one percent of citations to jurisdictions other than the U.S. were complete numerical citations.

One possible explanation for the disparity between specific and non-specific citation is the strict citation standards in the United States and U.S. lawyers’ obsession with citation. The United States is unique among the jurisdictions of the world to have not only one but two citation systems vying for dominance, the ALWD Manual and The Bluebook. Both systems have received their share of praise and critique. An entire genre of writing on the subject has emerged, known as the “satirical Bluebook critique.” Reviews have been “written in doggerel as a critique of a torrid romance novel or a religious tract, and

336. Baudenbacher, supra note 5, at 525.
337. Id.
338. Thirty-two out of fifty-nine citations to U.S. materials.
339. Three out of fourteen citations to materials from non-U.S. jurisdictions.
340. Nadia E. Nedzel, Legal Reasoning, Research, and Writing for International Graduate Students 42 (2004) (posing that this obsession is due to the great number of primary and secondary sources available in the United States).
in imitation of the books and cantos of Dante’s Divine Comedy.”342

In contrast to the United States, the citation systems in other jurisdictions are not as strict. In many countries “the standards are not absolute nor writ in stone. Many countries have vernacular forms which are more prevalent, even if there are more formal standards for citation.”343 A comprehensive guide to foreign legal citation was only available as early as 2006.344 Given the fervor over citation in the United States and the comparative paucity of standards in other jurisdictions it is not surprising that Advocates General are able to cite U.S. sources more completely than sources from other jurisdictions.345

2. Amount of Text Devoted to Foreign Law

The Advocates General’s opinions examined in this study devoted more text in their opinions to discussing U.S. law than they did to discussing the law of other jurisdictions. Figure 2 compares the number of Advocates General’s opinions devoting specific amounts of text to discussing U.S. law with the number of Advocates General’s opinions devoting specific amounts of text to discussing the law of other jurisdictions.

**Figure 2**

**Amount of Text Devoted to Foreign Law in Advocates Generals Opinions**

<table>
<thead>
<tr>
<th></th>
<th>United States</th>
<th>Other Jurisdictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than 1 paragraph</td>
<td>7 Opinions</td>
<td>1 Opinion</td>
</tr>
<tr>
<td>1 paragraph</td>
<td>9 Opinions</td>
<td>1 Opinion</td>
</tr>
<tr>
<td>2 sentences or more</td>
<td>3 Opinions</td>
<td>0 Opinions</td>
</tr>
<tr>
<td>1 sentence or less</td>
<td>7 Opinions</td>
<td>8 Opinions</td>
</tr>
</tbody>
</table>

A partial explanation for this disparity in textual space devoted to discussing the laws of particular jurisdictions is the difference between the style and length of case law in common and civil law jurisdictions.

342. Id. at 340.


344. Id.

Cases from the United States, or any other common law jurisdiction, simply provide the Advocates General with much more material to work with, and potentially include in an opinion, than cases from jurisdictions rooted in the civil law tradition. Common law cases are replete with ample citations to primary and secondary sources, a detailed explanation of the relevant facts of the case, a discussion of the procedural posture of the case, usually a discussion of the substance of the arguments made to the court, analysis of the applicable law and how it applies or does not apply to the facts of the case, and hopefully a clear explanation of the court's decision and the reasoning that lead to the decision.

In contrast to common law judgments, civil law judgments can be much less transparent. Civil law courts are known to include only very brief statements of the facts and issues before the court, to not include citations to relevant primary and secondary sources, and to not explain in great detail how they reached their decision. The disparity in space devoted to discussions of the law of jurisdictions other than the United States in the opinions of the Advocates General cannot be blamed entirely on the brief and cryptic format of civil law judgments. Some civil law courts issue additional documents that help explain their judgments. In France, for example, decisions of the Conseil d'État are supplemented with the Report of the Rapporteur, a detailed accounting of the facts and issues in the case written by a judge, and the Conclusions of the Commissaire du Government that “explain and illuminate the [Court's] decision.” However, none of the Advocates General's opinions examined in this study cited to a Report of the Rapporteur, Conclusions of the Commissaire du Government, or their equivalents in other jurisdictions.

Another potential explanation for this disparity is the style of codes in civil law jurisdictions. The codes of civil law jurisdictions are famous for their extreme brevity. For example, the French Civil Code contains only five paragraphs on the entire law of delict (torts) and the Austrian civil code dispenses with the subject with half that number of paragraphs. A casual reader of Advocates General's opinions might be tempted to conclude that the reason they devote such little space to

346. KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 259–64 (3d ed. 1998).


348. ZWEIGERT & KOTZ, supra note 346, at 90.
discussing concepts from civil law jurisdictions is because the conciseness of the code provisions leave the Advocates General nothing to discuss. This conclusion is not entirely correct given the history and position of scholarly legal writing, known as doctrine, in civil law jurisdictions. Scholarly legal writing is extremely important in civil jurisdictions because it explains and interprets the famously laconic provisions of the civil code. An Advocate General might discuss scholarly legal writing from a civil law jurisdiction in her opinion to illuminate a short civil code provision. However, only one Advocate General’s opinion examined in this study cited a treatise from a civil law jurisdiction.

The fact that discussions of common law concepts occupy more space in Advocates General’s opinions than discussions of concepts from other legal traditions is not surprising given the role of the Advocate General. As explained in the introductory paragraphs of this article, the Advocate General’s role is to help the Court by suggesting a solution to the case and, in doing so, the Advocate General “may opine on such points of law incidental to the case as he thinks fit, and may in particular make a critical assessment of the case law or comment on the development of the law in the area in issue.” Advocates General are known for their extensive use of comparative law, for raising issues not plead by the parties, and for citing sources not typically found in ECJ judgments including foreign law. It is not surprising that Advocates General devote more space to discussing common law concepts in their opinions because common law cases give them more to discuss.

3. An Evolution in Judicial Style

The fact that Advocates General cite common law concepts more frequently and discuss them in greater depth and detail is explained in part by a broader trend identified by Anthony Arnall. In the chapter titled The Normative Status of Case Law in his recent book, Arnall argues the ECJ’s judicial style has evolved from the civil style toward a more common law approach evident in certain aspects of the Court’s judgments. Originally, the ECJ published its judgments in two parts.

349. Id. at 96.
351. Tridimas, supra note 45, at 1385.
352. Ritter, supra note 2, at 758.
353. ARNALL, supra note 17, at 622.
The first part contained a summary of the facts and issues in the case. The second part of the judgment contained the Court’s ruling and reasoning presented in a manner “strongly reminiscent of that of the top French courts: brief and composed of a short number of long sentences, each beginning in the French text with the phrase ‘attendu que’ (whereas).” Over the past three decades the Court has abandoned the use of a short number of long sentences to convey its rulings and only publishes the summary of facts and issues in certain cases.

Arnulf contends these changes are a “watershed” and have had a “noticeable effect on the judgments proper.” Freed “from its self-imposed grammatical straight-jacket” the Court now engages “arguments in a more overt and direct manner and to draw more elaborate factual distinctions with the growing body of case law was making increasingly necessary.”

Arnulf provides several examples of common law techniques the Court has begun to use including reaffirming, distinguishing, and overruling its own previous cases. These techniques are evident in the rare occasions when the Court explicitly or implicitly references foreign law discussed in an Advocate General’s opinion. In the Courage judgment, when the Court followed the conclusion suggested by the Advocate General, the Court also cited the U.S. case referenced in the opinion.

In the Compagnie Maritime Case, the Court did not follow the conclusion suggested in Advocate General Fennelly’s opinion which involved the application of the act of state doctrine borrowed from U.S. law. The Court’s judgment includes a discussion of the act of state doctrine which the court distinguishes as not applicable to the case before it because of a factual distinction. The Court applied common law techniques in the Cipolla Case when discussing the U.S. antitrust state action doctrine raised in Advocate General Maduro’s opinion. The Court employed reasoning by analogy in a several paragraph discussion of how the Italian law in question was implemented with state supervision as required by the state action doctrine established in U.S. antitrust law.

354. Id. at 624 (footnote omitted).
355. Id. at 637.
356. Id. at 625.
357. Id. at 637.
358. ARNULF, supra note 17, at 625.
359. Id. at 627–32.
Just as the Court has embraced the common law style and common law techniques, the Advocates General have done so as well. In the three trademark cases involving the registration of sights, sounds, and smells, the Advocates General cited U.S. law and distinguished the U.S. approach as one that would not comport with EC trademark law and practice. Advocates General also used the common law technique of reasoning by analogy. In the Albany International opinion, the test proposed by the Advocate General draws direct analogies with U.S. anti-trust law. In the Panayotova opinion, the test proposed by the Advocate General is directly analogous with the type of judicial scrutiny used by the U.S. Supreme Court when faced with restrictions on fundamental constitutional rights.

This article does not contend that Advocates General look to common law jurisdictions more than jurisdictions from another legal family because doing so might increase their chances of the Court citing their opinion or following their conclusions. As Advocate General Fennelly put it “[t]he Advocate General should not be looking over his shoulder to improve his statistics by anticipating the judgment of the Court.” 361 As explained above, one reason Advocates General are more likely to cite common law cases is that they give them more material to work with in terms of fulfilling their role. The Court’s shift toward a more common law style in its judgments helps explain why, when the Court includes the rare explicit or implicit reference to foreign law cited in an Advocate General’s opinion in its judgment, that reference is more likely than not drawn from a common law case.

CONCLUSION: THE FUTURE

The European Union is currently undergoing fundamental institutional reform. The current manifestation of these efforts is the Treaty of Lisbon that would change the name of the ECJ to the Court of Justice of the European Union and would expand the jurisdiction of the Court to matters involving justice, home affairs, and certain foreign policy matters. 362 If the Court’s jurisdiction is expanded, it will be interesting to monitor the Advocates General’s opinions in these new areas to see if they contain references to foreign law. The successful implementation of the Treaty of Lisbon is not certain. It must be

361. Ritter, supra note 2, at 771 (citing Nial Fennelly, Reflections of an Irish Advocate General, 5 IRISH J. EUR. L. 5, 14 (1996)).
ratified by all Member States before it comes into force.\textsuperscript{363} Previous reform efforts stalled due to the failure of referendums on the European Constitution in France and the Netherlands in 2005.\textsuperscript{364}

Several new Advocates General were recently appointed to replace Advocates General Leger, Tizzano, Geelhoed, and Stix-Hackl.\textsuperscript{365} The majority of the departing Advocates General cited foreign law in their opinions fairly frequently over the past decade.\textsuperscript{366} It will be interesting to monitor the opinions of the new Advocates General for citations to foreign law to determine if the patterns and practices identified in this study will be repeated.

This study has focused on the Advocates General and their references to foreign law. The impact of foreign law on the ECJ has


been alluded to but not closely examined in this study. More research needs to be done to determine the impact of the Advocates General’s references to foreign law on the ECJ and on Community law in general.367

367. Two previous studies have attempted to gauge the impact of Advocates General’s opinions on the ECJ. See Ritter, supra note 2; Tridimas, supra note 45, at 1363. Both studies admitted that accurately determining the impact of Advocates General’s opinions on the ECJ is difficult. Ritter, supra note 2, at 766; Tridimas, supra note 45, at 1363.