

Title: The Idea of Legal Convergence and International Economic Law

Abstract: The convergence of different legal systems is one of the leading theses in the discipline of law. This paper proposes that International Economic Law is one of the great sources of inspiration for the coming together of various legal systems around the world. The paper will explore the European Union experience in this respect and it will analyse a number of legal principles which promote the idea of legal convergence in the sphere of international economic law. Furthermore, referral will be made to the organisations promoting the convergence of legal systems such as the International Monetary Fund (IMF), the World Bank Group (WB) and the World Trade Organization (WTO).

Key words: Idea of law convergence, international economic law, European Union law, principle of fidelity, principle of conferred powers, principle of subsidiarity, principle of conditionality, principle of conditionality.

The Idea of Legal Convergence and International Economic Law

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“The desire for convergence of legal systems merely expresses a yearning for simplicity. It responds to popular discontent with complexity and seeks to impose order where there is untidy diversity...it is little more than an expression of frustration at the fact that the world is complicated, disorderly and uncertain.”²

Introduction

There are few ideas as succinct and prevailing as the idea of law convergence in the discipline of law. Despite recent attacks³ to the idea of law convergence, this idea remains the orthodox approach in the discipline. The “mushrooming” of a number of international economic organisations, the parallel proliferation of international economic law norms after the end of the Second World War as well as the ever-increasing value of international economic regulation constitute a reality which points to such finding. Accordingly, this article will briefly refer to the idea of law convergence and what the idea stands for and it will then address the relevance and the key role of international economic law in the promotion of the idea. International economic organisations, international economic instruments and the leading legal principles of these instruments will also be referred to in the analysis so that the connection between the idea of legal convergence and the operations of international economic law becomes clear. With regard to the term ‘international economic law’, the author wishes to stress that he takes an expansive approach by understanding such law as incorporating international trade law, international monetary law, international financial law as well as international development law.

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² John H. Merryman, *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law* 27 (1999).

³ E.g. Pierre Legrand, *European Legal Systems are Not Converging*, 45 *Int'l & Comp. L.Q.* 52 (1996) or Pierre Legrand, *The Same and the Different* in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (2003).

The Idea of Law Convergence

The legal convergence thesis is one of the leading theses in the discipline of law. Convergence from the legal point of view can be seen as the coming together of different legal systems.⁴ More specifically, the idea of legal convergence would propose that “for good reasons and with particular circumspection⁵, with or without reservations⁶, national legal systems can and should gradually⁷ converge into each other and into wider, extra-national, legal formations”.⁸ Contrary to popular academic belief which argues that the idea of convergence of legal systems started with the Cicero’s call for ‘no different laws in Athens and in Rome’⁹, it has to be stated that the philosophical underpinning of the idea and therefore the idea of convergence *per se* goes back to Socrates and Plato. In particular, Plato’s theory for the postulation of universals¹⁰ certainly comes very close to the substratum of the idea of legal convergence itself. In this theory Plato maintained that human beings are inherently in favour of presenting and accepting the plural as singular and that in the essence of the matter all leads to one (as opposed to many).¹¹ Our analogy with law is an obvious one: If Plato saw the one as opposed to the many as a matter of course for human behaviour and thinking, then one questions the very existence of different legal systems and different legal norms.

Our times are an era of unparalleled developments in the internationalisation and transnationalisation of law.¹² It now becomes clear to all the classes of lawyers (academics, judges and practitioners) that modern domestic commercial and financial laws are the subject matter of international legal developments.¹³ However, the new *lex mercatoria* is less coherent than the old *lex mercatoria*. It somewhat lacks the conceptual unity so much admired by Continental jurists. But the directive nature of this new *lex mercatoria* should not be underestimated. It may take the form of guidelines¹⁴; yet these guidelines may produce legal regimes much more effective than the regimes which hard laws may produce. The reason for this is that international economic law creates a “*legal order of its own*”¹⁵, an autonomous legal microcosm, which may or may not be incorporated in the various domestic laws around the world. It is expected, however, that such extra-systemic legal order will touch upon the internal workings of domestic legal systems sooner rather than later, effectively promoting the convergence thesis to an even greater degree. To a certain degree this already occurs: the civil laws of France and Germany refer to case law for interpretation purposes,¹⁶ whereas the common lawyers *e.g.* in England have now to deal and apply the test of good faith in cases of consumer law by operation of EC Directive 93/13/EEC¹⁷. Also, consumer guarantees have been aligned

⁴ Basil Markesinis, *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (2000) or Mark van Hoecke, *The Harmonisation of Private Law in Europe: Some Misunderstandings* in Mark van Hoecke and Francois Ost (eds.), *The Harmonisation of European Private Law* 9 (2000).

⁵ Ugo Mattei, *Comparative Law and Economics* 17-19 (1998, reprinted in 2004).

⁶ See generally J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out* (1997). Cf. Liesbeth Lijnzaad, *Reservations to UN-human Rights Treaties* (1995).

⁷ Basil Markesinis, *The Gradual Convergence* (1994).

⁸ Antonios E. Platsas, *The Convergence of Laws: A Typology of Implementation Models & Factors* (Ph.D. Thesis University of Dublin) 5 (2007).

⁹ Cicero, *De Republica*, III, xxii, 33

¹⁰ See *e.g.* Rep. 596a: ‘We are in the habit of positing a single Form for each plurality of things to which we give the same name’ and Phaedo 100c-d: ‘... if there is anything beautiful besides Beauty itself, it is beautiful for no other reason than that it shares in that Beauty. ... nothing else makes it beautiful other than the presence of, or the sharing in, or however you may describe its relationship to that Beauty we mentioned, for I will not insist on the precise nature of the relationship, but that all things are made beautiful by Beauty’.

¹¹ Rep. 596a: ‘We are in the habit of positing a single Form for each plurality of things to which we give the same name’.

¹² Ole Spiermann, *Twentieth century internationalism in law*, 18 Eur. J. Int’l L. 785, 788 (2007).

¹³ Jan H. Dalhuisen, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law* 4-5 (3d ed. 2007).

¹⁴ *Id.* 6.

¹⁵ *Id.* 34, 211.

¹⁶ Peter de Cruz, *Comparative Law in a Changing World* 494, 500 (3d ed. 2007).

¹⁷ *Official Journal* L 95/29 (1993).

throughout Europe by operation of EC Directive 1999/44/EC¹⁸. These two directives will be dealt with and explained further below. Nonetheless, differences between legal systems occur¹⁹ and one should not oversee these differences yet the trend is clearly towards convergence of laws.

The hypothesis that the convergence thesis is a preferable state of affairs (when compared to the divergence thesis) is a well-established one and it is readily attestable. Without doubt, one could argue that since there is *unity of thought* in the human race, then it could be argued that there should also be *unity of legal thought*: our legal methods and techniques vary but our legal results –one way or another– are largely similar.²⁰ Besides, the exotic division of the law discipline according to jurisdiction is largely irrelevant in the face of epistemology as “[t]here is no such thing as ‘German’ physics or ‘British’ microbiology or ‘Canadian’ geology”.²¹ The coming together of the various national economic laws under convergent patterns of law will decrease investigation and transaction costs in the various legal regimes.²² Effectively, “there is no rational argument against, rather a strong sociological and economic argument in favour of *transnational substantive* law for professional dealings”²³. It has also to be stated that, even though globalisation is a *sui generis* state of affairs, international economic law through the ideological underpinning of the convergence thesis supports the idea of economic globalisation. It is also expected that, through the idea of law convergence, “neutral economic law” is to be produced, that is, law which is more or less acceptable by all the relevant legal systems affected.²⁴ Accordingly, the 1900 thesis of Lambert and Saleilles for more internationalised legal systems with the parallel creation of an international common law²⁵ is still most relevant in our days (a mere look at the existence and strengthening of such international organisations as the EU, the WTO, the IMF and the World Bank should suffice for the proof of such point). Wars, ideological conflicts, the very divisive nature of national interests and the clash of different cultures have not destroyed the ideal of legal convergence. Thus, the call for a more internationalised approach in law is still to be pursued.

International Economic Law and the Idea of Law Convergence

The idea of law convergence and more generally the idea of internationalism in law have been fuelled by the developments in the sphere of economic law. The example of the European Union is paramount in this respect.²⁶ The European Union (EU) has started as an economic law experiment and it has now

¹⁸ Official Journal L 171 (1999).

¹⁹ E.g. Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs German Doctrinalism*, Hastings Int'l & Comp. L. Rev. 295, 302, 304-305, 329-330 (2008).

²⁰ See the example of land register and title insurance companies which Zweigert & Kötz use in their book: Konrad Zweigert Reimann & Hein Kötz, *An Introduction to Comparative Law* 39 (3d ed. 1998).

²¹ *Id.* 15. The thesis of the unity of science comes in agreement with the modern Vienna Circle of philosophy. For writings on the unity of science see e.g. L. von Bertalanffy, *An Outline of General System Theory*, 1 *British Journal or the Philosophy of Science* 134, 134-165 (1950); P. Oppenheim and H. Putnam, *Unity of Science as a Working Hypothesis*, 2 *Minnesota Studies in the Philosophy of Science*, 3-36 (1958) as reprinted in R. Boyd, P. Gasper and J.D. Trout, *The Philosophy of Science* 405-427 (1991). Cf. J. Fodor, *Disunity of Science as Working Hypothesis* in 28 *Synthese* 77 (1974), reprinted as ‘Special Sciences’ in Boyd *et al.*, *op. cit.* 429-441 and more recently, J. Fodor, *Special Sciences: Still Autonomous After All These Years?*, 11 *Philosophical Perspectives* 149-163 (1997).

²² Philip Wood, *Law and Practice of International Finance* 38 (2008); Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Commercial Code in International Sales*, 15 *Cardozo J. Int'l & C. L.* 461, 468-469 (2007). Cf. Chris Bummer, *Regional Integration and Incomplete Club Goods: A Trade Perspective*, 8 *Chi. J. Int'l L.* 535, 547-548 (2008) where it is argued that uniformity (in our case uniformity of legal rules) may necessitate extra economic costs e.g. when a legal system denounces or modifies a bilateral treaty so that the system complies with a uniform legal rule.

²³ Jan H. Dalhuisen, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law* 211 (3d ed. 2007).

²⁴ Gabriël A. Moens & Rodolph Biffot (eds.), *The Convergence of Legal Systems in the 21st Century: An Australian Approach* 5 (2002).

²⁵ Peter de Cruz, *Comparative Law in a Changing World* 24 (3d ed. 2007).

²⁶ Tony Cleaver, *Understanding the World Economy* 95 (3d ed. 2007).

reached the level of a political/economic union. When the Treaty of Rome was signed in 1957, few would expect that the then economic project of Europe would pave the way for political integration²⁷ of the various European States. As a result, international economic law tends to be much more focused²⁸ (and for this reason much more effective) at the regional level rather than at the global level. In fact, as Cleaver argues, one speaks of a six-level approach at the regional level i.e. independent states forming a free trade area; such free trade area turning out to be upgraded to a customs union; the customs union turning into a common market; the common market turning into a coherent and co-ordinated economic union and finally such union turning into one “nation” with central political institutions.²⁹

In Europe convergent economic law has triumphed. “There is little doubt that European law is governing to a greater extent than perhaps generally realised, the commercial law of the member States, extending the scope of such areas to areas previously unimagined”.³⁰ The convergence of legal systems through the harmonisation of certain legal areas is the core business of the EU³¹, whereas the EU as an international economic organisation is “rooted in the rule of law under the auspices of the European Court of Justice”³². One speaks here of a new *ius commune*³³ or, at the very least, of a new European law interacting “at the crossroads of legal traditions”³⁴. The relevant legal pillar with regard to economic law is Pillar 1 (European Community) of the EU. It was in 1989 that capital and money flows had been liberated in all EU member states.³⁵ In 1992 the monetary union *per se* was completed and in 1999 the single currency was launched. These developments led all participating countries to align their domestic regulations in the respective areas (unless, of course, an opt-out had been negotiated *e.g.* the United Kingdom and Denmark were offered an opt-out from the single currency). This raises a fundamental question: Which country is to take part into a given international economic law project or, in other words, which legal system is to converge its laws with those of other systems? The author of this article is categorical in arguing that only the able and willing³⁶ legal systems can participate in a convergence circle. Systems which are to join the EU must prepare and unless they satisfy *all* legal requirements prior to accession, they are refused entry into the Union.³⁷ Beyond that, systems must be willing to converge their laws; all else would be considered undemocratic, tyrannical and manipulative. With regard to the fact that only the willing legal systems may wish to converge their laws, there is a parallel to be drawn here, a parallel with globalisation. Thus, as Twining argued in his definition of globalisation³⁸, the processes of globalisation do not necessarily penetrate every

²⁷ Sungjoon Cho, *Global Integration and the Complete Public Goods*, 8 Chi. J. Int'l L. 553, 554 (2008).

²⁸ Tony Cleaver, *Understanding the World Economy* 93-94 (3d ed. 2007).

²⁹ *Id.* 94-95.

³⁰ Peter de Cruz, *Comparative Law in a Changing World* 502 (3d ed. 2007).

³¹ Armin von Bogdany, *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Relationship*, 19 Eur. J. Int'l L. 241, 248 (2008).

³² Ole Spiermann, *Twentieth century internationalism in law*, 18 Eur. J. Int'l L. 785, 787 (2007).

³³ Koenraad Lenaerts, *Interlocking legal orders in the European Union and comparative law*, 52 Int'l & Comp. L.Q. 873, 878-879 (2003).

³⁴ Thijmen Koopmans, *The birth of European Law at the crossroads of legal traditions*, 39 Am. J. Comp. L. 493 (1991).

³⁵ Tony Cleaver, *Understanding the World Economy* 111 (3d ed. 2007).

³⁶ *Id.* 155.

³⁷ There are some thirty-five legal chapters that must be satisfied prior to EU accession. These chapters are particularly wide-ranging and include: Free Movement of Goods, Freedom of Movement for Persons, Freedom to Provide Services, Free Movement of Capital, Company Law, Competition Policy, Agriculture, Fisheries, Transport Policy, Taxation, Economic and Monetary Union, Statistics, Employment and social policy, Energy, Industrial Policy, Small and Medium-sized Enterprises, Science and Research, Education and Training, Telecom and IT, Culture and Audiovisual Policy, Regional policy and co-ordination of structural instruments, Environment, Consumer protection, Justice and Home Affairs, Customs Union, External Relations, Common Foreign and Security Policy, Financial Control, Finance and Budgetary Provisions, Institutions and Other Matters. See http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm#3.

³⁸ *Infra* n. 54.

single part of the world. Likewise, convergent patterns of economic law may not infiltrate every single legal system in the world.³⁹

Additionally, it has been argued that even in Europe "...the private law directives are still relatively little islands in an ocean of private law"⁴⁰. Nevertheless, the author of this article maintains that at least two of these "islands of legal unity" (EC Directive 93/13/EEC and EC Directive 1999/44/EC) have had a resounding effect in the alignment of European consumer commercial laws: accordingly, we as lawyers should appreciate the matter of legal convergence in qualitative terms rather than in quantitative terms. A brief explanation on the paramount effect of the two directives in question should suffice to establish such a point. First of all, the case of the EC Directive 93/13/EEC will be argued. This directive took a number of years to be crystallised⁴¹ and for this reason "its ambitions were lowered as [this] so often happen[s] during the preparation of EC legislation."⁴² The purpose of the Unfair Consumer Contract Terms Directive is to eliminate unfair terms from contracts drawn up between a professional and a consumer so that the approximation of laws, regulations and administrative measures in the area of the Member States becomes a reality.⁴³ So paramount is the operation of this directive that it has been said that the directive on Unfair Terms in Consumer Contracts set "a general fairness standard for European consumer contract law".⁴⁴ The directive does not apply to contractual terms reflecting mandatory provisions or regulations; nor does it apply to provisions arising from international agreements to which the Member States or the Community are signatories.⁴⁵ Most importantly however, under this directive EU consumers are not bound vis-à-vis traders in relation to unfair contract terms in consumer contracts, when the requirement for good faith has been breached,⁴⁶ whilst reasonable standardisation of consumer contract forms is promoted by the directive.⁴⁷ This is achieved mainly through the uniform interpretation clause of 'unfairness' in relation to consumer contracts.⁴⁸ Thus, the EU member states are expected to interpret unfairness in relation to: i) the nature of the goods or services covered by the contract, ii) the circumstances surrounding the drawing up of the contract and iii) the other terms in the contract or in another contract to which it relates.⁴⁹ The impact of the Unfair Terms in Consumer Contracts Directive has been enormous in European legal doctrine as a whole⁵⁰, whereas in the United Kingdom and Ireland the domestic consumer laws had to be re-aligned altogether by bringing into life a clear-cut doctrine of good faith in the respective consumer laws of these countries.⁵¹ Another clear-cut example of a directive which touched upon the various legal systems of Europe has been EC Directive 1999/44/EC. The purpose of this Directive is the approximation of national European laws in the area of the sale of consumer goods and associated guarantees "in order to ensure a uniform minimum level of consumer

³⁹ See also Chris Bummer, *Regional Integration and Incomplete Club Goods: A Trade Perspective*, 8 Chi. J. Int'l L. 535, 538-539 (2008) in relation to the limitations which regional economic clubs may have by way of economic theory.

⁴⁰ Mauro Bussani and Ugo Mattei (eds.), *The Common Core of European Private Law* 68 (2003).

⁴¹ The first EU resolution on the matter, Resolution (76) 47 on unfair contract terms in consumer contracts on appropriate method of control, adopted by the Committee of Ministers of the Council on the 16th of November 1976. However, the drafting of the directive in question started with the Commission Proposals 1990 (*Official Journal* 1990 c 243/2) and 1992 (*Official Journal* 1992 C 73/7). The almost final delimitation of the directive was achieved to a large extent in the EC Council on the 22nd of September 1992; see 'Council Directive 92/ /EEC of 22 September 1992 on unfair terms in Consumer contracts (common position)' (1992) 15 *Journal of Consumer Policy* 473.

⁴² G. Howells and T. Wilhelmsson, *EC Consumer Law*, Brookfield USA: Ashgate/Aldershot: Dartmouth, 1997, p. 88.

⁴³ Art. 1, para. 1 of the Unfair Terms in Consumer Contracts Directive 1993.

⁴⁴ G. Howells and T. Wilhelmsson, *op. cit.*, fn. 162, p. 88.

⁴⁵ Art. 1, para. 2 of the Unfair Terms in Consumer Contracts Directive 1993.

⁴⁶ Art. 3, para. 1 of the Unfair Terms in Consumer Contracts Directive 1993.

⁴⁷ G. Howells and T. Wilhelmsson, *op. cit.*, fn. 162, p. 89.

⁴⁸ Art. 4, para. 1 of the Unfair Terms in Consumer Contracts Directive 1993. However, 'total harmonisation is not expected and cannot be achieved.' See M. Dean, 'Unfair Contract Terms: The European Approach', (1993) 56:4 *Modern Law Review* 581, p. 582.

⁴⁹ Art. 4, para. 1 of the Unfair Terms in Consumer Contracts Directive 1993.

⁵⁰ *Report of the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, Brussels, 27.04.2000 COM (2000) 248 final, pp. 35-36.

⁵¹ *Id.*

protection in the context of the internal market”⁵². In effect, the Directive enables the consumers of any given EU member State to be afforded a minimum uniform standard of protection in the sale of consumer goods. Despite the fact that the Directive can be seen as a ‘lowest common denominator’ initiative, as it did not repeal higher levels of consumer protection in the various national legal systems,⁵³ its implementation has not been unproblematic. As a result, it took eight years for the European Commission to reach a finalised report in relation to the implementation record of the particular directive in question, even though the nominal implementation deadline for the directive in question was set for 1 January 2002. In April 2007 the European Commission reached the conclusion that the directive was finally transposed throughout the EU.⁵⁴ Despite this, Member States implemented the Directive in a divergent fashion in certain areas: e.g. Denmark, Greece and Sweden did not offer a definition of the word “producer” under the Directive,⁵⁵ whereas Latvia extended the definition of the word “producer” to cover persons who renovate goods for sale.⁵⁶ Also, the definition of “guarantee” has not been addressed during transposition by a significant number of EU member States (Czech Republic, Denmark, France, Greece, Hungary, Slovenia, Spain and Sweden),⁵⁷ whilst other countries (Finland, Latvia and Poland) have attempted to define the term but their definitions have been deemed worthy of clarification.⁵⁸ The Commission maintained that, where there have been problems of transposition of the Directive, such problems may have been the result of regulatory gaps in the Directive itself but also the result of insufficient transposition of the Directive by the legal systems themselves. In any case, even though the transposition of the Directive has been largely successful and had a powerful effect in such legal systems as Germany, since the particular instrument entailed changes not only to general consumer law but also to general contract law there,⁵⁹ the effect of the Directive is to be explored and re-assessed in the future.⁶⁰ The two directives in question certainly presented different problems in their implementation, problems which go to the heart of the convergence thesis. For instance, EC Directive 93/13/EEC has been attacked as creating more divergences in the first place,⁶¹ whereas Directive 1999/44/EC has been an instrument that was not clear. It is expected that such issues will have to be addressed in the enactment of other economic law instruments by bringing about instruments with clear-cut definitions and by co-ordinating transposition of the such instruments by scrutinising implementation at an early stage.

Close to the integration developments in Europe come the integration developments (albeit to a lesser degree⁶²) in other regions of the world. Nearly all countries subscribe nowadays to one or more⁶³ regional trade organisations. So there are other regional economic law arrangements such as North American Free Trade Agreement (NAFTA) and the Association of South East Asian States (ASEAN) but there are other organisations pursuing similar economic goals in various regions around the

⁵² Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *Official Journal L 171*, 07/07/1999 P. 0012 - 0016, art. 1(1).

⁵³ *Id.* art. 8(2).

⁵⁴ *Communication of the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers’ liability*, Brussels, 24.04.2007 COM (2007) 210 final 4.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* 5.

⁵⁸ *Id.*

⁵⁹ Peter Rott, *German Sales Law Two Years After the Implementation of Directive 1999/44/EC*, 5 *German Law Journal* 237-256 (2004).

⁶⁰ *Communication of the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers’ liability*, Brussels, 24.04.2007 COM (2007) 210 final 12.

⁶¹ Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *Modern Law Review* 11 (1998).

⁶² E.g. economic law comprises four legal chapters under NAFTA (Trade in Goods, Government Procurement, Investment, Intellectual Property), whereas in the EU it comprises some thirty legal chapters.

⁶³ E.g. the United States and Canada are members in both the Asian-Pacific Economic Cooperation and the North American Free Trade Agreement.

world.⁶⁴ These organisations have been created out of “[a] desire to emulate the EU’s success and a fear of losing out in competition”⁶⁵. Yet, even though there is no ideological opposition to the creation of regional trade blocks *per se*, the creation of regional trade blocks thereby creates in turn regional legal blocks which do not necessarily co-ordinate with each other, the result being economic *and* legal divergence amongst legal systems around the world.⁶⁶ That is why, at least from the economic and the theoretical point of view, it is preferable that we have global economic law instruments (as opposed to regional economic law instruments)⁶⁷.

The World Trade Organization (WTO) is another organisation that seeks to promote convergent legal regimes in relation to subsidies and countervailing measures in that it offers a charter of liberal economic principles to which the WTO Members must adhere. Under the organisation’s architecture, all WTO rules apply to all members and there is no space for reservations.⁶⁸ Furthermore, it should be also stressed that under the organisation’s framework an Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has been reached. The TRIPS Agreement acts as an interface between international trade law and the coverage of intellectual property rights.⁶⁹ The Agreement is extensive in that it covers a number of areas of intellectual property law, *i.e.* copyright⁷⁰, trade marks⁷¹, geographical indications⁷², industrial designs⁷³, patents⁷⁴, undisclosed information matters⁷⁵ and anti-competitive licences in contractual licences⁷⁶. The implications of the TRIPS Agreement would change the face of international economic law by reason of the fact that the Agreement requires extensive legal amendments and/or legal add-ons in the domestic laws of the countries in which it operates under the WTO framework.⁷⁷ Of particular importance is the fact the TRIPS Agreement acts as a legal back-up to existing intellectual property agreements.⁷⁸ A sophisticated machinery has been created under the auspices of the WTO supervising the implementation of the letter and spirit of the TRIPS Agreement.⁷⁹ For the current members of the WTO the process of convergence of their laws has been completed with the exception of new members to the WTO and countries which entered the implementation review process at a late stage. Legal convergence amongst the WTO members is achieved through TRIPS in at least three different ways: first of all, national legislation has to be brought into effect for a WTO country to fulfil its obligations under the TRIPS Agreement; second, each WTO member is to provide the same level of protection to national of other WTO countries, as it would provide its own nationals in relation to intellectual property rights and third, its WTO member is to provide the most-favoured-nation approach to all other WTO members in relation to the same matters.⁸⁰ However, there is academic conflict as to whether or not the WTO charters bind the legal systems which have joined the WTO and ratified its legal texts.⁸¹ This relates to the question over the role of international law in domestic legal matters into a given legal system.⁸² This is a question which is predominantly

⁶⁴ Other organisations with regional economic goals are: the European Free Trade Area; Mercosur; the Asian Pacific Economic Cooperation; the Andean Community of Nations; the Commonwealth of Independent States; the Association of Caribbean States; the African Union and the South East Asian Association for Regional Cooperation.

⁶⁵ Tony Cleaver, *Understanding the World Economy* 121 (3d ed. 2007).

⁶⁶ *Id.* 121-122.

⁶⁷ Sungjoon Cho, *Global Integration and the Complete Public Goods*, 8 *Chi. J. Int'l L.* 553, 558 (2008).

⁶⁸ Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* 642 (3d ed. 2005).

⁶⁹ Asif H. Qureshi & Andreas R. Ziegler, *International Economic Law* 338-339 (2d ed. 2007).

⁷⁰ Arts. 9-14 of TRIPS.

⁷¹ Arts. 15-21 of TRIPS.

⁷² Arts. 22-24 of TRIPS.

⁷³ Arts. 25-26 of TRIPS.

⁷⁴ Arts. 27-38 of TRIPS.

⁷⁵ Art. 39 of TRIPS.

⁷⁶ Art. 40 of TRIPS.

⁷⁷ Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* 433 (3d ed. 2005).

⁷⁸ Asif H. Qureshi & Andreas R. Ziegler, *International Economic Law* 339 (2d ed. 2007).

⁷⁹ *Id.*

⁸⁰ Asif H. Qureshi & Andreas R. Ziegler, *International Economic Law* 339-340 (2d ed. 2007).

⁸¹ Simon Lester *et al.*, *World Trade Law* 123 (2008).

⁸² *Id.*

concerned with the constitutional structures of every legal system, legal systems taking either a monist or a dualist approach in the assumption of their international responsibilities in domestic law.⁸³

In any case, so powerful are the driving forces behind international economic law that academic opinion has it that there is a pertinent sociological element behind these forces.⁸⁴ Hence, economic law drives societies and systems by bringing them closer politically and economically, but at the same time economic law is driven by politics and societies. Take for example the reception of certain American law concepts in Europe through the overall political convergence between Europeans and Americans post Second World War. This resulted in further legal convergence between the laws of the countries across the Atlantic. Effectively, this occurred because legal concepts were introduced into the various European legal systems.⁸⁵ At the same time there have been deeper elements of convergence between the US legal order and European legal systems in that the latter have begun to adapt the “economic analysis of law” approach, which is certainly related to American jurisprudence.⁸⁶

Turning to globalisation, the concept of globalisation and the idea of legal convergence of systems have certain parallels. Giddens has characterised the process of globalisation as ‘the intensification of world-wide social relations which link localities in such a way that local happenings are shaped by events occurring many miles away and vice versa’⁸⁷. Twining, on the other hand, defined the term as ‘those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it’⁸⁸. Even though the term ‘globalisation’ has been overused in recent years,⁸⁹ it would be an omission not to state that world economic law promotes the idea of globalisation. The opposite is also true. At the same time, we should not omit from our analysis that close to globalisation forces, there are parallel regionalisation forces. So even though, leading legal-economic systems tend to promote the idea of legal internationalism through such organisations as the World Trade Organization (WTO) or the International Monetary Fund (IMF), the same countries embark on regional integration projects e.g. NAFTA or the EU. It is not necessary that the regional integration organisations subscribe to a globalisation agenda of any kind. However, what is certain, at least from the legal point of view, is that such organisations are the launchpad for economic and legal convergence of different and differing legal systems.

Concurrently, as legal convergence can occur on bottom-up basis⁹⁰ (as opposed to the more centralised top-down approach⁹¹), one can detect that non-State players may initiate a global law agenda. One of the typical examples here is the globalisation of securities markets, something that has a particularly significant impact on investor protection.⁹² Strikingly, convergence or integration of the regulatory frameworks of the various investor-protection frameworks around the world occurs at a very subtle level, since the securities markets would still preserve their regulatory autonomy to a considerable degree.⁹³

⁸³ See Xin Zhang, *Direct effect of the WTO Agreements: national survey*, 9 Int’l Trade L. & Reg. 35 (2003) for an extensive comparative analysis on this.

⁸⁴ Moshe Hirsch, *The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System*, 19 Eur. J. Int’l L. 277 (2008).

⁸⁵ Peter de Cruz, *Comparative Law in a Changing World* 505 (3d ed. 2007).

⁸⁶ *Id.* but cf. Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs German Doctrinalism*, Hastings Int’l & Comp. L. Rev. 295 (2008).

⁸⁷ Anthony Giddens, *The Consequences of Modernity* 64 (1990).

⁸⁸ William Twining, *Globalisation and Legal Theory* 4 (2000).

⁸⁹ See in this respect Twining’s recent article: William Twining, *Globalisation and Comparative Law* in Esin Örüciü & David Nelken (Eds.), *Comparative Law: A Handbook* 69-89, in particular 69-72, 74 (2007). Also, Cleaver calls the term ‘imprecise’. See Tony Cleaver, *Understanding the World Economy* 88-89 (3d ed. 2007).

⁹⁰ E.g. multinational companies promoting their agendas to national legal systems.

⁹¹ E.g. centralised institutions such as the European Parliament and/or the European Commission promoting their agendas to national legal systems.

⁹² Shelley Thompson, *The Globalization of Securities Markets: Effects on Investor Protection*, 41 Int’l Law. 1121 (2007).

⁹³ *Id.* 1123.

It has to be borne in mind however, that not all legal harmonisation efforts are met with success. Second, the fact that something constitutes a legal harmonisation effort does not mean that it is something that will touch upon the internal workings of a given legal system. For instance, the United Nations Convention for the International Sale of Goods 1980 does not touch upon the internal structures of the legal systems which have ratified it. It merely asks that the various *national* fora to interpret it in a more international fashion, according to its provisions, without resorting to national law.⁹⁴ There have been voices of criticism in relation to this, *i.e.* international law requires a separate regulatory scheme⁹⁵ but at the same time it requires a separate adjudicatory scheme (as opposed to having various national fora)⁹⁶. In a sense, international commercial courts already occur through the medium of commercial arbitration fora but, unlike an international commercial court system, which would allow for appeals, international commercial arbitration fora do not provide for an appeal.⁹⁷

It is also essential to bear in mind that the international economic law (whether regional or global) is governed by certain legal principles, principles which in turn govern and support the idea of law convergence. The author submits that the following are only some of the leading principles of general international law which govern or tend to govern international economic law:

- Principle of Fidelity
- Principle of Conferred Powers
- Principle of Subsidiarity
- Principle of Proportionality
- Principle of Conditionality

This principle of fidelity requires States to do more than merely refrain from breaching their international law obligations.⁹⁸ As a result not only have legal systems to comply with international economic law but all the parts of their legal systems “at each level and unit of government must act to ensure the proper functioning of the system of governance as a whole”⁹⁹. According to the principle of conferred powers, one can expect that EU law will bind e.g. the German legal system *in its areas of competence only*. All other areas remain in the sovereign responsibility of the German authorities. Also, by extension, the EU and NAFTA can only act in areas which are assigned to them by the relevant treaties. Furthermore, under the principle of subsidiarity, in an area where the EU does not have exclusive competence and a proposed action can be achieved at the national level e.g. through UK legislative action, then the Community should not interfere¹⁰⁰. Hence, the principle suggests that an international economic law organisation is to intervene in achieving certain objectives only if the State cannot achieve these objectives at the State level.¹⁰¹ With regard to the principle of proportionality (especially in the case of European economic law) all EU acts must be (1) suitable to pursue their legitimate aims, (2) necessary to do so and (3) the acts must not have an excessive effect on the affected party. Turning to the principle of conditionality, conditionality by and large is a legal principle which enables an international organisation to push for its agenda in various legal systems. The principle pre-supposes an assessor (normally an international organisation with economic goals) and an assessed (normally the State which seeks to derive economic benefit from membership to the international organisation which assesses the State’s compliance). In practice, the principle asks for the imposition of transparent legal rules and economic conditions to a State in return for a loan or resources as a whole. Effectively, “The financial discipline [which conditionality encapsulates] impinges on the

⁹⁴ To this effect see United Nations Convention for the International Sale of Goods, April 10, 1980, art. 7(1), <http://www.cisg.law.pace.edu/cisg/text/treaty.html>.

⁹⁵ Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Commercial Code in International Sales*, 15 *Cardozo J. Int’l & C. L.* 461, 462 (2007).

⁹⁶ Jan H. Dalhuisen, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law* 36-38 (3d ed. 2007).

⁹⁷ *Id.* 38.

⁹⁸ Damian Chalmers *et al.*, *European Union Law* 193 (2006).

⁹⁹ Daniel Halberstam, ‘The Political Morality of Federal Systems’ (2004) 90 *Virginia Law Review* 101, 104. This is clearly provided in Article 10 EC Treaty.

¹⁰⁰ See e.g. Article 5 EC Treaty.

¹⁰¹ Jan H. Dalhuisen, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law* 1230 (3d ed. 2007).

very nerves of a state”¹⁰². The classic example here is the International Monetary Fund (IMF). The IMF is to “adopt adequate safeguards for the use of its resources” (Article V, s 3 of the IMF Articles of Agreement). The World Bank follows a largely similar approach based on conditionality. Conditionality can be financial or economic. Financial conditionality maybe concerned with the amount of assistance, charges, repurchase orders etc. Economic conditionality deals with the alignment of macroeconomic indicators e.g. the pricing system of a country, the exchange rates, the monetary rates and other relevant figures. Conditionality has been described as a “tool to promote good policies”, “serves as substitute for collateral” and “encourages development”.¹⁰³ It is believed that the method of conditionality is a key way to push the law convergence agenda further, especially in the case of developing countries. As stated, conditionality also occurs within the World Bank framework (see e.g. legal framework for co-ordinated accountability framework¹⁰⁴) and the pre-accession to the World Trade Organization and to the EU framework. However, it should be stressed the imposition of conditions on the part of the assessor to the assessed should take into account the capacity of the assessed State to implement legal changes, the member’s constitution and its ability to bring legislative changes.¹⁰⁵ Certainly, it should be remembered that any exercise of conditionality should not interfere with the political affairs of a country,¹⁰⁶ as the various legal systems are presumed to be politically sovereign. Nonetheless, one may come up with a situation, especially in the case of less developed countries, where the distinction between the legal system and the political system within the same country is blurred. By extension, legal interference on the part of an international organisation through the principle of conditionality may be received as political interference, when in fact it is not.

Admittedly, international economic law comes up with a number of challenges. First of all, international economic law is the result of legal amalgamation and often –unfortunately– the result of legal compromise. Thus, “[t]he fewer the parties involved in any negotiations, and the more they have in common, the easier is to secure agreement”¹⁰⁷. It is lawyers that draft international economic law instruments but it is national legal traditions that dictate their agenda. Yet, it would seem that additional factors in the creation of international instruments are such things as “rational choice, economic, political science, and constitutional theories”¹⁰⁸. Secondly, international economic law may not always keep pace with the practical challenges of world economic integration forces. Thus, on the one hand we observe that information crosses frontiers through the medium of technology, there is interconnectedness of national economies¹⁰⁹ and by all means a considerable volume of international business flows and transactions which take place every day. On the other hand, protectionist economic regimes are still raised even in the more developed countries of the world. Thirdly, international economic lawyers may have to decide from the outset the means of producing their texts. In other words, they may have to negotiate before they actually draft legal texts of harmonised legal standards, the ways and strategies for drafting. One approach would be that of political consensus and diplomatic compromise;¹¹⁰ another way would be to allow diverse legal rules to compete and thereafter reach a conclusion as to the most preferred and effective model.¹¹¹ Systems could also follow certain model laws (e.g. the UNCITRAL Model Law on Cross-Border Insolvency) or follow the principles of soft laws;¹¹² hard laws could also be the case, as in the case of EU integration, wherein a number of States have agreed from the outset that can be bound by such law; finally, a fifth way would be to establish independent teams of experts who would propose certain legal patterns with global ambit. Irrespective of the methods, international economic law should strive for the furtherance of the idea of convergence of systems, the hypothesis being that it is preferable that systems converge rather than diverge (for an

¹⁰² Asif H. Qureshi & Andreas R. Ziegler, *International Economic Law* 223 (2d ed. 2007).

¹⁰³ *Id.* 210.

¹⁰⁴ World Bank, *Review of World Bank Conditionality* 20 (2005).

¹⁰⁵ Asif H. Qureshi and Andreas R. Ziegler, *International Economic Law* (Thompson/Sweet Maxwell, London 2007) p 530.

¹⁰⁶ *Id.* 244.

¹⁰⁷ Tony Cleaver, *Understanding the World Economy* 93 (3d ed. 2007).

¹⁰⁸ Moshe Hirsch, *The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System*, 19 *Eur. J. Int'l L.* 278 (2008).

¹⁰⁹ Mathias Reimann & Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* 603 (paperback ed. 2008).

¹¹⁰ *Id.* 606.

¹¹¹ *Id.*

¹¹² Philip Wood, *Law and Practice of International Finance* 38 (2008).

explanation on the validity of the hypothesis *see* further above¹¹³ in the analysis).¹¹⁴ It has also been suggested that the ideal pattern for the harmonisation of financial laws would be a competition of different legal systems “which requires a degree of free decision subject to peer pressure”,¹¹⁵. This approach finds more and more supporters amongst comparative lawyers and international lawyers. Alternatively, it is suggested that there can be competitive supragovernmental regulation by non-State actors, even though such an approach is problematic due to its lack of democratic legitimacy (democratic deficit)¹¹⁶.

Conclusion

The preceding analysis has dealt with the interaction and the specifics of the relationship between the convergence of legal systems thesis and international economic law. It has been maintained that international economic law (whether regional or global) plays a key role in the realisation of the law convergence thesis ideals. International law instruments, such as the Treaty of Rome, the launch of such powerful organisations as the WTO and the deriving principles which govern such instruments and the operation of such organisations, all point to the fact that legal systems move steadily towards convergent patterns of law. To this international law organisations help: the UNCITRAL, the UNIDROIT, the WTO, the IMF and the EU to name a few. The process is slow and the relevant legal developments may not be felt immediately. After all, it took almost half a century for the Europeans to reach the level of an economic union through the introduction of a common currency for Europe. Legal systems (as well as economies) can benefit when acting in unity. The increased standards of living in the last decades in all the southern EU states, the economic development in Ireland and the economic development occurring in the Eastern part of Europe are all realities that point to this direction. Law in Europe has played a remarkable role in the development of economics. At the same time national boundaries become less relevant¹¹⁷ and it is only a question of time that the legal walls surrounding the various legal systems will fall to the great benefit of international business transactions and to the benefit of international economic law as a whole. “The seeds of cross-fertilisation and integration appear to be well and truly sown”¹¹⁸. The world economic nexus requires a legal regime that is reasonable, predictable and stable with clear-cut, transparent and liberating laws¹¹⁹; a legal regime which will transcend national legal systems. Such a legal regime will benefit legal systems and economies alike, as the private market players will benefit by reducing their transaction costs in the first place. Thus, let us recall Rhees’ excellent philosophical metaphor of “fibres overlapping” by bearing in mind that legal systems become stronger when acting in unity. That is to say, convergence is like a strong rope consisting of fibres; a rope, which “does not get its strength from any fibre [any convergent legal system for the purposes of our analysis], which runs through from one end to the other, but from the fact that there is a number of fibres overlapping”.¹²⁰

¹¹³ *Supra* “*The Idea of Law Convergence*”.

¹¹⁴ Refer to Hegel’s account of idealism which can be seen as the idea that the being is ultimately comprehensible as an all-inclusive whole. *See e.g.* Robert B. Pippin, *Hegel's Idealism: The Satisfactions of Self-consciousness* (1989).

¹¹⁵ Philip Wood, *Law and Practice of International Finance* 38 (2008).

¹¹⁶ Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 *Chi. J. Int’l L.* 513 (2008).

¹¹⁷ William Twining, *Globalisation and Legal Theory* 81 (2000).

¹¹⁸ Peter de Cruz, *Comparative Law in a Changing World* 521 (3d. ed. 2007).

¹¹⁹ Philip Wood, *Law and Practice of International Finance* 13 (2008).

¹²⁰ For this excellent philosophical metaphor *see* Rush Rhees, *Preliminary Studies for the ‘Philosophical Investigations’* 87 (2d. ed. 1964).