Judicial Globalization: New Development or Old Wine in New Bottles?

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I. INTRODUCTION

In the last few years a number of articles have been published in American law journals on what has been called judicial globalization.† That term is used to describe the phenomenon of high court judges (whether international, regional, or national) entering into a global conversation by referring to and borrowing from each other and—similar to political leaders—gathering information as they see each other at special meetings or even at summits. Academic literature has so far predominantly focused on human rights and certain criminal law issues such as capital punishment or abortion. This article includes economic law questions. It will first explain that globalization has lead to a homogenization of legal problems and of legal responses to those problems. It will then discuss the judicial conversation among European high courts. Subsequently, the article will address the question of whether a conversation of judges takes part on the global level. Next, methodological and practical problems will be dealt with. Finally, the issue of whether judicial globalization constitutes a new development will be discussed.

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In times of globalization, legal problems of the First and of the Third World tend to be compared, in particular in the field of human rights and in certain areas of criminal law due to the increased similarity of social debates, which is favored by advances in global communication. "Issues like assisted suicide, abortion, hate speech, gay and lesbian rights, environmental protection, privacy, and the nature of democracy are being placed before judges in different jurisdictions at approximately the same time." Economic law problems tend to arise in similar ways, especially in advanced societies and economies, such as the United States, the European Union, the countries of the European Free Trade Association, Canada, and Japan. To a certain extent, this may also be true in the case of threshold economies, i.e., less developed countries that are on the brink of becoming industrialized. Operators who are globally active sometimes face identical legal problems in all or most of the jurisdictions in which they are active. For instance, they produce worldwide, sell their goods and services worldwide, file patent and trademark applications all around the globe, pursue the same or similar marketing strategies, participate in mega-mergers, participate in globally operating cartels, and the like.

For a long time, the responses of individual legal orders to these developments were, as a consequence of the concept of a nation-state, different. Increasingly, however, there are fields in which the law in various jurisdictions is (more or less) homogeneous. In this context, the phenomenon of export of law is to be mentioned. Historic examples are the export of the English common law to what has become the Anglo-Saxon world; of the French Civil Code to countries like Italy, Spain, and Portugal (and from the two latter countries to Latin America); and of the German Civil Code to Japan and Greece. After World War II, the most important example has been the export of U.S. law to other parts of the world—in particular, to Japan and to Germany and from Germany to the rest of Europe, especially the European Community (EC). The idea of antitrust has been of particular importance. One will remember that, until 1945, Germany was a classical cartel country and that, in France and Italy, the idea of antitrust is relatively recent. Also, the concept of product liability and new types of contracts such as leasing, franchising, or factoring are U.S. exports.

In particular in the last two decades, there has been a general development toward convergence of many areas of the law. The harmonization process of the European Union with its ramifications in the countries of the European Economic Area and the Eastern European countries that are on the brink of joining the EU stands out. For the sake of order, it is to be noted that Switzerland is refusing to join the European Union and the European Economic Area, but the government launched a comprehensive program of so-called autonomous implementation of EC economic law fifteen years ago. It is clear that this decision was prompted by economic pressure by the EC. Beyond that, European law has had an impact on legal orders all over the world including the WTO system. On the other hand, the development of the relation between the EC and its Member States has been influenced by American federalism. A field in which legal solutions have become more and more similar in the last twenty years or so, is intellectual property law. With regard to

2. L’Heureux-Dubé, supra note 1, at 23.
6. See generally id.
the regional level, EC law is to be mentioned. On the global scale, the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement of the World Trade Organization (WTO) stands out. Finally, governments around the world tend to look to each other when enacting new legislation even without being forced to do so. This again is a development that may lead to the convergence of national laws.

II. THE EUROPEAN CONVERSATION AMONG HIGH COURTS

A. National High Courts

The term “European conversation” describes, first, the fact that high courts in many European countries have long been referring to each other and quoting each other when interpreting their respective national laws. This phenomenon predates the genesis of the European Community. Its roots are to be found in the *ius commune* tradition of the individual European jurisdictions. The Supreme Courts of Austria and Switzerland tend to look at what is happening in Germany. The Swiss Supreme Court also takes into account French, Italian, and Austrian case law. The German Supreme Court has borrowed from the Swiss Supreme Court. In cases involving issues of motor vehicle insurance law, copyright law, unfair competition law, patent law, and criminal procedure law, the German Federal Supreme Court relied on rulings of the Austrian Supreme Court. The Dutch Hoge Raad does, as a matter of principle, not refer to judgments of foreign courts. This is, however, to a certain extent compensated for by the practice of the Procureurs-General of the Hoge Raad.

A tripartite conversation has taken place among the supreme courts of Germany, Switzerland, and Austria with regard to the issue of indemnity payment to a terminated agent. According to the relevant provisions in the Austrian Statute on Agents, the Swiss Code of Obligations, and the German Code of Commerce, a terminated agent may, in certain circumstances, claim an indemnity payment for the stock of customers that he or she leaves to the principal. The respective law originated in Austria in 1925, was exported to Switzerland in 1949, and taken over by Germany in 1953.

It goes without saying that the conversation among high courts of European countries is particularly developed in cases involving identical legal problems. A first example

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10. BGHZ 136, 381 (393).
11. BGHZ 117, 115 (118).
13. BGHSt 32, 345 (356).
14. See, e.g., Hoge Raad der Nederlanden (Supreme Court of the Netherlands), ELRO-nummer: AA2345 Zaaknr 00210/00.
concerns the Lego cubes saga. With its cubes, Lego has invented a system of basically unlimited demand. As a consequence, competitors adopted all sorts of copying strategies. First, they copied the Lego cubes in a one-to-one manner. This was prohibited by the courts as unfair competition or trademark infringement. After this, competitors started to create their own cubes with a different brand and different colors, but in exactly the same size so that their cubes could be built together with the Lego cubes. Lego brought action in at least ten different jurisdictions including the United States. The company scored its most important victory in Germany. The German Supreme Court held that using exactly the same size as a Lego cube is not just about creating confusion or a likelihood of confusion. Even if another brand and a different color is used, the fact that a competitor uses exactly the same size means that he or she profits from a demand that has been created by somebody else. This, according to the German Supreme Court, constitutes unfair competition.

In other jurisdictions, for instance in Switzerland and in Norway, Lego lost its cases. The Swiss Supreme Court did not mention the judgment of the German Supreme Court. Lego’s counsel was apparently not aware of that decision. In its 1994 judgment, the Norwegian Supreme Court quoted Lego judgments from Germany, France, Denmark, Sweden, and the United Kingdom. It found that in the light of the similarity of the legal question and the legal orders, those judgments were, as a matter of principle, relevant. Since the line of reasoning of those courts was not uniform, the Norwegian Supreme Court concluded that it had to find its own solution. In the end it confirmed the judgment of the court of appeal, which had dismissed Lego’s claim. In the same year, the Supreme Court of Hungary granted Lego protection and indirectly referred to the case law of the German Federal Supreme Court.

Another example of an identical legal problem leading to a multitude of proceedings in different jurisdictions concerned the so-called “shock”-advertising campaign run by Benetton. In many European countries and in the United States, Benetton, an Italian fashion designer popular among young people and parents of small children, showed pictures of particularly horrifying events in connection with the promotion of Benetton merchandise. Images included, for instance, a duck covered in oil after a crash of an oil vessel, little kids doing hard work in a third world country, or the uniform of a soldier killed in the Bosnian war with the bullet hole and the blood stains around it. In another case, Benetton showed a vessel containing people from Albania trying to flee the country, falling into the Adriatic Sea, and drowning. The most famous picture displayed was a human upper arm with an “HIV positive” stamp on it. In Europe, Benetton also ran a campaign showing convicted prisoners on U.S. death rows. The text always read: “Sentenced to death. Name, a short bio, sentenced to death for this crime. To be executed on such and such date.” At the bottom it read: “United Colors of Benetton.” Benetton was sued in many different jurisdictions. In Germany, the company lost in the ordinary courts, including the Supreme Court. The German Supreme Court found that the HIV stamp constituted a violation of the dignity of mankind. Showing the stamp and exploiting the fact that so many people suffer from AIDS, the Supreme Court found, is not compatible

with Article 1 of the German Constitution. Other German courts ruled that it was just indecent to profit from the misery of other people. The Norwegian Markedsradet followed the German example and decided accordingly, without, however, quoting any foreign judgments. Swedish and Finnish courts, on the other hand, dismissed the lawsuits against Benetton based on unfair competition law, and in Switzerland such an action was never even brought. It should also be noted that the German Constitutional Court annulled the decision of the German Supreme Court.

B. The Special Role of the Court of Justice of the European Communities

As far as the fifteen Member States of the European Community are concerned, the conversation of high courts has entered a new dimension as a consequence of the existence of a supranational court—namely, the Court of Justice of the European Communities (ECJ). The ECJ is an actor in the European conversation in a number of respects. First, it is involved in a dialogue with the national courts of the EC Member States. Second, it is engaged in an ongoing conversation with the European Court of Human Rights (ECHR). Third, it has opened a certain dialogue with the Court of Justice of the European Free Trade Association (EFTA) Court. I will not deal with the cooperation between the ECJ and the national courts of the EC Member States that takes place in the framework of the Article 234 EC preliminary ruling procedure. Under that procedure, national courts are obliged to follow the ECJ’s rulings.

Given the vertical nature of their relationship, it is hardly surprising that national courts of the EC Member States for their part regularly rely on the judgments of the ECJ. It goes without saying that this happens with regard to virtually all issues. Also, third country high courts, such as the Swiss Supreme Court, occasionally quote the ECJ, particularly in cases concerning the so-called autonomously implemented EC Directives. A case in point is, for instance, a ruling referring to the ECJ’s Kalanke judgment regarding positive gender discrimination. The Court feels, however, free to follow the ECJ’s case law or not. It may also choose to follow that case law in substance without quoting it.

In particular, in its early years, the ECJ in key questions has borrowed from the legal orders of EC Member States and from the rulings of their supreme and constitutional courts, without, however, quoting them. On the other hand, the Advocates General not only carry out analysis of the national laws of the Member States including the highest courts’ case law, but also explicitly refer to the respective judgments. A good example is case C-158/91 Levy, in which a manager had been accused of employing women on night work, which was contrary to French law. The relevant national law provisions were adopted in order to implement an International Labor Organization (ILO) Convention on

23. See BAUDENRACHER, supra note 21, at 143–45.
25. The Swedish Consumer Ombudsman even refused to take the case before the courts. Annette Kur, 1996 GRUR INT. 255, 255 n.5.
27. BVerfGE 102, 347.
28. See, e.g., BGH 1 ZR 3401; OGH 8 ObS 292/00z.
29. ATF 123 I 152.
30. See ATF 123 III 466 (concerning transfer of an undertaking).
night work for women in industry. Advocate General Tesauro referred to a judgment of the German Constitutional Court that considered the German prohibition on night work to be contrary to the fundamental right of equality provided for in the German Constitution. He also referred to ECJ case law under Directive 76/207/EEC on equal treatment of men and women, stating that the Member States may not prohibit night work by women where night work by men is not prohibited. The Court ruled with regard to Article 307 EC that Community law was not violated when the national provisions are “necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty.”

For the sake of order, it may be mentioned that there seems to be one recent exception to the rule that the ECJ does not, as a matter of principle, quote national courts of the Member States. In case C-108/96 Mac Quen, the Court held that the case law of the Belgian Cour de Cassation prohibiting opticians to offer eyesight examination to their customers and reserving that activity to qualified medical doctors restricted the freedom of establishment (Article 43 EC). However, the protection of public health constituted an overriding reason based on general interest and therefore was, in principle, capable of justifying national measures which apply differently in situations, such as the ones at issue. According to the ECJ’s well-established case law, the court must examine whether the prohibition under challenge is necessary and proportionate to securing a high level of health protection. The ECJ noted that the interpretation that the Cour de Cassation gave to the relevant Belgian provisions is based on an assessment of the risks to public health which might result if opticians were authorized to carry out certain eyesight examinations. The Court went on, stating:

An assessment of this kind is liable to change with the passage of time, particularly as a result of technical and scientific progress. It is significant in this regard that the Bundesverfassungsgericht [Federal Constitutional Court of Germany] concluded, in its decision of 7 August 2000 (1 BvR 254/99), that the risks which might follow from authorising opticians to carry out certain examinations of their clients’ eyesight, such as tonometry and computerised perimetry, are not such as to preclude them from conducting those examinations.

In the end, the ECJ held that it is for the national court to assess, in the light of the Treaty requirements relating to freedom of establishment and the demands of legal certainty and the protection of public health, whether the interpretation of domestic law adopted by the competent national authorities remains a valid basis for the criminal prosecutions brought in the case in the main proceedings. Interestingly, the judgment of the German Constitutional Court was not referred to in the Opinion of Advocate General Mischo.

The ECJ regularly refers to judgments of the European Court of Human Rights (ECHR) in cases involving human rights. As a rule, the ECJ aims at avoiding a judicial conflict. It has, for instance, followed the ECHR’s case law with regard to the right to a

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34. Id. para. 2.
37. Id. para. 36.
fair and public hearing, the right to freedom of expression, the right to be represented by a lawyer, and the right to freedom of association. On a couple of occasions, the ECJ has, however followed its own track. Advocates General also deal extensively with the relevant case law of the ECHR. An example is provided by Federal Republic of Germany v. European Parliament and Council of the European Union, a case concerning the validity of the Directive on advertising and sponsoring of tobacco products, in which Advocate General Fennelly cited the ECHR’s Open Door Counselling v. Ireland judgment.

On certain occasions, the ECJ also quotes rulings of the EFTA Court. The same holds true for the Advocates General. Insofar, it must be noted that the law of the European Economic Area, which the EFTA Court has to apply, is, to a very large extent,

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C. European Court of Human Rights

The European Court of Human Rights has developed a special relationship with the ECJ. As far as the application of the Convention for the Protection of Human Rights and Fundamental Freedoms in areas is concerned in which there is ECJ case law on parallel provisions of EC law, the ECHR will carefully examine that case law and try to avoid any judicial conflict. It may even be that the ECHR will give up its own line of argument in favor of the one pursued by the ECJ.\footnote{See, e.g., Pellegrin v. France, App. No. 28541/95, 31 Eur. Ct. H.R. 651 (1999), paras. 38, 41, available at http://www.echr.coe.int/Eng/Judgments.htm (last visited Apr. 22, 2003); Frydender v. France, App. No. 30979/96, 2000-VII Eur. Ct. H.R. 173.} On the other hand, there are also cases in which the ECHR does not follow the case law of the ECJ.\footnote{See, e.g., Case A/256-A, Funke v. France, [1993] 16 Eur. H.R. Rep. 297, [1993] I C.M.L.R. 897 (1993).}

The ECHR has been called one of the world’s most important “givers” of ideas in the framework of judicial globalization.\footnote{See Anne-Marie Slaughter, A Global Community of Courts, 44 HARV. INT’L L.J. 191, 201–02 (2003).} It does not, however, appear to participate actively in the global conversation of high courts.

D. EFTA Court

The EFTA Court is bound to follow or take into account ECJ case law by special homogeneity rules.\footnote{See Agreement on the European Economic Area, May 2, 1992, art. 6, 1994 O.J. (L 1) 3; Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, art. (3)2, 1994 O.J. (L 344) 1, modified by the agreement of Dec. 29, 1994.} In fact, there is hardly an EFTA Court judgment that does not quote ECJ rulings. What is less evident is that the EFTA Court, which operates without Advocates General, has also started to quote opinions of ECJ Advocates General. The Court did that for the first time in its 2002 Landsorganisasjonen judgment.\footnote{Case E-8/00, Landsorganisasjonen i Norge v Kommunene Sentralforbund, Judgment of Mar. 22, 2002, 22 EFTA Ct. R. 114, para. 35.} The case was essentially about how far immunity of collective agreements from the European competition rules extends. The Court quoted Advocate General Jacobs’ opinion in Albany who, interestingly enough, seemed to be more competition oriented than the ECJ’s judgment in that case.\footnote{Case C-67/96, Albany Int’l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5751, [2000] 4 C.M.L.R. 446 (1999).}


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TV 1000, a case involving the broadcast of hard-core pornographic movies from Sweden to Norway,54 the Court referred, inter alia, to Article 10 of the European Human Rights Convention (the provision on freedom of expression) and quoted the ECHR’s landmark decision in the Handyside case55 concerning the limits of that freedom.

III. THE GLOBAL CONVERSATION AMONG HIGH COURTS

A. U.S. Supreme Court

On the global level, the U.S. Supreme Court has long been the main supplier of ideas particularly in constitutional matters including human rights, but also in questions of economic law. Former Canadian Supreme Court Justice Claire L’Heureux-Dubé stated:

The Warren Court’s two decisions in Brown v. Board of Education are cited in judgments ranging from a decision about the expulsion of a student from school in Trinidad and Tobago for wearing a hijab, to a judgment in New Zealand applying a treaty on Maori fishing rights, not only because the cases are directly applicable, but because they stand for a principle and an approach to constitutional interpretation taken by the court that rendered it.56

With regard to economic law issues it is fair to say that the U.S. Supreme Court has heavily influenced the case law of the ECJ in matters such as fundamental freedoms and antitrust.57 It has, furthermore, been instrumental in enabling the breakthrough of the recognition of human and animal life as patentable subject matter.58

As far as active participation in the global conversation is concerned, the U.S. Supreme Court’s record is less impressive. In capital punishment cases, the issue of whether minors ought to be executed has played an important role. In Thompson v. Oklahoma,59 a fifteen year old who had actively participated in a brutal murder was tried as an adult in Oklahoma state courts, convicted, and sentenced to death. The Supreme Court vacated the judgment on the grounds that the “cruel and unusual punishments” prohibition of the Eighth Amendment prohibits the execution of a person who was under sixteen years of age at the time of his or her offense and remanded the case. It added that

[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is

56. L’Heureux-Dubé, supra note 1, at 28 (citations omitted).
57. See infra Part III.B.
consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. . . . Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

Justice Scalia wrote for the minority that the Supreme Court only had constitutional authority to set aside this death penalty if it could find capital punishment contrary to a firm national consensus that persons younger than sixteen at the time of their crime cannot be executed. In Stanford v. Kentucky, the Supreme Court affirmed judgments of the Kentucky and Missouri state supreme courts that imposed the death sentence on seventeen and sixteen years old juveniles. Justice Scalia, delivering the opinion of the Court, wrote:

We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant. While “the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well,” . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

In Atkins v. Virginia, the Supreme Court held that execution of mentally retarded criminals is “cruel and unusual punishment” prohibited by the Eighth Amendment. Having found that a national consensus has developed against executing such criminals, the majority noted that, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved and referred to an amicus curiae brief for the European Union in another case. Chief Justice Rehnquist, dissenting, called attention to “the defects in the Court’s decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion.” In Printz v. United States, the Supreme Court held that the federal Brady Handgun Violence Prevention Act’s interim provision, which required commanding the chief law enforcement officer of a state to conduct background checks, was unconstitutional. Justice Breyer, with whom Justice Stevens joined, dissented and stated that

the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least

60. Id. at 830–31 (citations omitted).
62. Id. at 369 n.1 (citations omitted).
63. 122 S. Ct. 2242 (2002).
64. Id. at 2249 n.21.
65. Id. at 2252–53.
some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central “federal” body . . . . Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own . . . . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . .

As far as the issue of standing is concerned, the judgment in Raines v. Byrd has some international flavor. In 1996, the Senate had passed a bill, the Line Item Veto Act. The next day the House passed the same bill, and the President signed it into law. The Act stated that the President may cancel certain spending and tax benefit measures after he has signed them into law. Appellees—four senators and two representatives—had voted “nay” when Congress passed the legislation in question. The U.S. Supreme Court found that the appellees lacked standing to bring this suit. The majority stated that the appellees lack support from precedent as well as from historical practice and quoted respective cases. It conceded that “[t]here would be nothing irrational about a system which granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime . . . . But it is obviously not the regime that has obtained under our Constitution to date.”

A certain openness—partly on the part of the dissenters—is also recognizable in cases involving abortion and borderline problems. In the Roe v. Wade landmark decision on abortion, the majority held that the Texas abortion statutes were unconstitutional. In its reasoning, it referred in a rather unspecified way to ancient attitudes, the teachings of Christianity, the common law, English statutory law, and U.S. law. With regard to case law, it limited itself to judgments of U.S. (federal and state) courts. In Planned Parenthood of Southeastern Pennsylvania v. Casey, five provisions of the Pennsylvania Abortion Control Act of 1982 were at stake. These provisions were intended to make obtaining an abortion difficult. Chief Justice Rehnquist and Justices White, Scalia, and Thomas, concurring in part and dissenting in part, concluded that each of the challenged provisions was consistent with the Constitution. They pointed to the fact that “two years after Roe, the West German constitutional court . . . struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected” and that “in 1988, the Canadian Supreme Court followed reasoning similar to that of Roe in striking down a law that restricted abortion.”

In Washington v. Glucksberg, the Supreme Court held that the asserted right to assistance in committing suicide was not a fundamental liberty interest protected by the due process clause and that Washington’s ban on assisted suicide was rationally related to legitimate government interests. The Court referred to the fact that the states’ assisted-

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67. Id. at 976–77.
69. Id. at 828.
70. 410 U.S. 113 (1973).
72. Id. at 945 n.1.
suicide bans have been reexamined in recent years and that other countries are embroiled in similar debates. In this context, the Court pointed to the Supreme Court of Canada’s recent rejection of a claim that the Canadian Charter of Rights and Freedoms establishes a fundamental right to assisted suicide in Rodriguez.74 The Court also looked at the refusal of the British House of Lords Select Committee on Medical Ethics to recommend any change in Great Britain’s assisted-suicide prohibition, the rejection of a proposed “Death With Dignity Bill” by New Zealand’s Parliament, and the fact that the Australian Senate overturned the Northern Territory of Australia’s 1995 law legalizing assisted suicide and voluntary euthanasia in 1997.75 Moreover, the Court referred to evidence about the practice of euthanasia in The Netherlands.76

In economic law, the U.S. Supreme Court has, to a very limited extent, participated in the global conversation. In McGowan v. Maryland,77 employees of a department store were fined for selling items on Sunday that were excluded from the limited grouping of materials that could be sold on that day. These employees claimed that the laws violated the Equal Protection and Due Process Clauses because they were based on specific religious beliefs. The Court ruled that Maryland’s Sunday closing laws had evolved into furthering secular ends and therefore did not violate the Federal Constitution’s provisions for religious liberty. In a separate opinion in which Justice Harlan joined, Justice Frankfurter stated that

[e]ven on the Continent the forces which in the latter half of the nineteenth century pressed for the amelioration of the working conditions of the laborer expressed themselves in part in Sunday legislation. Germany, Austria, the Swiss Federal Government, Denmark, Norway and Russia in the 1870’s, 80’s and 90’s promulgated regulations prohibiting Sunday employment—in some cases only for women and children; in others, for all workers in enumerated industries—or closing factories or commercial establishments during part or all of the day.78

B. Court of Justice of the European Communities

Decisions of the European Court of Justice “offer no direct clue as to whether they have been influenced by decisions of the U.S. Supreme Court”79 or by any other foreign court. In important cases, however, the opinions of the Advocates General contain citations of such courts. Such references are of direct relevance when the Court follows the Advocates Generals’ opinion. Furthermore, they may have a dialectic function when the Court does not follow. In Case C-376/98, concerning the validity of the Directive on advertising and sponsoring of tobacco products, Advocate General Fennelly deduced criteria for the severability of the valid and invalid parts of a legislative measure such as the Directive in question.80 The Advocate General referred to the case law of the ECJ, a

74. Id. at 711 (citing Rodriguez v. British Columbia (Attorney General), [1993] 107 D.L.R.4th 342 (Can.)).
75. Id. at 718 n.16.
76. Id. at 732.
78. Id. at 483 n.40.
judgment of the Irish Supreme Court\textsuperscript{81} and the judgment of the U.S. Supreme Court in \textit{Lynch v. United States},\textsuperscript{82} where Justice Brandeis said:

It is true that a statute bad in part is not necessarily void in its entirety. A provision within the legislative power may be allowed to stand if it is separable from the bad. But no provision, however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the Legislature intended the unobjectionable provision to stand in case other provisions held bad should fall.\textsuperscript{83}

However, the ECJ ruled that “partial annulment of the Directive would entail amendment by the Court of provisions of the Directive. Such amendments are a matter for the Community legislature. It is not therefore possible for the Court to annul the Directive partially.”\textsuperscript{84}

Concerning borderline problems, the judgment C-13/94 in the case \textit{P. v. S. and Cornwall County Council} may be mentioned,\textsuperscript{85} in which the Court of Justice of the European Communities had to decide on the case of an employee dismissed because of his intention to undergo gender reassignment. The ECJ held that dismissal in relation to transsexuality is forbidden under Directive No 76/207/EEC, establishing the principle of equality as one of the fundamental principles of Community law. Moreover, the dignity and freedom of the person concerned must be respected. Thus, in a broad interpretation, the Court refused to confine the scope of the Directive simply to discrimination based on the fact that a person is one sex or the other but also sought to safeguard discrimination arising from gender reassignment.\textsuperscript{86} Advocate General Tesuaro’s opinion contained a chapter on “transsexuality and law” as well as a broad comparison of laws and judgments given by national and international courts. He cited a judgment of the German Constitutional Court, which recognized—in the absence of relevant legislation—transsexuals’ right to change their civil status and the courts’ obligation to act in the interests of legal certainty and the principle of equality between men and women.\textsuperscript{87} With regard to the argument that the factor of sex discrimination was missing in the case since P. would have been treated equally unfavorable had he been a woman before his gender reassignment, the Advocate General referred to case law in U.S. courts that both rejected and approved claims that dismissal of transsexuals constituted a discrimination on grounds of sex.\textsuperscript{88}

In \textit{Kalanke}, an affirmative action case, the ECJ was asked by the German Supreme Labor Court to interpret provisions of the Equal Rights Directive.\textsuperscript{89} According to a statute of the Land of Bremen, in cases of appointments and promotions, women having the same qualifications as men were automatically to be given priority in sectors where they were under-represented—that is to say, where they did not make up at least half of the workforce.

\textsuperscript{81} Mahler v. Attorney General, [1973] I.R. 140.
\textsuperscript{82} 292 U.S. 571 (1934).
\textsuperscript{83} \textit{Id.} at 586.
\textsuperscript{86} \textit{Id.} para. 20.
\textsuperscript{88} \textit{Id.} para. 18.
Advocate General Tesauro advised the Court to hold that the directive would preclude such a national rule. He referred to the judgments of the U.S. Supreme Court in *Regents of the University of California v. Bakke*, *United Steelworkers of America, AFL-CIO-CLC v. Webster*, and *City of Richmond v. Croson*. The Court followed the Advocate-General’s opinion, but it softened its stand two years later in *Marschall* and in later judgments.

In economic law, in Case C-65/86 *Bayer AG v. Heinz Süllhöfer*, the ECJ decided on the question of whether a non-challenge clause in a patent and utility license agreement was invalid under the cartel prohibition laid down in Article 85(1) and (2) EEC (now Article 81(1) and (2) EC). Advocate General Darmon proposed that the Court hold that “the inclusion in a licensing agreement of a contractual stipulation by which the licensee undertakes not to challenge the validity of technical industrial property rights in respect of which he has been granted licenses . . . is normally incompatible with Article 85(1) of the Treaty.” Mr. Darmon referred to the U.S. Supreme Court decision in *Lear v. Adkins*, in which the Court held that such clauses were against public policy and stressed the need to ensure the possibility that the licensee challenges the patentability of the invention in question. The Advocate General quoted the following statement of the U.S. Supreme Court: “Licensees may often be the only individuals with enough economic incentive to challenge the patentability of an inventor’s discovery.” For the sake of completeness it should be added that the U.S. Supreme Court went on to say: “If they are muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification.”

In the 1995 *Leclerc-Siplec* case (C-412/93), Advocate General Jacobs unsuccessfully tried to convince the Court to distance itself from *Keck* in a case involving a provision of French law that prevents the distribution sector from advertising on television. One of the main purposes of the ban is to protect the country’s regional daily press by forcing the distribution sector to advertise in newspapers rather than on television. Advocate General Jacobs quoted the following sentence from the U.S. Supreme Court’s judgment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

The Advocate General argued that legislation such as the one in question could have a significant effect on trade between Member States. In the case at hand, however, he came

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90. Id. para. 9 n.10.
97. Id. at 672–74.
98. Id. at 670.
99. Id.
to the conclusion that the French rule’s impact on trade between the Member States was only minimal. The ECJ refused to accept the de minimis rule.

The practice of the U.S. Supreme Court was also instrumental in a case on the relationship between the free movement of goods and the specific subject matter of a national patent. In Europe, as in the United States, manufacturers of generics plan to bring a generic to the market the day patent protection of the original product has expired. In order to accomplish this, they must start rather early to obtain market approval for their drug. To do so, these manufacturers take the patented drug; analyze it to find out its composition; manufacture the generic, even though the patent term has not expired; file for authorities’ approval; and then, the very day the patent expires, throw their generics in the market. Under a Dutch rule, such a strategy was struck down as being a violation of the Pharmaceutical Manufacturers’ Patent. The ECJ was presented with the question of whether this Dutch rule was compatible with the principle of the free movement of goods. The Court found that the strategy in question violated the specific subject matter of the patent and upheld the Dutch rule. Advocate General Jacobs referred to a ruling by the U.S. Supreme Court in Eli Lilly & Co. v. Metronic, Inc.\textsuperscript{102} The ECJ followed the Advocate General’s opinion.\textsuperscript{103}

As far as antitrust in particular is concerned, the opinion of Advocate General Darmon in the Woodpulp case stands out. Woodpulp producers outside the European Community were charged with concerted price practices.\textsuperscript{104} Mr. Darmon referred to the 1927 Lotus judgment of the Permanent Court of International Justice and the Separate Opinion of Sir Gerald Fitzmaurice in the 1970 Barcelone Traction judgment of the International Court of Justice. In addition, he meticulously discussed the development of U.S. law on the extraterritorial application of antitrust, the U.S. Supreme Court’s ruling in American Banana, Judge Learned Hand’s Alcoa opinion, the Swiss Watchmakers case and the Timberland Lumber and Mannington Mills decisions of the Ninth Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals. In the end, the Advocate General suggested that the Court adopt the “effects” doctrine. The ECJ did not quite follow the Advocate General’s suggestion, but developed a so-called “implementation” doctrine that, in the case at hand, led to the same result.\textsuperscript{105} For the sake of completeness, it must be added that in March 1999 the European Court of First Instance (CFI) openly acknowledged the effects doctrine in Gencor, a merger case.\textsuperscript{106} It held that the application of the EC Merger Regulation is justified under public international law “when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.”\textsuperscript{107} Although the judgment does not contain any reference to foreign law, it is obvious that this formula has been inspired by judgments of U.S. courts.

On other antitrust issues, too, the Advocates General have borrowed from the U.S. Supreme Court. In Case C-480/93 Zunis Holding SA v. Commission,\textsuperscript{108} Advocate General Lenz carried out an in-depth examination of judicial review of decisions adopted under the Merger Control Regulation. He concluded “that the shareholders in an undertaking should generally have no locus standi to bring actions against Commission decisions in the area of

\textsuperscript{102} 496 U.S. 661 (1990).
\textsuperscript{105} \textit{Id}.
\textsuperscript{107} \textit{Id.} para. 90.
merger control.”109 To support this view, he referred to U.S. law, in particular Sections 4 and 16 of the Clayton Act. Under the relevant case law, the plaintiff claiming compensation for damages must have suffered an “antitrust injury” in order to demonstrate its locus standi. Mr. Lenz cited the U.S. Supreme Court in Brunswick Corp. v. Pueblo Bowl-O-Mat Inc. and in Cargill, Inc. v. Montfort of Colorado, Inc.,110 where a definition of this term was given. As to the more specific question of actions by shareholders alleging infringement of the antitrust laws to the detriment of the undertaking, Lenz referred to two judgments given by U.S. appeal courts,111 where such actions were dismissed. The ECJ followed the Advocate General’s opinion. In Case C-7/97 Oscar Bronner, Advocate General Jacobs referred to case law of the U.S. Supreme Court and of two federal appeals courts concerning the conditions according to which a company with monopoly power is required to contract with a competitor under the essential facilities doctrine.112 Mr. Jacobs proposed that the Court rule that an undertaking with a substantial market share for daily newspapers in a Member State, and that operates the only nationwide home-delivery distribution service for subscribers, does not abuse a dominant position if it refuses to allow the publisher of a competing newspaper access to that home-delivery distribution service. In other words, the distribution system was not deemed to be an essential facility. The ECJ followed the Advocate General’s suggestion.113 In Tetra Pak,114 Tetra Pak tried to rely on U.S. Supreme Court Brooke Group v. Brown & Williamson Tobacco Corp.,115 stating that, according to that judgment, predatory pricing could only be penalized under Article 82 EC if the dominant firm had a realistic chance of recouping its losses. Advocate General Ruiz Jarabo Colomer dealt explicitly with the argument and suggested that the ECJ reject it. The ECJ followed, without, however, mentioning the U.S. Supreme Court’s ruling.116

C. National Supreme Courts of European Countries

The Swiss Supreme Court has been praised as a role model of openness when it comes to judicial conversation. Approximately ten percent, if not more, of all judgments contain comparative remarks. A close look shows, however, that the comparison is in most cases limited to neighbouring countries. There are, nevertheless, important examples of a global approach, some of them dating back to the 1930s.117 In the recent past, the case law on the exhaustion of copyright and of patent rights should be mentioned. In the 1998 Nintendo case involving parallel imports of a computer game, the Supreme Court held that copyright was exhausted upon first sale anywhere in the world.118 It indirectly referred to the U.S. Supreme Court’s Quality King v. L’anza ruling,119 a case concerning copyright for labels on shampoo bottles. The U.S. copyright owner’s English distributor sold goods to

109. Id. para. 38.
113. Id. para. 76.
117. See ATF 61 II 138 (Considering that English and American law appeared to totally exclude the nullity action, the Federal Supreme Court held that a patent licensee is, as a matter of principle, entitled to bring an action for nullity against the patent owner.).
118. BGE 124 III 321.
Malta from where they were imported into the United States.\(^{120}\) The Swiss Supreme Court held that the copyright was exhausted, which meant that it ruled in favor of international exhaustion.\(^{121}\) The second example concerns the exhaustion of patents. The Zurich Commercial Court ruled in a 4-1 decision in favor of international exhaustion of patents in a case involving parallel imports in Kodak films.\(^{122}\) The Supreme Court reversed in a 3-2 ruling.\(^{123}\) In doing so, it referred not only to the case law of the European Court of Justice on exhaustion of patent rights, but discussed a whole range of foreign jurisdictions.

The German Supreme Court borrowed from the U.S. Supreme Court with regard to the question of whether colors and product forms should enjoy trademark protection. On December 10, 1998, the Court ruled in the Gelb/Schwarz case\(^ {124}\) that a concrete combination of the two colors yellow and black is, as a matter of principle, able to obtain trademark protection in Germany. It will obtain this protection if the mark is capable of distinguishing the goods or services of one producer from those of another.\(^{125}\) The German Supreme Court pointed to the fact that marks consisting of colors and combinations thereof have, in fact, been protected in other jurisdictions including the United States and referred to the 1995 Qualitex Co. v. Jacobson Products Co.\(^ {126}\) judgment of the U.S. Supreme Court.\(^ {127}\)

Next, on November 23, 2000, the German Supreme Court decided to refer questions for preliminary rulings to the European Court of Justice in Luxembourg in three cases regarding the protection of form marks. The three cases concerned a forklift truck, a flashlight, and a (Swiss) watch. In all three cases the question was whether a certain form mark could be registered.\(^ {128}\) The Federal Supreme Court essentially wanted to know whether signs that consist exclusively of the shape that results from the nature of the goods themselves are subject to stricter standards with respect to distinctiveness than are other form marks. For our purposes, the decisive point is that the Federal Supreme Court referred to the U.S. Supreme Court’s Wal-Mart Stores, Inc. v. Samara ruling of March 2000. In this case, the U.S. Supreme Court held that “design, like color, is not inherently distinctive.”\(^ {129}\) The U.S. Supreme Court thereby confirmed its Qualitex judgment where it had ruled that color may be protected only if it has acquired secondary meaning. The German Supreme Court is obviously concerned about a trend in German and in international intellectual property law that forms may be permanently monopolized. This could lead to an undermining of the law of inventions, in particular the law of design patents, which is based on different requirements and different restrictions with regard to time and substance. The German Supreme Court has furthermore referred to other foreign high courts in a 1999 judgment on exhaustion of patents.\(^ {130}\) The Court confirmed its earlier case law according to which patents are not subject to international exhaustion. It

\(^{120}\) Id. at 139.

\(^{121}\) Id. at 145.

\(^{122}\) Blätter für Zuercherische Rechtsprechung (ZR) 79 Nr. 112.

\(^{123}\) BGE 126 III 129.


\(^{125}\) Id.


\(^{128}\) Order of the Supreme Court of Nov. 23, 2000, I ZB 15/98.


discussed the rulings of the Tokyo Court of Appeal and the Supreme Court of Japan in the BBS case\textsuperscript{131} as well as the judgment of the Zurich Commercial Court in Kodak.\textsuperscript{132} The Japanese courts came to the opposite result. But the German Supreme Court concluded that this was no reason to deviate from earlier case law. But the German Supreme Court concluded that this was no reason to deviate from its earlier case law.

The German Supreme Court has also used a global approach in other areas of the law. An example is provided by the Caroline of Monaco judgment on the protection of the right of privacy of persons of contemporary history.\textsuperscript{133} The Court analyzed the right to be let alone as a specification of the right of privacy as discussed by the U.S. Supreme Court in Katz v. United States.\textsuperscript{134} In criminal law, a judgment may be mentioned that concerned voluntary manslaughter by soldiers of the former German Democratic Republic People’s Army at the Berlin Wall. In that case, the German Supreme Court referred to the U.S. Supreme Court’s ruling in Tennessee v. Garner.\textsuperscript{135}

D. Canadian Supreme Court

The Canadian Supreme Court is actively participating in the global conversation, particularly in constitutional and human rights law. With regard to the latter, the Court has looked to decisions of the European Commission and Court of Human Rights, while American jurisprudence has been most prominently used.\textsuperscript{136} As far as economic law is concerned, the Harvard Onco-mouse case is to be mentioned. The Harvard Onco-mouse is a genetically engineered animal. Researchers of Harvard University have been able to isolate a gene and implant it in the mouse. The oncogene makes the mouse susceptible to cancer. Harvard obtained a patent for the gene, the engineering process, and the engineered mouse in the United States in 1988\textsuperscript{137} and in Japan in 1994. A European patent was granted in 1991 by the European Patent Office in Munich, albeit with some modifications. The Canadian Patent Office limited the patent to the oncogene and to the process for isolating the gene and implanting it in the mouse, but did not grant a patent for the mouse itself. A judge of the Federal Court affirmed the decision, holding that the Harvard researchers had invented a process, but not a mouse. According to the judge, the existence of the oncogene was new, but the mouse was not new. The Federal Court of Appeal reversed in a 2-1 decision and granted Harvard a patent for the animal.\textsuperscript{138} One judge of the majority relied on the U.S. Supreme Court’s opinion in Diamond v. Chakrabarty\textsuperscript{139} —the first ruling of the U.S. Supreme Court that held that biotechnological inventions are patentable—and declared that judgment to be persuasive authority.\textsuperscript{140} The Canadian Supreme Court found, however, in a 5-4 decision that higher life form is not patentable because it is not a “manufacture” or “composition of matter” within the meaning of Section

\textsuperscript{131} Japanese Supreme Court, Judgment of July 1, 1997, 1998 GRUR INT. 168.
\textsuperscript{132} Kodak v. Jumbomarkt AG, ZR 79 Nr. 112.
\textsuperscript{134} 389 U.S. 347, 350–51 (1967).
\textsuperscript{136} L’Heureux-Dubé, supra note 1, at 19.
\textsuperscript{138} Harvard College v. Canada (Comm’r of Patents), [2000] 189 D.L.R.4th 385 (Fed. Ct.).
\textsuperscript{139} 447 U.S. 303 (1980).
\textsuperscript{140} Harvard College v. Canada (Comm’r of Patents), No. 28155, 2002 SCC 76, para. 36, (Can. Dec. 5, 2002).
2 of the Canadian Patent Act. The majority as well as the minority referred to the U.S. Supreme Court’s decision.

IV. METHODOLOGICAL AND PRACTICAL PROBLEMS OF JUDICIAL GLOBALIZATION

That courts in different jurisdictions face the same or similar legal problems is no novelty. In some countries, high courts have always been open-minded and prepared to take into account the law of other jurisdictions. What is new is the global approach. Judicial globalization means being prepared to take into account judgments from every jurisdiction around the globe, not just the laws of the most powerful powers such as the United States, Britain, France, or Germany. Justice Claire L’Heureux-Dubé speaks of a tremendous change and emphasizes that “the process of international influence has changed from reception to dialogue.” That may be true, but at the same time, the global approach renders comparison more difficult.

Certain experiences gained in traditional comparative law seem also to apply to judicial globalization. A truth that cannot be repeated often enough is that only comparable issues can be compared. It makes little sense to compare legal provisions or judgments as such. One should rather first compare the real life problems that lead to legal implications—i.e., the legal problems—and, second, the provisions enacted and judgments rendered with the aim of resolving those problems.

The question then arises: what is the function of judges’ conversation? Is it only an additional tool that would allow a court to confirm a result that it has found based on the interpretation of national or supranational law? Or does it have a similar significance as, for instance, the wording, the history, the purpose, and the overall scheme of a given provision? In many cases, the global conversation will simply provide a confirmation. That does not mean that it is useless. It may still serve as a an additional support for the deciding court’s approach to the matter. A case in point is the Kodak ruling of the Swiss Supreme Court, which mentions a whole range of foreign jurisdictions. There are, however, cases, where it was the look across the border that has convinced a high court to opt for a certain solution. Examples of this are to be found in particular in cases where a high court fills gaps or overrules its earlier case law. In its 1971 Agfa judgment, the Austrian Supreme Court switched from national to international exhaustion in trademark law, explicitly following the examples of the German and the Swiss Supreme Court.

Experience also shows that courts may refer to a foreign judgment in a dialectic way by mentioning it, but concluding that for certain reasons it should not be adopted into the case law of the court. An example would be the U.S. Supreme Court’s ruling in Raines v. Byrd. Another dialectic technique is sometimes used in courts which adhere to an open vote and dissenting opinion system: Whereas the majority decides the case based on considerations stemming from national law, dissenting judges refer to judgments of foreign courts. A notable example of this technique is the dissenting opinion of Justice Breyer in

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141. Id. para. 155.
142. Id. paras. 36–38, 157.
143. L’Heureux-Dubé, supra note 1, at 17.
144. Kodak v. Jumbomarkt AG, BGE III 126,129.
It may also happen that foreign material is used in a wrong or at least questionable way.

A very practical question is whether a Court should carry out a comparative analysis on its own motion or only if the parties plead accordingly. One will, as a rule of thumb, have to assume that, in most cases, the parties’ lawyers will put the comparative materials on the court’s table. In the case of the ECJ, the important role of the Advocate General is to be mentioned here. Moreover the issue of how a Court can obtain information about foreign law needs to be addressed. Two problems are to be distinguished. The first one concerns a simple technical question: Does the Court have the means for carrying out comparative studies? It is clear that courts that do not have the resources for comparative research will hardly be able to participate in the global conversation. The ECJ is in a particularly favorable situation in this regard. It has its own research department which may be asked to write a note de recherche in a given case. In addition to that, the ECJ has the advantage of having a judge from each Member State. This will in any case facilitate the conversation with the courts of the Member States. German courts may ask one of the Max Planck Institutes for expertise and, in Switzerland, the Swiss Institute of Comparative Law will provide assistance. The second issue is related to the dichotomy between law in the books and law in action. But even if a court is able to assess the law in action in a foreign jurisdiction, it may still prove difficult to understand the social realities and the values as well as the spirit of the foreign law. Geography, climate, the concept of government, the litigiousness of individuals and economic operators, are other non-legal factors of a legal culture that are to be taken into account. One must finally not overlook that in practical life, whether foreign judgments are known to the court, will often depend on coincidences. A judge who has attended law school abroad will naturally tend to take the respective country’s legal order into account. Former Canadian Supreme Court Justice Claire L’Heureux-Dubé observed that

Israeli Supreme Court Justice Shimon Agranat, who was educated in the United States, made extensive use of American principles in several of his judgments. In Canada, too, educational backgrounds have clearly contributed to the influence of certain jurisdictions on our law. Supreme Court Justices who were educated in the United States have referred to the United States with more frequency than others.

The establishment of LL.M. programs at American universities after World War II has been instrumental for the export of American legal thinking to other parts of the world. In fact, generations of non-Americans have been influenced by their studies in the United States for their whole life. Understanding a foreign judgment in its context may, however, require some reading of literature. This leads to the language problem. Here Europeans appear to have a particular advantage over Americans.

With regard to the questions dealt with in the previous paragraphs, judges’ meetings may play an important role. One of the special features of judicial globalization is in fact that judges see each other in person. This, again, is not new in every respect. Conferences of the judges of the Nordic countries, for instance, have taken place for the last 100 years. There are many other institutionalized meetings of national courts in Europe. As far as the European level is concerned, the ECJ meets supreme court justices from the EC Member States on a regular basis; ECJ judges and advocates general see their colleagues from the ECHR and from the EFTA Court. The ECJ also maintains contacts with the supreme

148. L’Heureux-Dubé, supra note 1, at 20–21.
The judges of the EFTA Court get together with judges from the Court of First Instance of the European Communities as well as with judges from the European Court of Human Rights. What is apparently new are meetings on a global scale, such as the ECJ’s meetings with the Tribunal de la Comunidad Andina and with certain African and Asian courts. The EFTA Court has recently received a visit from the justices of the Chinese People’s Supreme Court. Special occasions such as anniversaries of courts may provide an opportunity for judges from different jurisdictions to convene. A recent example concerns the fifty-year anniversary of the ECJ, which brought together judges from Europe, Africa, and Latin America. One should also point to the two “summits” that took place between delegations of the ECJ and the U.S. Supreme Court. Once a personal relationship has been established, a judge may feel free to contact his or her foreign counterpart in a given case. This constitutes, in the era of electronic mail, a very effective and cost-saving research method.

V. CONCLUSIONS

The title of this article implies the question of whether the global conversation of judges constitutes a new development. That question may partly be answered in the affirmative. On the one hand, traditional comparative law has, at least in certain countries, long been looking for solutions in other jurisdictions. In the end, this is what comparative law is about. The conversation among courts in Europe is to be mentioned. It is, however, quite clear that Europe is, to a large extent, a special case. European societies share common values in particular with regard to the social model underlying the single legal orders. Harmonization of the law in the EC with its ramifications (EEA, Europe Agreements, autonomous implementation in third countries) plays an important role in this context. The situation may be compared to the conversation among state courts and between the U.S. Supreme Court and the state courts in the United States. On the other hand, it cannot be denied that a new development is on the way. Whereas in the past, courts have mainly been focusing on judgments in neighboring or powerful countries, in times of globalization, every jurisdiction on the globe is, as a matter of principle, eligible as a resource. This development is to be judged as positive. American comparatists John Henry Merryman and David S. Clark have rightly stated: “From ancient times, . . . those wishing to establish a just legal system have sought inspiration and example from other lands.” It is clear that a court which takes a foreign judgment into account will not necessarily follow it. The discussion of that judgment will nevertheless enhance the rationality of the decision. Foreign judgments play a similar role in the common law concept of persuasive authority.

The U.S. Supreme Court does not offer the same support to the global conversation as other Supreme Courts. American authors speak of American anomaly. There is a widespread feeling that the attitude of the U.S. Supreme Court has to do with the fear that a participation in the global conversation would also extend to especially sensitive areas of the law—in particular to criminal law and to capital punishment. The sad part is that in economic law, where convergence has gone much further than in any other field of the law,


there is no judicial conversation either. For the future it would be important to include U.S. courts, in particular the U.S. Supreme Court. An informal survey on whether U.S. Supreme Court rulings are still as influential in the rest of the world as they used to be in the 1960s and 1970s has found that this is not the case.\textsuperscript{152} The explanation is as simple as convincing: this is clearly a consequence of excluding yourself from the global conversation. If you do not take part in this game, others will rely less on you.

My conclusion with regard to judicial globalization would be that we are only at the beginning. A certain humbleness is required since judges are often shooting a moving target if they want to take into account foreign case law. It may also be that a court decides to abstain from participating in the global conversation because it feels that it cannot master the foreign material. In such a case, foregoing global conversation is not a sign of parochialism or stubbornness, but may also be an indication of intellectual honesty and modesty.

\textsuperscript{152} L’Heureux-Dubé, \textit{supra} note 1, at 29–30.