Foreword: Globalization of the Judiciary

PROF. DR. CARL BAUDENBACHER†

On September 5 and 6, 2002, the *Texas International Law Journal* hosted an international symposium on the globalization of the judiciary. The first day dealt with the phenomenon commonly referred to as "judicialization of international law." "Judicialization" means that traditional mechanisms of dispute resolution, which are rooted in the world of diplomacy, are being replaced by independent courts and court-like institutions. One of the main focuses of the symposium was to what extent global and regional courts are, in fact, judicialized. This question was not only the subject of a general opening speech, but was subsequently examined with regard to the International Criminal Court, the European Court of Human Rights, the WTO Appellate Body, and the Dispute Resolution Panels under the North American Free Trade Agreement. The second day was dedicated to the dialogue or conversation of national, supranational, and international courts which in recent literature has been called judicial globalization.[1] The attitude of the individual courts with regard to this non-institutionalized dialogue, as well as its methodological and practical problems were discussed. Judicialization and judicial globalization are to a significant extent a consequence of the globalization—or, in the case of Europe—regionalization of economic and social relations.

The symposium contributors consisted of judges and advocates-general sitting on international courts such as the European Court of Human Rights, the WTO Appellate Body, the Court of Justice of the European Communities, and the Court of Justice of the European Free Trade Association as well as a number of respected academics. The Chief Justice of the Supreme Court of Texas gave a stimulating luncheon talk on the role of state courts in a global world. The special feature of the conference was that it brought together those who make the decisions with those who query them. At the same time, the symposium profited from the fact that the speakers came from both sides of the Atlantic. The organizers of the symposium trust that the articles in this special volume will make a significant contribution to the understanding of the consequences of globalization for the judiciary, be it national, international, or supranational. The success of the event has prompted the *Texas International Law Journal* to announce a second symposium on the globalization of the judiciary on September 4–5, 2003. The title of the conference will be: "Key Issues of Economic Law, Business Law, and Human Rights Law."

In his opening address, Columbia Law Professor José E. Alvarez attempted to separate visions in the judicialization debate from reality. He examined five of what he calls "half-truths" in the current judicialization discussion. His statements were the following:

(1) *The recent proliferation of international tribunals constitutes the "judicialization" of international law.* Since only a small part of international disputes are heard by a judge and the greater part is resolved by way of old-fashioned diplomacy or ad hoc arbitration, this statement amounts to a myth. Moreover, individual access is actually granted by less than five courts worldwide, none of them being of global nature.

† President of the EFTA Court, Professor at the University of St. Gallen, Visiting Professor at the University of Texas School of Law

1. *See, e.g.*, Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

(2) *The proliferation of international tribunals constitutes a fundamental shift in favor of law over politics, legal discourse over "power based" diplomacy.* To support the contrary, Alvarez pointed to the highly political character of dispute settlement proceedings in international courts and the lack of enforcement mechanisms. Moreover, he doubted that the shift toward the rule of law by institutionalizing dispute settlement procedure will be of a permanent nature, due to political backlash among national administrations and international NGOs. But even from within, international adjudication is, in his view, exposed to political influence that will result in politically compromised judgments.

(3) *The proliferation of courts means a fundamental shift to "hard" law and "hard" remedies.* According to Alvarez, however, international dispute settlers tend to apply "soft" sources of law—such as the subsidiarity principle in European Law—and supply only "soft" remedies. The application of soft law by judicial bodies could also create political backlash. Whether the hardening process in dispute settlement will be of significance in the long term remains to be seen. Finally, most courts are only functioning under soft law conditions themselves, give rulings that are non-binding or not generally applicable and contain vague language like the ECHR's "margin of appreciation" doctrine.

(4) *We have seen the future and it is Europe.* Prof. Alvarez opposed "Euro-romanticisim" and claimed that effective international dispute settlement is not dependent on the specific assets of the European judicial system (the effectiveness of which is, in his view, not beyond doubt). He pointed to the successful performance of WTO dispute settlement, which lacks access for individuals or direct effect of its rules in national law. Recent developments, especially in international criminal courts, show that the principle of complementarity might well become an alternative to the hierarchic principle of primacy by international over national courts.

(5) *The Grotian Moment: the "constitutionalization" of international law is nigh.* Contrary to international lawyers' faith in multilateralism, international systems are still far from being comparable to national legal orders, despite some elements of evolving constitutionalization within the United Nations, for example. They are lacking either a bill of rights or a scheme of governance. Whether a constitutionalization within certain systems will take place in the future is an open question. Despite his critical approach, Alvarez concluded that at least in some areas of the international system, the rule of law prevails over diplomacy and that there is as much truth in his five half-truths as not.

Texas Law Professor Steven Ratner took the view that, compared to the success of international courts dealing with human rights in Europe and Latin America, the impact of the International Criminal Court (ICC) as a court dealing with criminal law will probably remain small. Although Ratner acknowledges the accomplishment of setting up a permanent international criminal court, he observes severe obstacles to the ICC's effectiveness. The concept of individual accountability of state leaders will likely not find the same acceptance as traditional interstate accountability. As proof of his statement, Ratner refers, among other things, to the Rainbow Warrior affair, where the UN Secretary-General ordered France to apologize for sinking the Greenpeace ship and opened up for the possibility of damages to be paid. In other cases, truth commissions on personal fault were accepted, but not court trials. Those setting up the ICC reckoned that by basing the Court on the complementarity principle, cases would be pushed into the domestic judiciary in the first place. Moreover, personal accountability makes things more difficult as compared to mere interstate liability. There are practical problems, like that of getting custody of the accused. This will result in excessively long trials before international criminal courts. The rules of evidence are easier to deal with in interstate liability cases, essentially being civil matters. As a consequence, states with poor human rights records are reluctant to ratify the ICC statute, making the incident of actual trials before this court more unlikely. With

regard to the lack of ratification by the United States, the main concern is that ratification might deter the United States from using military force in fear of investigation, thus undermining global peace and security. However, in Ratner's view, the specific U.S. mistrust of international institutions is not justified in the case of an international court, like the ICC, as such an institution will not be eager to entrap U.S. citizens but will want to work with the United States and gain its trust. Looking at the prospects for the ICC, Steve Ratner predicted that the United States will not ratify its statute for a long time, just like the states with poor human rights records. States that have ratified will remain reluctant to hand over their nationals to the ICC. Ratner also expects the ICC to treat the Member States rather gently, an expectation backed up by the ECHR's history, namely the latter's "margin of appreciation" doctrine. Finally, Ratner indicated that there might be domestic alternatives to the ICC better suited to deal with human rights violation.

Judge Jean-Paul Costa, Vice-President of the European Court of Human Rights, recalled that although being the oldest international court in the field of protection of human rights, the European Court of Human Rights (ECHR) was only recently transformed into a permanent, full-time judicial body. The Court has developed a number of basic principles in its case law, namely the principles of subsidiarity and the "margin of appreciation" theory. It is in this framework, and in cooperation with national courts, that the ECHR interprets and applies the European Convention of Human Rights. With regard to the conversation with the Court of Justice of the European Communities (ECJ), Judge Costa uses the term "partnership." Concerning the objective underlying the Court's jurisprudence on fundamental rights protection, Costa noted the preservation of democracy and the rule of law as paramount. Notwithstanding a number of exceptions, the rights protected are primarily of political, not social and economic, nature. A "water-tight division" between the categories is, however, not possible. Moreover, the Court has recognized the existence of positive obligations for the states. Of great importance are the procedural guarantees established in the Court's case law. In certain cases, the Court will also modify the rules governing the burden of proof before it in favor of the applicant. Other important principles are the "evolutive" method of interpretation, the regional nature of the Convention, and the connection with democracy as the decisive factor in interpreting the freedom of expression rule. In conclusion, Judge Costa pointed to the increasing caseload of the Court due to the expansion of the Council of Europe. The Court is running the risk of becoming a victim of its own success. A major overhaul of the judicial system will be unavoidable. This overhaul will stem from a postulated right to decline to examine cases raising no substantial issue in combination with the creation of a separate division within the Court for the preliminary examination of applications.

Professor Doctor Claus-Dieter Ehlermann, former member and chairman of the WTO Appellate Body, maintained in his "Experiences from the WTO Appellate Body" that dispute settlement in the WTO is still not conferred to a wholly independent judicial organ, mainly due to the requirement of panel and Appellate Body reports being adopted by the Dispute Settlement Body. He nevertheless emphasized its quasi-judicial character. Once established, the ad hoc panels act more or less like an independent judicial body. Still a WTO panel differs from traditional judicial bodies by the lack of public trial, the "interim review" requirements, and the lack of assistance staff. The weakest point, in Ehlermann's view, is the absence of structural guarantees ensuring independence. He therefore suggested the establishment of a standing panel, divided into different specialized sections. With regard to the independence of the permanent Appellate Body Ehlermann sees but one problem: the duration of its members' terms of office. Although seeing no actual threat to independence, he pleaded in favor of an eight-year, non-renewable term rather than the current rule of a four-year, once-renewable term. The Appelate Body's oral hearings

should, in Ehlermann's view, be opened to the public. Elaborating on the Appellate Body's methods of interpretation, Claus Ehlermann recalled that Article 3.2 Dispute Settlement Understanding (DSU) postulates in "accordance with customary rules of interpretation of public international law," thereby recognizing Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Of the methods named there, "the ordinary meaning of the terms" is by far predominant for the Appellate Body's rulings, whereas the ECJ tends to follow a teleological approach. Although, according to Ehlermann, the consensus on this interpretative principle has facilitated the decision making, it has limits, particularly where confronted with a gap in the agreements. In many cases the reference to public international law established by the Appellate Body in the Gasoline case proves helpful. With regard to the tensions between the dispute settlement and the rule making system of the WTO, Ehlermann concluded that the honeymoon of the new dispute settlement system was over. This finding was based on the criticism following the Appellate Body's acknowledgment of amicus curiae briefs not foreseen by the DSU, as well as the examination of regional trade agreements. In the actual situation, Ehlermann maintained, the dispute settlers should avoid legal activism, and WTO members should exercise self-restraint in having recourse to dispute settlement and should strengthen the political decision-making process instead. With *de lege ferenda* in mind, however, the equilibrium should not be disturbed by weakening the judicial side in reinforcing the old diplomatic model or the political side, for example, by giving WTO law direct effect.

Texas Law Professor Patricia I. Hansen spoke on "Judicialization and Globalization in the North American Free Trade Agreement." According to her, the NAFTA approach to international dispute resolution is threefold. First, the Agreement contains general dispute settlement procedures, which, in terms of judicialization, are more advanced than the ad hoc panel system under the old GATT but significantly less "judicial" than its WTO counterpart. There is no right of appeal and no binding effect. Private and non-governmental parties, as well as the domestic judicial institutions within the NAFTA countries, are virtually excluded from the proceedings. Moreover, compliance has proven difficult. Hansen said that as a consequence, in a number of cases, the NAFTA countries have taken their disputes to the WTO instead of a NAFTA panel. Second, NAFTA provides for binational ad hoc panels for reviewing antidumping and countervailing duties involving imports from the Member States. The panels include full participation of non-governmental parties, binding effect of the decisions and a limited right to appeal. However, the selection process for panelists is politically determined and causes difficulties in each dispute. Professor Hansen reported doubts on whether the panel system for antidumping and countervailing duties will be viable and desired in the long run. Third, the NAFTA Agreement contains an investor-state arbitration by which citizens of other Member States can bring damage claims for violation of Chapter Eleven by a government. Most cases concern measures that are allegedly "tantamount to expropriation" or violate the investor's right to "fair and equitable treatment" and "full protection and security." Ad hoc tribunals created under Chapter Eleven have often referred to customary international law principles. Nevertheless, the outcome will, in Hansen's view, likely be in line with domestic tribunals. Moreover, the process of judicializing Chapter Eleven has—with the exception of at least one decision allowing for amicus curiae briefs—not come very far to date.

In my contribution, I examined the phenomenon of judicial globalization with a broad view. Against the background of similar legal problems calling for answers in ever-more closely moving national and international jurisdictions, the fact that high court judges take into account the solutions from other high courts worldwide seems natural. However, the intensity of such an intercourt conversation depends on the willingness of the individual courts to take part by referring to and discussing foreign judgments. This happens to very

different extents, depending particularly on the context in which courts operate. European high courts have always been engaged in a judicial dialogue because of the common roots of their respective jurisdictions. The Lego and Benetton cases vividly illustrate this. The ECJ entered that conversation with the entry into force of the Treaty of Rome. Obviously, this court will be cited regularly by EC Member States' courts. On the other hand, the ECJ is very reluctant to cite national high courts. With one recent exception, it is always the Advocates General who make the references to courts of other jurisdictions. The ECJ does refer to judgments of the ECHR in cases involving human rights, and in certain cases, to the EFTA Court. The Court of Human Rights will, for its part, quote the ECJ. The EFTA Court is, as a rule, bound to follow or take into account ECJ case law by special homogeneity rules.

On the global level, the U.S. Supreme Court is considered a main supplier of ideas. It has, for example, influenced the ECJ's caselaw on fundamental freedoms and antitrust. On the other hand, the Supreme Court mostly abstains from taking into account decisions from foreign jurisdictions. In the ECJ, it will again be the Advocates General who take care to take into account Supreme Court rulings. The Supreme Court's influence on EC antitrust law is immense. Like the ECJ judges, the ECHR does not actively participate in a global judicial exchange. National high courts are often less restrained. The case law of the Supreme Courts of Germany and Switzerland provide examples for openness to foreign jurisdictions and judgments. The case law of the Supreme Court of Canada does as well. An example is its recent judgment in the Harvard Onco Mouse case. As far as the function of intercourt conversation is concerned, I have concluded that in many cases, judges will use it as a confirmation for an already agreed upon result. On some occasions, conversation may, however, prompt a court to change its caselaw. It may also happen that a court uses a foreign judgment in a dialectic way by considering, but not following it. Practical aspects of global communication include the question of how judges obtain information about developments in foreign jurisdictions and whether they should raise such issues on their own motion or not. On balance, I have labelled judicial globalization as a partly new phenomenon. Comparison is more and more carried out globally, regardless of neighborhood or power of the cited jurisdiction.

Texas Law Professor Ernest A. Young's attitude towards judicial globalization, as expressed in his article, "The Trouble with Global Constitutionalism," is a rather skeptical one. In his view, when international norms are becoming increasingly supranational and judicialized, they start taking over the role of constitutional principles and thus overlap with domestic constitutional law. Thus, international norms will alter constitutional checks and balances governing the domestic lawmaking process and intended to protect individual liberty. International law will undermine these principles and break the chain of accountability between the American people and its politicians. Young refers to the example of the direct effect of customary international law, which is part of U.S. law according to the Supreme Court in *Paquete Habana* and is "made" U.S. law by an international community not accountable to the American electorate. The same is true for international trade law in the WTO and NAFTA, threatening the constitutional values of federalism and democracy. Young warns of throwing such structures out the window in favor of a largely untested international procedure with unpredictable effects. As to the future, Professor Young suggests what he calls constitutional damage control in limiting the scope of delegations to supranational entities or rendering them accountable to domestic actors.

Francis Jacobs, Advocate General of the Court of Justice of the European Communities, described the various ways in which his court is influenced by and influences

other courts and jurisdictions. The European Union is characterized by its quasi-federal structure as laid down in its "constitution," the Treaties. Other constitutional principles like direct effect and primacy of EU law, as well as the recognition of fundamental rights and the proportionality principle, have been developed by the Court without any basis in the Treaties. This was achieved in judgments given either in direct action cases or in preliminary rulings, the par excellence of judicial dialogue between the ECJ and the Member States' courts and tribunals. The ECJ's judgments not only bind the national court that has referred the questions, but will also ensure the uniform application of EU law throughout the Union. At least in its first thirty years, the Court has possibly made the most significant contribution of all to European integration.

Besides this internal dimension of interaction, the ECJ is engaged in a dialogue with various international courts outside the EU. Its most important partner in this connection is the ECHR. The ECHR's case law is followed by the ECJ, although some divergent interpretations exist. On the other hand, the ECHR has sometimes followed the ECJ, as for example in a question concerning retroactive effect of judgments. Then, the relationship between the ECJ and the EFTA Court is very close. However, the different structure of the Union and the EEA can lead to different interpretations as has happened in the Maglite and Silhouette cases on international exhaustion of trademark rights. Interaction with other international courts like the ICJ and the WTO Appellate Body exists, although their impact may still increase in the future. As to national systems outside Europe, and the United States in particular, Advocate General Jacobs is of the opinion that parallels are not common, taking into account the differences between these systems in their basic texts as well as in their contexts. This can even be seen in supposed "universal" subjects like human rights and anti-discrimination legislation. An exception, however, is the area of antitrust, where the influence of the U.S. approach on European law is huge and will boost convergence after an internal market has progressively been achieved in Europe. Jacobs referred to the essential facilities doctrine and to extraterritorial jurisdiction as examples of that impact.

In his luncheon address, Chief Justice Thomas R. Phillips showed how U.S. state courts were entrusted with jurisdiction over certain issues of international law in 1789. Subsequently, state courts have always dealt with questions of international law, in particular of customary international law. Chief Justice Phillips assumed that they handle even more international law cases than their federal counterparts. He illustrated the application of international law in state courts with examples from Texas legal history. Whether these and similar cases could have been removed on the basis that customary international law is inherently a question of federal common law remains open. There are decisions issued by federal courts in support of either answer. For the time being, the Texas courts continue to be chosen extensively by foreign plaintiffs in suits for personal injury and death. In a look to the future, the Chief Justice assumed that the influence of international law will be growing at least in areas falling under state court jurisdiction, like criminal and family law. This growth is mainly due to new conventions. Moreover, the growing global commerce will lead to an increase in the international law-related caseload of U.S. courts. On the other hand, trends like mediation and arbitration may well lead to a decrease in the significance of international litigation.

In his speech on "International Judicial Negotiation," Texas Law Professor Jay Westbrook gave an insight into the more practical aspects of judicialization. He reported an impressive number of examples of intercourt communication and negotiation in cross-border proceedings. More precisely, he dealt with the management of dispute settlement in cases where two or more legal orders and jurisdictions are involved and common dispute settlement mechanisms are not available. These lawsuits typically involve many of the same parties and same claims that are pending in the courts of more than one nation.

Multilateral cases of that sort, where one court is able to decide wholly independently, are becoming fewer. Westbrook suggested that negotiations between courts are more adequate to deal with the rising problems of parallelism than traditional approaches like reciprocity, the first-to-judgment-rule, and the anti-suit injunction. As he exemplified with a number of cases, intercourt negotiations are most advanced in multinational insolvency cases, where the administration of the case may be governed by court-approved protocols and reorganization plans. Such negotiations will also take place in what Westbrook refers to as parallel claims cases, where they sometimes will amount to substantial interferences in another nation's adjudicatory process. Apart from that, the negotiation phenomenon can also be observed in forum non conveniens cases and elsewhere, often coupled with conditionality. Closely related to negotiations are methods of direct communication among courts, in order to obtain information about the governing law in the other court and to prepare negotiations. These communications can potentially increase cooperation and eliminate costs. Westbrook also referred to possible hindrances of intercourt communication, namely language or procedural problems like the necessity to involve counsel.

On behalf of the *Texas International Law Journal*, I would finally like to thank Texas Law Professor Sarah H. Cleveland for her closing remarks. Special thanks go to the Editor in Chief of the Journal, Christina Ponig, the Symposium Coordinator, Shahreen Abedin, the Director of Development, Cass Burton, and the other members of the *Texas International Law Journal*. The speakers appreciated the Texan hospitality that they were shown as well as the seamlessness of the symposium itself. The conference will leave a lasting memory on all who participated.