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.[1] 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 homogeneization 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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1. *See, e.g.*, Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Christopher J. Borgen, *Judicial Views of International Law*, 95 ASIL PROC. 28 (2001).

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."[2] 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).[3] 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.[4]

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.[5] It is clear that this decision was prompted by economic pressure by the EC.[6] 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.

3. *See, e.g.*, Mario Monti, European Commissioner for Competition Policy, Antitrust in the US and Europe: A History of Convergence, Address Before the General Counsel Roundtable of the American Bar Association, Washington D.C. (Nov. 14, 2001), *available at* http://www.europa.eu.int (discussing the export of elements of U.S. antitrust law to the European Union).

4. *See* Carl Baudenbacher, *Das europäische Modell bei Kartellverbot und Missbrauchsaufsicht—ein Exportartikel? [The European Model of the Prohibition of Cartels and Abuses of a Dominant Position—an Export Article?]*, 175 FIW-SCHRIFTENREIHE HEFT 9, 12 (1997).

5. Carl Baudenbacher, *Zum Nachvollzug europäischen Rechts in der Schweiz*, 27 EUROPARECHT 309, 310–11 (1992).

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.[7] 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.[8] In cases involving issues of motor vehicle insurance law,[9] copyright law,[10] unfair competition law,[11] patent law,[12] and criminal procedure law,[13] 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.[14]

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.[15]

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

7. *See, e.g.*, George Bermann, *European Law: Yesterday, Today and Tomorrow*, 36 TEX. INT'L L.J., 525, 527 (2001) ("EU law is the comparative frame of reference par excellence for our assessments of American law, whether existing or proposed.").

8. *See, e.g.*, CARL BAUDENBACHER & NICO SPIEGEL, DIE RECHTSPRECHUNG DES SCHWEIZERISCHEN BUNDESGERICHTS ZUM VERHÄLTNIS VON SACHMÄNGELGEWÄHRLEISTUNG UND ALLGEMEINEN RECHTSBEHELFEN DES KÄUFERS—EIN MUSTERBEISPIEL ANGEWANDTER RECHTSVERGLEICHUNG?, FESTSCHRIFT ZUM 65 GEBURTSTAG VON MARIO M. PEDRAZZINI 229–61 (1990).

9. Bundesgerichtshof [BGH], Judgment of June 13, 1994, 30 VERSICHERUNGSRECHT [VersR] 834 (1984).

10. BGHZ 136, 381 (393).

11. BGHZ 117, 115 (118).

12. BGH, Judgment of Mar. 12, 2002, Case X ZR 43/01, 104 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 511, 513 (2002); *see also* BGH, Judgment of Mar. 12, 2002, Case X ZB 12/00, 104 GRUR 523 (2002); BGH, Judgment of Mar. 12, 2002, Case X ZR 73/01, 104 GRUR 527 (2002).

13. BGHSt 32, 345 (356).

14. *See, e.g.*, Hoge Raad der Nederlanden (Supreme Court of the Netherlands), ELRO-nummer: AA2345 Zaaknr 00210/00 ;

15. Carl Baudenbacher, *Zum Kundschaftsentschädigungsanspruch des Agenten im schweizerischen Recht. Rechtsvergleichende Betrachtungen unter Berücksichtigung des deutschen Rechts*, JURISTEN ZEITUNG 919–927 (1989).

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* case[55] 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

54. Case E-8/97, TV 1000 v. Norwegian Gov't, [1998] 3 C.M.L.R. 318 (1998). *See* Walter Kälin, *The EEA Agreement and the European Convention for the Protection of Human Rights*, *available at* http://www.ejil.org/journal/Vol3/No2/art7.html (last visited Apr.22, 2003).

55. Handyside v. United Kingdom, 1 Eur. H.R. Rep. 737 (1976).

56. L'Heureux-Dubé, *supra* note 1, at 28 (citations omitted).

57. *See infra* Part III.B.

58. Advocate General Jacobs construed the European Patent Convention when he dealt with the Harvard oncomouse. Case C-377/98, Netherlands v. Parliament & Council, 2001 E.C.R. I-7079, para. 38, [2001] 3 C.M.L.R. 49 (2001) (concerning the validity of the Directive on the legal protection of biotechnological inventions). Jacobs also mentioned the judgment of the U.S. Supreme Court in Diamond v. Chakrabarty, 447 U.S. 303 (1980), jump-starting the biotechnological industry by granting a patent for a genetically engineered bacterium. *Netherlands*, 2001 E.C.R. I-7079, para. 36 n.41. With regard to the situation in Canada, see also Robert Lockhart, *A Mouse That Could Roar: Issues for Consideration at the Appeal of the Harvard Oncomouse Case*, 10 J. ENVTL. L. & PRAC. 237 (2000), which discusses the legal issues concerning the patentability of animal life faced by the Canadian Supreme Court.

59. 487 U.S. 815 (1988).

> 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.[60]

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*,[61] 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.[62]

In *Atkins v. Virginia*,[63] 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.[64] 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."[65] In *Printz v. United States*,[66] 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).
61. 492 U.S. 361 (1989) (emphasis added).
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.
66. 521 U.S. 898 (1997).

> 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 . . . .[67]

As far as the issue of standing is concerned, the judgment in *Raines v. Byrd*[68] 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."[69]

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,[70] 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*[71] 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."[72]

In *Washington v. Glucksberg*,[73] 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-

67. *Id.* at 976–77.
68. 521 U.S. 811 (1997).
69. *Id.* at 828.
70. 410 U.S. 113 (1973).
71. 505 U.S. 833 (1992).
72. *Id.* at 945 n.1.
73. 521 U.S. 702 (1997).

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.

110. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); Cargill, Inc. v. Montfort of Colo., 479 U.S. 104, 104 (1986).

111. Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910), *cited with approval in* Associated Gen. Contractors of Cal., Inc. v. Cal. St. Council of Carpenters, 459 U.S. 519, 533 (1983); Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n., 830 F.2d 1374, 1378 (7th Cir. 1987).

112. Case C-7/97, Oscar Bronner v. Mediaprint Zeitungs, 1998 E.C.R. I-7791, para 47, [1999] 4 C.M.L.R. 112 (1998).

113. *Id.* para. 76.

114. Case C-333/94, Tetra Pak Int'l SA v. Comm'n, 1996 E.C.R. I-5951, [1997] 4 C.M.L.R. 662 (1996).

115. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 940 (1993).

116. *Tetra Pak Int'l*, 1996 E.C.R. I-5951, para. 77.

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.

119. 523 U.S. 135 (1998).

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.

124. BGH, Judgment of Dec. 10, 1998, Case I ZB 20/96, 1999 Gewerbliche Rechtschutz und Urheberrecht 491.

125. *Id.*

126. 514 U.S. 159 (1995).

127. BGH, Judgment of Dec. 10, 1998, Case I ZB 20/96, 1999 Gewerbliche Rechtschutz und Urheberrecht 491.

128. Order of the Supreme Court of Nov. 23, 2000, I ZB 15/98.

129. 529 U.S. 205, 212 (2000); Tony Reese, *Federal Trademark Protection for Product Configurations and Product Colors in U.S. Law*, *in* NEUESTE ENTWICKLUNGEN IM EUROPÄISCHEN UND INTERNATIONALEN IMMATERIALGÜTERRECHT 2000, at 185 (Carl Baudenbacher & J.G. Simon eds., 2001).

130. BGH, Judgment of Dec. 14, 1999, Case X ZR 61/98, 143 BGHZ 268 (2001).

discussed the rulings of the Tokyo Court of Appeal and the Supreme Court of Japan in the *BBS* case[131] as well as the judgment of the Zurich Commercial Court in *Kodak*.[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.[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*.[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*.[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.[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[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.[138] One judge of the majority relied on the U.S. Supreme Court's opinion in *Diamond v. Chakrabarty*[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.[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

131. Japanese Supreme Court, Judgment of July 1, 1997, 1998 GRUR INT. 168.

132. Kodak v. Jumbomarkt AG, ZR 79 Nr. 112.

133. *See, e.g.*, BGH, Judgment of Dec. 19, 1995, Case VI ZR 15/95, 131 BGHZ 332 (1997), *rev'd*, BverfG, Judgment of Dec. 15, 1999, 1 BvR 653/96 (1999), *available at* http://www.bverfg.de (last visited Apr. 22, 2003).

134. 389 U.S. 347, 350–51 (1967).

135. BGH, Judgment of Nov. 3, 1992, 46 NJW 141, 146 (1993) (referring to Tennessee v. Garner, 471 U.S. 1 (1985)).

136. L'Heureux-Dubé, *supra* note 1, at 19.

137. U.S. Patent No. 4,736,866 (issued Apr. 12, 1988), *available at* http:/www.uspto.gov (last visited Apr. 22, 2003).

138. Harvard College v. Canada (Comm'r of Patents), [2000] 189 D.L.R.4th 385 (Fed. Ct.).

139. 447 U.S. 303 (1980).

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.[141] The majority as well as the minority referred to the U.S. Supreme Court's decision.[142]

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*."[143] 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.[144] 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.[145]

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*.[146] 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

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.
145. 1974 ÖSTERREICHISCHE BLÄTTER FÜR GEWERBLICHEN RECHTSSCHUTZ UND URHEBERRECHT [AUSTRIAN JOURNAL OF INTELLECTUAL PROPERTY LAW] 84.
146. 521 U.S. 811, 976 (1997).

Printz.[147] 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.[148]

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

147. Printz v. United States, 521 U.S. 898, 939 (1997).
148. L'Heureux-Dubé, *supra* note 1, at 20–21.

courts of the candidate countries in Eastern Europe and with the Swiss Supreme Court. 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.[149] 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."[150] 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.[151] 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,

149. *See, e.g.*, Anton Pelinka et al., *Sozialpolitik und Leitbild des Unternehmens im 21. Jahrhundert*, *in* EUROPA UND DIE GLOBALISIERUNG: REFERATE DES ZWEITEN WIENER GLOBALISIERUNGS-SYMPOSIUMS 10. UND 11. MAI 2001, at 89–142 (Carl Baudenbacher & Erhard Busek eds., 2002).

150. COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS: CASES AND MATERIALS 1 (John Henry Merryman & David S. Clark eds., 1978).

151. *See The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 Harv. L. Rev. 2049, 2064–70 (2001).

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.[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.

152. L'Heureux- Dubé, *supra* note 1, at 29–30.