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Preface

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In February 2007, the European Court of Justice (ECJ) completed its second official visit to the United States of America at the invitation of the Supreme Court of the United States. This event was made possible thanks to the initiative and organizational efforts of the Southern Methodist University Dedman School of Law and, in particular, Dean John Attanasio. The current issue of *The International Lawyer* features articles that touch upon the topics that were at the center of the discussions between the delegation of the ECJ and the Supreme Court and other U.S. Federal and State Courts.

Although judicial dialogue is certainly developing as a generalized international trend, one could understandably question the added value of a Judicial Summit between the ECJ and the U.S. Supreme Court. It is important to underline that for us at the ECJ, judicial dialogue is a way of life. On an institutional level, the preliminary reference procedure, which accounts for approximately half of our workload, is essentially a dialogue between the courts of EU Member States and the ECJ, through which the ECJ offers them guidance on the interpretation of EU law. On an informal level, our Court has very frequent exchanges with the Supreme and Constitutional Courts of the Member States on various matters of mutual interest and concern. The reasons of course are evident: in a community of nations such as the EU, where it is primarily up to national courts to apply EU law in concrete cases, coherence and uniformity are of the essence. One can also understand why the ECJ would periodically meet and discuss with other transnational Courts of a similar nature and, most importantly, the European Court of Human Rights.

Nevertheless, the value of such exchanges between the ECJ and the U.S. Supreme Court is not as apparent. In fact, our two courts are different in many respects. First of all, the Supreme Court has a two century-long tradition with its first landmark judgments dating back to the early 1800s. The ECJ is in existence for a mere 55 years, and its first landmark judgments were rendered in the 1960s. Moreover, the U.S. Supreme Court is a national court of a federal state, whose jurisdiction is defined in a national constitution,

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whereas the ECJ is a transnational court of a Union of independent sovereign nations, whose jurisdiction is based on an international treaty.

The Supreme Court is comprised of nine Justices appointed for life without regard to the State they originate from while the ECJ numbers twenty-seven Judges (one from each Member State) and eight Advocates General (also appointed based on their nationality) for a renewable mandate of 6 years. In other words, the legal order of each EU member state is represented within the Court. Moreover, the ECJ sits in different judicial formations: chambers of three judges, chambers of five judges, the grand chamber with thirteen judges, and the plenary with twenty-seven judges.

More importantly, the ECJ has no control over its docket and is obliged to hear every case brought before it. In addition, the ECJ does not publish dissenting or concurring opinions, and all judges who heard the case sign the final text of the judgment. Finally, and this is something we really envy our American counterparts for, the Supreme Court works in one language only whereas the ECJ works in twenty-three languages.

However, notwithstanding all those differences—and I have only mentioned a few—our two Courts have certain rather important similarities which outweigh such differences. From the very beginning of their existence, they established the respect for the Rule of Law as the cornerstone of their jurisprudence. In their early landmark cases, they identified certain fundamental principles which were not clearly mentioned in the constitutional texts but were essential in their mission to ensure the respect of the Rule of Law. For the Supreme Court, it was the *Marbury v. Madison* decision in 1803 where it introduced the principle of constitutional review and established its legitimacy as the authoritative constitutional adjudicator. For the ECJ, it was the judgments in *Van Gend en Loos* and *Costa/ ENEL* in the early 1960s where it established the principles of supremacy and direct effect of Community law.

Fundamental rights constitute an essential part of the case law of both Courts notwithstanding the absence of a legally binding Bill of Rights in the EU. Federalism and the vertical division of powers is also an integral part of their jurisprudence. For the Supreme Court, it is most notably the task of defining the relationship between federal and state Law. For the ECJ, it is the delimitation of competences between the EU and its Member States.

Likewise, issues pertaining to the horizontal separation of powers between the different branches of government feature prominently in the respective case law of the two Courts. Just like the Supreme Court has very often adjudicated controversies regarding the powers of each of the three branches of the federal government, the ECJ has resolved disputes concerning the powers of the European Commission, the European Council, and the European Parliament.

On a more anecdotal basis, it was Chief Justice Charles Evans Hughes who famously said, "We are under a Constitution, but the Constitution is what the judges say it is," and Chief Justice Earl Warren added that "it is the spirit and not the form of law that keeps justice alive." These statements are also true for the ECJ, a transnational court that, through its interpretation of an international treaty, has contributed to the creation and evolution of a quasi-federal supranational legal order based on the Rule of Law, which is largely responsible for the longest period of peace and prosperity in Europe's history.

But to move away from famous quotes, if I were to summarize in one phrase what the Supreme Court and the ECJ have in common, I would suggest that all the essential ele-

ments of constitutional adjudication are prominently present in their jurisprudence. Therefore, despite the institutional and other differences, discussions between the two Courts can be and were always purposeful and mutually beneficial. In fact, it was in 1978 that Chief Justice Warren Burger visited Luxembourg and the ECJ for the first time in what was the first official contact between the two courts. More recently, in 1998, Justices Sandra Day O'Connor, Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer visited the ECJ in Luxembourg. In 2000, ten Members of the ECJ visited the United States at the invitation of the Supreme Court, and, in 2004, a judicial summit was organized at Oxford University with the participation of members of the ECJ and the Supreme Court.

The 2007 visit of the ECJ to the United States was the natural continuation of these previous exchanges. Nevertheless, the agenda of this visit was the most comprehensive one to date. The main topics that were the focal point of the discussions with the U.S. Supreme Court were federalism, separation of powers and interpretation. Although the EU is not a *stricto sensu* federal state, it presents certain similarities with a federal structure. Consequently, issues such as the principle of supremacy of EU and federal U.S. law, the legal or jurisprudential basis of that supremacy and its function, the mechanism of enforcement of EU and federal law, the doctrine of pre-emption and the principle of subsidiarity are of great interest for both courts. In regard to separation of powers, it is apparent that questions related to judicial independence and judicial activism and restraint are of concern to all judicial bodies around the world. Nevertheless, the issues related delimitation of competences between the EU and Member States in certain sensitive areas such as criminal law present certain analogies with vertical separation of powers problems in a federal state. As for methods of interpretation, the debate over the use of the comparative approach and foreign legal materials in constitutional interpretation is without doubt a very current debate on both sides of the Atlantic.

Furthermore, during the week-long visit of ECJ to the United States, the delegation had the opportunity to meet and discuss with the judges of the Court of Appeals for the Federal Circuit on Intellectual Property and Government Contracts and with judges of the District of Columbia Circuit Court on Administrative Law.

Last, as I have already mentioned, the Dedman School of Law played an instrumental role in the organization of this second visit of the ECJ to the United States. And one may ask why a Texan University may have such an interest in a Court that sits thousands of miles away in the small and little-known Grand Duchy of Luxembourg. Similarly, one may also wonder why the ECJ would be keen on visiting Texas and its academic and judicial institutions.

The answer to this question is as obvious. Dedman School of Law has a very ambitious international-oriented curriculum and has long ago established itself as one of the Global Law Centers in the United States. And as Dean Attanasio very eloquently describes it:

> A Global Law School is not primarily about conventional international and comparative law teaching or about producing lawyers to work in a select group of international law firms or intergovernmental institutions, although these comprise important aspects. Global Law Schools will train that cadre of elite lawyers who will build the global marketplace and those governmental and neogovernmental institutions that will regulate that marketplace.

It is thus expected for an institution with such a vision to have a great interest in the EU and, more particularly, in the ECJ, whose case law contributed to the transformation of a community of sovereign nations to a quasi-federal transnational legal order. And the ECJ has a lot to gain from engaging in a dialogue with distinguished academics from this side of the Atlantic who embrace the vision of a Global Law Center.