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## Special Issue Approximation to EU Law

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# Transformative Engagement Through Law:

## The *Acquis Communautaire* as an Instrument of EU External Influence

Amichai Magen\*

### A. Introduction

The inquiry into the economic, political and legal reasons for third countries to align, or refrain from aligning, their domestic rules, institutions and policies with the *acquis communautaire*, wholly or partially, falls squarely within the emerging third generation of European integration scholarship – a ‘top-out’ prism that asks whether and how the European Union’s (EU) institutions, rules and policy-making processes impact the laws, institutions, and even identities of third countries beyond Europe.

Having positioned the topic explored in this special Issue within the broader intellectual history and trajectory of the field in Section B, this article seeks to contribute to the nascent ‘top out’ body of literature by advancing three sequential claims regarding the relationship between the *acquis communautaire*, on the one side, and non-member, non-candidate states, on the other side.

Section C contends that rather than amounting to a reasonably clear, homogenous, fixed and prospectively knowable standard, the *acquis communautaire* is, in reality, fuzzy and contested. At a time when the deployment of the phrase has become ubiquitous in EU policy and academic discussion (suggesting the growing importance of the concept in the EU legal order) the meaning of the term remains remarkably unsettled, making disciplined assessments of the pros and cons of alignment problematic.

Section D then goes on to submit that the fuzziness characterizing the nature and scope of the *acquis* stems, at least in part, from a fundamental, tacit duality imbued in the concept itself. In reality, it is argued, the phrase ‘*acquis communautaire*’ contains two commonly undifferentiated yet strongly distinct

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personalities, which in turn serve two very different purposes: an inward-looking, ‘internal order’ personality that represents the inherited patrimony of the community and acts to preserve the *sui generis* genetic code of European integration; and a second, ‘transformative engagement’ (or ‘governance export’) personality, whose purpose is the outward projection of EU norms and the advancement of its interests abroad. The Janus-faced *acquis*, in other words, is unitary in language but binary in function. Indeed, in its external dimension, the very unsettled and flexible nature of the concept allows EU foreign policy actors a degree of strategic ambiguity that serves them well in their efforts to influence the laws and policies of third countries and other international entities.

The very instrumentality of the *acquis communautaire* represents our third and final focal point. Far from constituting a passive, technocratic, objective legal standard, Section E asserts that the *acquis communautaire* itself amounts to an important galvanizing and influence-inducing mechanism in the hands of EU foreign policy makers. The community-building function inherent in the concept; its legalistic-technocratic aura, scope, determinacy, flexibility and evolutionary nature; its combinability with conditionality; as well as the fact that the authoritative interpretation of the *acquis communautaire* remains the exclusive prerogative of EU actors – all these combine to make the *acquis (qua acquis)* a potent instrument which the EU can, and does wield, in its efforts to engage and transform targeted states beyond its borders.

## B. Approximation of Laws by Non-EU Countries in European Integration Studies

The inquiry into the alignment, actual and potential, of third-country legislation, institutions and policies with the *acquis communautaire* falls firmly within the third, and latest, developmental phase in European integration scholarship; namely the influence of the EU – as supranational system, actor, process, model and symbol – on the legal, regulatory and governmental systems of non-member, non-candidate states, as well as on institutions of regional and global governance beyond Europe.

The topic is relatively novel; our very engagement with it attesting to the status of the EU as a regional hegemon, perhaps even a “global player”.<sup>1</sup>

It wasn’t always so. From the inception of modern European integration in the immediate aftermath of the Second World War, political scientists and international lawyers have been chiefly concerned to conceptualize and account for the evolution of a European polity itself. During the first decades of the integration process,

<sup>1</sup> As intended by EU policy-makers in the field of external relations. See J. Solana, *A Secure Europe in a Better World: European Security Strategy*, Document proposed by Javier Solana and adopted by the Heads of State and Government at the European Council in Brussels (12 December 2003). For a critical analysis of the strategy and comparison to the National Security Strategy of the US see S. Duke, *The European Security Strategy in a Comparative Framework: Does it Make for a Secure Alliance in a Better World?*, 9 *European Foreign Affairs Review* 459 (2004).

the debate was framed by neofunctionalists and liberal intergovernmentalists, but attracted little attention from the dominant realist theory of international affairs.<sup>2</sup> The revitalization of the European project in the late 1980s and early 90s intensified the debate over the emergence and durability of the European integration process. Mainstream realists, neoliberals and eventually constructivists, were drawn in, bringing more generalizable theoretical perspectives to bear on a previously “boutique” subject of study.<sup>3</sup> By 1991, for instance, Joseph Weiler famously argued that the Community had incrementally transformed relations among its Member States from a system governed by general principles of public international law to a “specified interstate governmental structure defined by a constitutional charter and constitutional principles.”<sup>4</sup> At the same time, other branches in European integration research began to shift the analysis of European law and institutions to a post-ontological phase – away from theorizing the integration process *per se* and towards closer examination of the substance of integration, the details of the policy in light of discourse-formation, coordination and implementation problems, as well as comparative examination of the Community/Union in light of broader, growing international interdependence.<sup>5</sup> What united these disparate literatures for decades was a *bottom-up* intellectual prism, in which accounting for the appearance and continued existence of a supranational European order constituted the focal point of both theoretical debate and empirical inquiry.

By the mid to late 1990s, the virility of European integration precipitated the emergence of a major second dimension in European integration scholarship: a *top-down* perspective, where European-level actors, procedures and processes are no longer viewed solely as the dependent variable in the analysis, but become independent variables that are themselves understood to shape the institutions, rules, administrative practices and even identities of domestic actors.<sup>6</sup> During

<sup>2</sup> On the role of European integration studies in the evolution of international relations theory see P. Katzenstein, R. Keohane & S. Krasner, *International Organization and the Study of World Politics*, 52/4 *International Organization* 645, at 654–655 (1998); M. Pollack, *International Relations Theory and European Integration*, 39/2 *Journal of Common Market Studies* 221 (2001).

<sup>3</sup> See for example, N. MacCormick, *Beyond the Sovereign State*, 56 *Modern Law Review* 1 (1993); A. Moravcsik, *Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community*, 45 *International Organization* 19 (1991); G. Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 *International Organization* 533 (1992); P. Pierson, *The Path to European Integration: A Historical-Institutionalist Analysis*, in W. Sandholtz & A. Stone-Sweet (Eds.), *European Integration and Supranational Governance* (1998).

<sup>4</sup> J. H. H. Weiler, *The Transformation of Europe*, 100 *Yale Law Journal* 2403, at 2407 (1990–1991).

<sup>5</sup> The term ‘post-ontological’ was originally used by James Caporaso to define this shift: J. Caporaso, *The European Union and Forms of State: Westphalian, Regulatory or Post-Modern*, 34/1 *Journal of Common Market Studies* 29, at 30 (1996). For leading examples of ‘post-ontological’ studies see H. Wallace & W. Wallace (Eds.), *Policy Making in the European Union* (1996); L. Hooghe & G. Marks, *Multi-Level Governance and European Integration* (2001); S. Hix, *The Study of the European Union II: The ‘New Governance’ Agenda and its Rival*, 5/1 *Journal of European Public Policy* 38 (1998).

<sup>6</sup> The terms ‘bottom up’ and ‘top down’ were originally used by Tanja Borzel and Thomas Risse to describe this shift in European integration literature: T. Borzel & Th. Risse, *When Europe Hits*

the 1980s and 90s, the gradual, but persistent transfer of powers to Community institutions, the far reaching Single Market legislative program, as well as cumulative effects of European Court of Justice (herein 'ECJ') jurisprudence, drew growing attention to the 'Europeanization' (or 'EU-ization') of Member State executive, legislative and even judicial branches of government. Theorizing across the old International Law-International Relations divide, for example, lawyers and political scientists such as Anne-Marie Slaughter, Walter Mattli and Geoffrey Garrett, argued that the ECJ has been able to secure compliance with its judgments in Member State systems by adroitly co-opting national courts, and shaping the conduct of national judges and litigants.<sup>7</sup> Similarly, commentators on European integration identified numerous cases where harmonization of Member State national legal systems with Community law were enhanced by voluntary adoption of EU law concepts and rules, even in situations not prescribed by the relevant directive or other binding instrument (so-called 'spontaneous harmonization').<sup>8</sup> More broadly, in the last decade scholars have increasingly turned to explore the effects of Europeanization – understood as the diffusion of formal and informal rules, procedures, practices and beliefs, that are first defined in EU policy-processes and then incorporated into the domestic (national and sub-national) structures, policies and identities of Member States – across a plethora of themes and actors; ranging from EU influence on national defense, to regional financial management, from the Europeanization of gender equality to the socialization of civil servants in the Brussels bureaucracy.<sup>9</sup>

While the intellectual progeny of the bottom-up and top-down perspectives are very much alive and kicking, a third prism of inquiry – what may be termed the

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*Home: Europeanization and Domestic Change*, 4/15 European Integration online Papers (EioP) (2000) (available at: <http://eiop.or.at/eiop/texte/2000-015a.htm>).

<sup>7</sup> See A.-M. Burley & W. Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 *International Organization* 41 (1993); G. Garrett, *The Politics of Legal Integration in the European Union*, 49 *International Organization* 171 (1995); W. Mattli & A.-M. Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 *International Organization* 183 (1995); D. Wincott, *The Role of Law or the Rule of the Court of Justice? An Institutional Account of Judicial Politics in the European Community*, 2 *Journal of European Public Policy* 583 (1995); A.-M. Slaughter *et al.* (Eds.), *The European Court and National Courts – Doctrine and Jurisprudence* (1998).

<sup>8</sup> G. Betlem, *Case Note*, 36 *Common Market Law Review* 165 (1999).

<sup>9</sup> See in particular K. Featherstone & C. Randelli (Eds.), *The Politics of Europeanization* (2003); G. de Burca (Ed.), *EU Law and the Welfare State: In Search of Solidarity* (2005); M. Green Cowles *et al.* (Eds.), *Transforming Europe: Europeanization and Domestic Change* (2001); F. Snyder (Ed.), *The Europeanization of Law: The Legal Effects of European Integration* (2000); J. Howorth & A. Menon (Eds.), *The European Union and National Defence* (1997); H. Micklitz & S. Weatherill (Eds.), *European Economic Law* (1997); Y. Meny, P. Muller & J.-L. Quermonne (Eds.), *Adjusting to Europe: The Impact of the European Union on National Institutions and Policies* (1996); S. Andersen & K. Eliassen (Eds.), *Making Policy in Europe: The Europeification of National Policy-Making* (1993); Ch. Knill & D. Lehmkuhl, *The National Impact of European Union Regulatory Policy: Three Europeanization Mechanisms*, 41 *European Journal of Political Research* 255 (2002); L. Hoodge, *Supranational Activists or Intergovernmental Agents?*, 32 *Comparative Political Studies* 435 (1999); D. Sindbjerg Martinsen, *The Europeanization of Gender Equality – Who Controls the Scope of Gender Non-Discrimination?*, 14 *Journal of European Public Policy* 544 (2007).

*top-out* perspective – has also emerged in the post-Cold War era. In essence, the new prism asks whether and how EU institutions, rules, policy-making processes and broader international ‘actorness’ not only mould member and candidate states, but constitute independent variables that impact the legal, regulatory, and administrative structures and conduct of entities well beyond the EU’s borders. Still at a nascent stage of theoretical and empirical evolution, the *top-out* perspective has so far subdivided into three main avenues of investigation. One theoretically-oriented angle debates whether the study of EU external relations can be usefully extended beyond traditional, intergovernmental conceptions, to embrace a governance perspective.<sup>10</sup> A second set of questions concentrates on the EU’s role in the agenda-setting, decision-making and organizational development processes of other regional and global governance institutions, such as the World Trade Organization (WTO), United Nations (UN), multilateral development institutions (including the World Bank), and regional organizations in the Americas, Africa and Asia.<sup>11</sup> And thirdly, the *top-out* nexus of inquiry has begun to investigate the impact – actual and potential – of the EU on the economic, democratic, human rights and conflict-resolution institutions and practices of non-member, non-candidate states, as well as cases of voluntary harmonization with EU law by such third countries.<sup>12</sup> Evidence of transformative engagement (also referred to as ‘EU governance export’ or ‘external Europeanization’) beyond enlargement can be found globally, but the phenomenon is most pronounced in the European

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<sup>10</sup> See the symposium published on the subject by the Journal of European Public Policy in volume 11 issue 4 (2004): F. Schimmelfennig & W. Wagner, *Preface: External Governance in the European Union*, 11 Journal of European Public Policy 657 (2004); F. Schimmelfennig & U. Sedelmeier, *Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe*, 11 Journal of European Public Policy 661 (2004); S. Lavenex, *EU External Governance in ‘Wider Europe’*, 11 Journal of European Public Policy 680 (2004).

<sup>11</sup> See for example, D. De Bievre, *The EU Regulatory Trade Agenda and the Quest for WTO Enforcement*, 13/6 Journal of European Public Policy 851 (2006); K. Smith & K. Verlin Laatikainen (Eds.), *The European Union at the United Nations: Intersecting Multilateralisms* (2006); K. Smith, *Speaking With One Voice? European Union Coordination on Human Rights Issues at the United Nations*, 44 Journal of Common Market Studies 97 (2006); L. Kuhnhardt, *The Global Proliferation of Regional Integration: European Experience and World Wide Trends* (2004); M. Telo (Ed.), *European Union and New Regionalism* (2001).

<sup>12</sup> See for example, A. Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?*, 12 Columbia Journal of European Law 383 (2006); A. Tovias & A. Magen, *Reflections from the New Near Outside: An Israeli Perspective on the Economic and Legal Impact of EU Enlargement*, 10 European Foreign Affairs Review 399 (2005); R. Petrov, *Recent Development in the Adaptation of Ukrainian Legislation to EU Law*, 8 European Foreign Affairs Review 125 (2003); M. Szymanski & M. Smith, *Coherence and Conditionality in European Foreign Policy: Negotiating the EU-Mexico Global Agreement*, 43 Journal of Common Market Studies 171 (2005); Der-Chin Horng, *The Human Rights Clause in the European Union’s External Trade and Development Agreements*, 9 European Law Review 677 (2003); J. Grugel, *New Regionalism and Modes of Governance – Comparing US and EU Strategies in Latin America*, 10 European Journal of International Relations 603 (2004); J. Monar, *The EU as an International Actor in the Domain of Justice and Home Affairs*, 9 European Foreign Affairs Review 395 (2004); M. Busse et al., *The Impact of ACP/EU Economic Partnership Agreement on ECOWAS Countries*, Final Report, Hamburg Institute for International Economics (HWWA) (2004).

peripheries. Regions surrounding the EU: “attract attention from policy-making institutions of the EU and, over time, become targets of significant ‘policy export’ from the Union.”<sup>13</sup>

This latter arena of inquiry sits well with (but is yet to be fully integrated into) the wider contemporary quest on the part of development economics, democracy promotion and Western security practitioners and scholars to better understand the mechanisms and pathways of international impact on domestic change in national systems. Do Western international actors, including the EU, play a significant role in encouraging processes of market, institutional, regulatory and normative change in developing, transitional or other states? If so, when and how do external incentives, financial and technical aid, socialization within international forums, diplomacy or sheer demonstration effects, influence national decision-makers to pursue rule-alignment with a given international actor – the United States, EU, Russia or China, for instance? What combination of domestic considerations and external influence-mechanisms are most likely to result in convergence with EU rules and practices, to the exclusion of other poles of power? Does EU influence, where it exists, follow the pathway of direct intergovernmental bargaining, or does it act indirectly, surreptitiously, through persuasion of epistemic communities and other non-state elites who then promote a pro EU-alignment policy internally?

Despite the fact that commentators have begun delving into some of these questions – chiefly in the context of EU enlargement to the Central and Eastern European Countries (CEECs), Turkey and the Western Balkans – to date there has been a conspicuous dearth of analysis into the role of the *acquis* as an instrument of EU external influence beyond enlargement, and the response of third-countries to the EU’s efforts at promoting alignment with the *acquis* in the broader international system. In taking on these issues, the contributors to this Journal address a set of questions of acute relevance to contemporary European integration studies, the understanding of legal reform dynamics in a globalized world, and beyond.

### C. What Are We Approximating With?

Thus far we have referred to the phrase ‘*acquis communautaire*’ as a given; a term whose meaning is plain and settled. If that assumption were true, we could safely proceed to discuss the relative merits and costs of alignment with a known and familiar substance.

Even a cursory review of official use and academic writing, however, reveals a starkly different picture. Far from being a reasonably clear, homogenous, fixed and prospectively knowable standard, the notion of the *acquis* is, in reality, opaque and contested – raising both substantive and procedural difficulties for any third country contemplating full or partial alignment with ‘it’. Indeed, at a time when the deployment of the phrase has become ubiquitous in EU policy and academic discussion, suggesting the growing importance of the concept in

<sup>13</sup> Th. Christiansen, F. Petito & B. Torna, *Fuzzy Politics Around Fuzzy Borders: The European Union’s ‘Near Abroad’*, 35 *Cooperation and Conflict* 389, at 410 (2000).

the EU system, the meaning of the term remains remarkably undetermined. This state of affairs risks analytic confusion, as generic use and conceptual stretching undermine coherent discourse.<sup>14</sup> To conduct a disciplined exploration of the merits of approximation of laws by non-EU countries with the EU *acquis*, therefore, we are compelled to address a fundamental, *a priori*, question: what is it that we are aligning with? What, in other words, is this ‘*acquis*’?

The Treaty on European Union (TEU) introduced the term ‘*acquis communautaire*’ into treaty language, placing the notion at the core of EU primary law and the apex of its constitutional hierarchy. Article 2 TEU now provides that “to maintain in full the *acquis communautaire* and build on it”, represents the one of the five objectives of the Union.<sup>15</sup> Article 3 TEU tells us that the reason for the three pillars of the Union being served by a single institutional framework stems from the need for the Union “to attain its objectives while respecting and building upon the *acquis communautaire*.”<sup>16</sup> Under the title on provisions for closer cooperation added by the Treaty of Amsterdam (ToA) and amended by the Treaty of Nice (TN), Member States are only permitted to establish such links if this activity “respects the *acquis communautaire*.”<sup>17</sup> Moreover, the new Article 44 TEU introduced by the TN states that the acts and decisions required to implement enhanced cooperation “shall not form part of the *Union Acquis*.”<sup>18</sup>

Remarkably, none of these provisions define the meaning, scope or nature of the terms ‘*acquis communautaire*’, ‘*union acquis*’, or explain the relationship between them. Similarly, Protocols 4 (on the UK and Ireland), 5 (on Denmark) and 7 (on the principles of subsidiarity and proportionality) annexed to the Treaty establishing the European Community (ECT) by the ToA, all invoke the phrase ‘*acquis communautaire*’ without elucidation. Protocol 2 ToA refers to all agreements and related provisions it lists as the ‘*Schengen acquis*’, thereby demarcating some sectoral part within the wider undefined whole. In contrast, Article 49 TEU, revised with EU accession to the CEECs in mind, avoids mentioning the requirement of candidates to accept and effectively implement the entire *acquis communautaire*.<sup>19</sup> Only somewhat less enigmatic is the use of the term in the Treaty Establishing a Constitution for Europe (Constitutional Treaty), which alludes to “the acts of the institutions, bodies, offices and agencies adopted on the basis of the treaties” and the “other components of the *acquis* of the Community and the Union ... in particular the interinstitutional agreements, decisions and agreements arrived at by the Representatives of the Governments

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<sup>14</sup> Stable concepts and shared understanding of categories are rightly viewed in social science as a foundation of any research Community. On the problem of ‘conceptual traveling’ and ‘conceptual stretching’ see G. Sartori, *Concepts Misformation in Comparative Politics*, 64 *American Political Science Review* 1033 (1970); D. Collier & J. Mahon, *Conceptual “Stretching” Revisited: Adapting categories in Comparative Analysis*, 87 *American Political Science Review* 845 (1993).

<sup>15</sup> Article 2 TEU.

<sup>16</sup> Article 3 TEU.

<sup>17</sup> Article 43 (b) TEU, as amended by the Treaty of Nice.

<sup>18</sup> Article 44 TEU, as amended by the Treaty of Nice. Emphasis added.

<sup>19</sup> Other examples of undefined invocation of the term include: Declaration 51 concerning Article 10 TEU, annexed to the ToA.

... on the functioning of the Union or of the Community or linked to action by the Union or by the Community ...”<sup>20</sup>

In the absence of even a skeletal definition in primary EU law – of which the unratified Constitutional Treaty is not a part – sources of explanation need to be sought elsewhere. Alas, here too disparate descriptions are the norm. The official glossary of the EU, for instance, defines the *acquis communautaire* as simply: “The entire body of legislation of the European Communities and Union.”<sup>21</sup> In contrast, as Decourt documents, in the texts relating to accession the concept of *acquis communautaire* is interpreted more extensively, to involve adherence not merely the binding law of the first, second and third pillars, but to entire scheme of the treaties, including the non-binding principles and political objectives of European integration.<sup>22</sup>

Among academic commentators, similarly, we find widely differing characterizations. Whereas for Goebel “the *Acquis Communautaire* essentially conveys the idea that the institutional structure, scope, policies and rules of the Community (now Union) are to be treated as ‘given’ (‘Acquis’),”<sup>23</sup> for Silvia and Beers-Sampson “the *Acquis Communautaire* represents a reconfigured retrieval of the standard of civilization” – a standard that Europeans have wielded since the 16<sup>th</sup> Century in a problematic effort to act as exclusive authors and judges of acceptance in international society.<sup>24</sup> Whereas for Weiler, the *acquis communautaire* is “The holiest cow of all” in the EU legal order,<sup>25</sup> Delcourt asks whether “the concept *Acquis Communautaire* is still meaningful these days, or is it outdated and about to disappear?”<sup>26</sup>

## D. The Janus Faced *Acquis*: Internal Order & Transformative Engagement Instrument

What accounts for these wildly varying characterizations of what is after all widely understood to be a foundational tenet of EU law? The range of possible answers to this question is broad, extending from plain misunderstanding of a term brandished by the popular media, politicians and scholars; to the idea that the *acquis* is an inherently dynamic concept with no fixed definition; to suspicions of some deliberate, constructive ambiguity on the part of elite European policy-makers.

<sup>20</sup> Article IV-438 (3) Treaty Establishing a Constitution for Europe.

<sup>21</sup> See [http://ec.europa.eu/justice\\_home/glossary/glossary\\_a\\_en.htm](http://ec.europa.eu/justice_home/glossary/glossary_a_en.htm).

<sup>22</sup> Ch. Delcourt, *The Acquis Communautaire: Has the Concept Had Its Day?*, 38 Common Market Law Review 829, at 832 (2001).

<sup>23</sup> R. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 Fordham International Law Journal 1092, at 1141 (1995).

<sup>24</sup> S. J. Silvia & A. Beers Simpson, *Acquis Communautaire and European Exceptionalism: A Genealogy*, ACES Working Paper 2003.1, SAIS (2003) at 2-3.

<sup>25</sup> J. H. H. Weiler, *The Reformation of European Constitutionalism*, 35 Journal of Common Market Studies 97, at 98 (1997).

<sup>26</sup> Delcourt, *supra* note 22, at 829.

While there is a grain of truth in all these answers, a different line of reasoning may provide additional, analytically useful insights. Much of the fuzziness surrounding the phrase ‘*acquis communautaire*’ (with its different permutations ‘*union acquis*’, ‘*community acquis*’ or simply ‘*acquis*’), it is submitted, stems from the fact that the term contains two separate meanings, which in reality are substantively and functionally distinct, but which are seldom differentiated by those who invoke the language of the *acquis*. The current use of the term in policy and academic discussions, in other words, is somewhat schizophrenic; conflating what in reality are two distinct concepts, each with variant content and different purposes: an ‘internal order’ purpose, and a second, external, ‘transformative engagement’ (or ‘governance export’) one.

## I. Internal Order

As EU lawyers we are all but pedagogically conditioned to resonate with Weiler’s characterization of the *acquis communautaire* as “The holiest cow of all”, and his contention that “within the *Acquis*, the Holy of Holies is the constitutional framework of the Community.”<sup>27</sup> Etymologically, the phrase ‘*acquis communautaire*’ (‘acquired’ or ‘achieved’ community) denotes a substance and an attainment unique to the Community politico-legal order; an attainment almost naturally deserving of protection and continued nurturing. Indeed, the sense of progressive accomplishment imbued in the phrase is even maintained in many of the translations of the French term into other official languages of the Community: ‘patrimony’ in English; ‘possession/ownership’ in the Greek and German versions; ‘accumulation’ in the Spanish and Portuguese; and ‘normative achievement’ in the Swedish.<sup>28</sup>

The textual reading sits well with the integrationist ambitions and anxieties of the architects of European unification, particularly in the 1960s to 80s, who sought to preserve what had been achieved by then and to ensure that whatever was to follow is built upon the principles already accepted by the Member States within the framework of the treaties.<sup>29</sup> To comprehend this facet of the *acquis* we must recall that what distinguished the European Community (and later the EU) from its inception, was its inherent, future-oriented dynamism. The Community is, by construction, a phenomenon of progressive development, comparable to a living organism.<sup>30</sup> A system which seeks to preserve its own patrimony (its genetic code) and to continue evolving in perpetuity, without losing its essential self, must, as Azoulai observes “refer to some type of acquired characteristics,

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<sup>27</sup> Weiler, *supra* note 25, at 98.

<sup>28</sup> C. C. Gialdino, *Some Reflections on the Acquis Communautaire*, 32 *Common Market Law Review* 1089, at 1089 (1995).

<sup>29</sup> Tindermans Report on the European Union to the European Council, December 1975, April 1976 and July 1976, Part V; Biesheuvel, Dell and Marjolin, Report on the European Institutions to the European Council, November 1979.

<sup>30</sup> L. Azoulai, *The Acquis of the European Union and International Organizations*, 11 *European Law Journal* 196 (2005).

guarantees of its integrity.”<sup>31</sup> Within the Community edifice the *acquis* is the substance that ensures continued socio-political construction.<sup>32</sup>

In effect the internal order face of the *acquis* is positioned in the mesosphere created by the EC/EU between national systems, on the one side, and the global international system, on the other. To ensure its self-preservation and continued coherent development, the *acquis* must protect itself against encroachment from both. Resisting pressure from below, as Gialdino put it, the *acquis* “signifies a means to safeguard the uniqueness and originality of the model created by the Treaties of Paris and Rome, and to avoid the risk of its being fundamentally modified as a result of intergovernmental positions liable to lead to the re-nationalization of the Community institutions ...”<sup>33</sup> Simultaneously, as Sack warns: “the growing role of international organizations in all the domains of politics constitutes a real risk for the *acquis communautaire*.”<sup>34</sup> Accordingly, to maintain its independent existence, the *acquis* must define itself as both distinct and separate from both national and international law.

The principal objective of the *acquis communautaire*, viewed from this internal perspective is therefore the harmonious, progressive development of a *sui generis* Community legal order; preserving its accumulated genetic code, and pushing for the teleological development of the Euro-organism. In the original, and still most potent articulation of this internal order conception of the *acquis*, Pescatore spoke of a “fundamental *Acquis*” which: (1) distinguishes the EC (later EU) as a legal order, separate from both the national legal systems of Member States and other forms of international law; (2) contains the fundamental principles and case law defining the nature, structure and method of the Community legal order; (3) enjoys constitutional status that enshrines the unique achievements of Community integration; (4) constitutes an unchallengeable, untouchable inner core, without which the notion of an EC/EU is devoid of real independent meaning, and; (5) must therefore be preserved at all costs, even at the expense of prevailing over the rules of treaty revisions themselves.<sup>35</sup>

The existence of such a fundamental *acquis* has been endorsed by the ECJ, which affirmed the existence of “the internal constitution of the Community” and even a “Constitutional Charter of the Community.”<sup>36</sup> “[A]ny attack on the *Acquis*

<sup>31</sup> *Id.*, at 197.

<sup>32</sup> On the *acquis communautaire* as a product and generator of ‘social construction’ see K. E. Jorgensen, *The Social Construction of the Acquis Communautaire*, European Integration Online Papers (EIOP) 3/5 (1999).

<sup>33</sup> Gialdino, *supra* note 28, at 1100.

<sup>34</sup> J. Sack, *The European Community’s Membership of International Organizations*, 32 *Journal of Common Market Studies* 1227, at 1228 (1994).

<sup>35</sup> P. Pescatore, *Aspects judiciaires de l’acquis communautaire*, RTDE 617 (1981).

<sup>36</sup> Opinion 1/76 [1977] ECR 741, para. 12; Opinion 1/91 [1991] ECR 6079, para. 21, respectively. See also para. 71 in Opinion 1/91. Regarding Opinion 1/91 in particular, Gialdino argues that in its opinion the ECJ endorsed a theory of a constitutional hard core of values (*Verfassungskern*) suggested by Carl Schmidt and prevalent in the national constitutional traditions of a number of the Member States. Gialdino, *supra* note 28, at 1110.

*Communautaire* in the field of the unity of the market”, the Court has further warned, “would risk unleashing ... mechanisms of disintegration.”<sup>37</sup>

Given this hallowed status in the Community legal order, it is of little surprise that so much of the discourse dedicated to the *acquis communautaire* focuses on the constitutional questions of determining what is the proper scope of the *acquis*, and whether it is unitary or somehow divisible into fundamental and non-fundamental components.

At its core, the general consensus is that as a concept embodying the internal legal order of the Community (its accumulated patrimony), the *acquis communautaire* comprises: the content, principles and political objectives of the Treaties (including the principles of conferred powers and subsidiarity; that Member States must ensure the fulfilment of treaty obligations; protection of fundamental rights, democracy and the rule-of-law; fairness, proportionality, legitimate expectations, non-retroactivity and transparency; direct effect and primacy of Community law; that discrimination on grounds of nationality and other prescribed bases is prohibited; guaranteed rights of citizenship; the abolition of customs duties and all charges of equivalent effect on exports and imports between Member States; the abolition of all measures creating quantitative restrictions on imports and exports to and from Member States; free movement of capital, services, establishment of corporations, workers, self-employed persons and their dependents; and prohibition of measures that distort competition; international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union’s activities); the secondary legislation (regulations, directives, and decisions) adopted in application of the treaties; and the case law of the ECJ and Court of First Instance (CFI).

More controversially, the *acquis communautaire* is generally understood to encompass ‘soft law’ provisions – non-binding rules of conduct and declarations that may carry legal effects depending on their contents and the legal intentions of the drafters.<sup>38</sup> The effects of Community soft-law provisions, like Community law more generally, is ultimately subject to the exclusively authoritative determination of the ECJ,<sup>39</sup> which has in practice ruled on the legal effect of non-binding sources quite regularly.<sup>40</sup>

From the time of the entry into force of the Maastricht Treaty in 1993, furthermore, the *acquis communautaire* co-exists with a broader ‘*union acquis*’

<sup>37</sup> Joined Cases 80 and 81/77, *Commissaires Reunis v. Receveurs des douanes*, [1978] ECR 947 (cited in Azoulai *supra* note 30, at 198).

<sup>38</sup> See K. C. Wellens & G. M. Borchardt, *Soft Law in European Community Law*, 14 *European Law Review* 267 (1989) (identifying the following sources of soft law in the Community system: interinstitutional agreements; non-binding recommendations and opinions; declarations, demarches, conclusions and resolutions of the institutions, with or without the Member States; communications and white papers regarding prospective policies); L. Senden, *Soft Law in European Community Law* (2004).

<sup>39</sup> Wellens & Borchardt, *supra* note 38, at 285.

<sup>40</sup> See for example, Case 230/81, *Luxemburg v. Parliament* [1983] ECR 255; Case 294/83 “*les Verts*” *v. European Parliament* [1986] ECR 1339; Case 34/86, *Council v. European Parliament* [1986] ECR 2155; Case 44/84, *Hurd v. Jones* [1986] 46 CMLR 2. The incorporation of soft-law into the scope of the *acquis* corresponds to Toth’s encyclopaedic definition:

which, in addition to encompassing the ‘genetic inheritance’ of the EU – the *acquis communautaire* itself – contains a further corpus of second and third pillars *acquis*.<sup>41</sup> The *union acquis* encompasses acts adopted under Title V of the TEU – namely the principles and general guidelines of the Common Foreign and Security Policy (CFSP), common positions, joint actions, common strategies and decisions – as well as measures relating to provisions on Police and Judicial Cooperation in Criminal Matters under Title VI TEU, including common positions, framework decisions, binding decisions, and conventions proposed by the Council and adopted by the Member States. Clearly, therefore, even as a concept applicable solely to the internal order of the EU, the *acquis* represents a non-unitary substance, of variant content.

Whatever the exact components of that substance may be (a precise definition of the actual scope of the *acquis* is clearly precluded by its continuously shifting, fluid nature) an essentially descriptive, strictly legalistic understanding of the *acquis* has been consistently rejected by most learned commentary.<sup>42</sup> Mortelmans, for instance, insists that the *acquis communautaire* is “a political or policy concept”, strongly distinguishable even from the most fundamental tenets of Community law *per se*.<sup>43</sup> Krenzler and Everson’s working group on the concept, similarly attacks the idea that the *acquis* constitutes a mere legal concept, and instead argue for a political, systemic understanding where the *acquis communautaire* acts as a unifying framework “in which shared policies/values are established and through which they are implemented.”<sup>44</sup> Thus, in the EU order, the *acquis*

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The Community patrimony: the whole body of rules, principles, agreements, declarations, resolutions, positions, opinions, objectives, and practices concerning the EC, whether or not binding in law, which has been accepted by the EC institutions and the Member States as governing their activities.

See A. G. Toth, Oxford Encyclopaedia of European Community Law, Vol. 1, at 9 (1990).

<sup>41</sup> On the relationship between the *acquis communautaire* and the ‘*union acquis*’ see Delcourt, *supra* note 22, at 832-835.

<sup>42</sup> An exception is Philippe Schmitter, a political scientist, who appears to equate the *acquis communautaire* with a legal depository, defining it as “the sum total of obligations that have accumulated since the founding of the ECSC and are embedded in innumerable treaties and protocols.” See Philippe Schmitter, *Imagining the Future of the Euro-Polity with the Help of New Concepts*, in G. Marks *et al.* (Eds.), *Governance in the European Union* 162 (1996).

<sup>43</sup> K. Mortelmans, *Community Law: More than a Functional Area of Law, Less than a Legal System*, 1 *Legal Issues of European Integration* 23 (1996).

<sup>44</sup> H. G. Krenzler & M. Everson, *Preparing for the Acquis Communautaire: Report of the Working Group on the Eastward Enlargement of the European Union*, European University Institute, RSC Policy Paper 98/6 (October 1998). The working group further states that the *acquis communautaire*

may be characterized as a means whereby peaceful voluntary co-operation among free nations is disciplined and formalized. European law, as guarantor of the *acquis*, thus first provides – via the various European treaties – a mode for the translation of the otherwise transient political commitments of sovereign European states into legally-binding supranational principles; and secondly furnishes ... a structured dynamic to the integration process.

*Id.*, at 6.

is both the result and the driver of integration through law, where Member State practices are turned into authoritative rules, and through which Member State practices may themselves be further elaborated into substantive EU policies with the participation of the supranational institutions and policy-making processes.

The notion that within the EU order the *acquis* serves as the structured means by which temporal political commitments are translated into fixed and evolving sinews of integration is also echoed in Wiener's concept of the 'embedded *acquis communautaire*' – which he characterizes as a key institution of EU governance that combines formal rules and processes with routinized practices, values and ideas, to construct social meaning within and for the Euro-polity.<sup>45</sup> As an institution of EU-order construction, in other words, the *acquis communautaire* "contains the governance resources which have been created over decades of European integration." As such: "It is crucial to note", Wiener asserts, "that beyond its role as a legal concept, and hence a guiding set of rules for European governance at any one time ... the *Acquis* also represents the continuously changing institutional terms which result from the constructive process of 'integration through law'."<sup>46</sup>

It is this, the preservation and constitutive application of the *acquis* – an ongoing process of generating, codifying and applying communal meaning – which epitomizes the internal-order face of the *acquis communautaire*. Without it, the conveyer belt of supranational consciousness creation, policy conflict, rule codification and implementation, would grid to a halt.

## II. Transformative Engagement Instrument

As fundamental as self-preservation and self-construction undoubtedly are they amount to only one facet of the *acquis communautaire*. For in practice, apart from its internal order dimension, the *acquis* possesses a second persona; an outward-looking, activist, interventionist, even imperialistic one, whose animus is the advancement of EU foreign policy goals through the projection of Community values, rules, and processes to the outside world.

The EU's deliberate effort to export its novel experience of conflict resolution, socio-economic and political cooperation, regional integration and supranational governance, comprises one of its most important characteristics as an international actor. This is hardly surprising, and is historically novel only to the extent that the EU represents a peculiar species of supranational political organization. It has been a ruling principle of Western politics, as Scruton observes, "that every extension of human powers should be accompanied by an extension of the law",<sup>47</sup> and that rationale has manifested itself in the works of European empires – from the Romans to the British – and their new world progeny – from *Pax Americana* to the liberal imperialism shaped under the leadership of the United States over

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<sup>45</sup> A. Wiener, *The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance*, in K. Neunreither & A. Wiener (Eds.), *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy* 318-342 (2000).

<sup>46</sup> *Id.* at 323-4.

<sup>47</sup> R. Scruton, *The West and the Rest: Globalization and the Terrorist Threat* 145 (2002).

the last six decades, partially through the work of institutions such as the World Bank (WB) and the International Monetary Fund (IMF).<sup>48</sup>

Indeed, any sense of discomfort or dissonance associated with the notion of the EU deploying its laws abroad as a means of promoting its essential interests – its “cooperative empire”<sup>49</sup> model, as Cooper put it – can only stem from the misguided idea that instrumentalist strategic calculations play no part in the EU’s international presence; a notion rightly debunked by a number of astute commentaries.<sup>50</sup>

Several observers have recently struggled to establish an appropriate frame of reference for this aspect of EU external policy, drawing on both rationalist and norm-based theories of international actor influence; capturing parts of the elephant, but never the living, moving creature in its entirety. Christiansen, Petito and Torna, for example, speak of the EU’s “fuzzy borders” and a resulting diffusion of its norms and policies into peripheral neighboring regions.<sup>51</sup> Another group of scholars, drawing on the new governance approach to the study of the European integration, propose that a similar perspective can be usefully applied to EU external policy.<sup>52</sup> Accordingly, Schimmelfennig, Sedelmeier and Lavenex adopt the notion of “EU external governance”, which they characterize as efforts on the part of EU actors, both national and supranational, to transfer variable EU rules, institutions and administrative practices to non-member states and other international organizations with the aim of inducing ‘rule adoption’ and so Europeanizing them.<sup>53</sup>

The idea of “transformative engagement”, offered by Youngs, adds a more comprehensive, action-oriented strand in this context.<sup>54</sup> EU transformative engagement, exercised through bilateral agreements and regional structures – notably the pre-accession process to the Central and Eastern European candidates (CEECs) and Turkey, the Stabilization and Association Process (SAP) in the Western Balkans, the Partnership and Cooperation Agreements (PCA’s) with the Newly Independent States of the former Soviet Union, the Euro-Mediterranean Partnership (EMP), European Neighbourhood Policy (ENP), the Russia common strategy, and the Cotonou Convention with the group of African, Caribbean and

<sup>48</sup> See in particular, G. J. Ikenberry, *Liberal Order and Imperial Ambitions* (2006); G. J. Ikenberry, *America’s Liberal Grand Strategy: Democracy and National Security in the Post-War Era*, in M. Cox, G. J. Ikenberry & T. Inoguchi (Eds.), *American Democracy Promotion: Impulses, Strategies, and Impacts* 103-126 (2002); B. Russett & J. Oneal, *Triangulating Peace: Democracy, Interdependence and International Organizations* (2001).

<sup>49</sup> R. Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* 78 (2003).

<sup>50</sup> See in particular, R. Youngs, *Normative Dynamics and Strategic Interests in the EU’s External Identity*, 42 *Journal of Common Market Studies* 415 (2004); R. Ginsberg & M. Smith, *Understanding the European Union as a Global Political Actor: Theory, Practice, and Impact*, paper delivered at the 2007 meeting of the European Union Studies Association (EUSA), Montreal, 17-19 May 2007; and the contribution by Guy Harpaz in this Issue.

<sup>51</sup> Christiansen, Petito & Torna, *supra* note 13.

<sup>52</sup> See the literature cited in note 10, *supra*.

<sup>53</sup> Schimmelfennig & Wagner, *supra* note 10, at 658.

<sup>54</sup> R. Youngs, *Engagement: Sharpening European Influence*, in R. Youngs (Ed.), *Global Europe: New Terms of Engagement* 1-14 (2005).

Pacific (ACP) countries – involves the establishment and progressive development of formal comprehensive ties incorporating regularized cooperation, dialogue and monitoring (bolstered by financial assistance, technical aid and conditionality) on a broad range of subjects (trade, competition, standards, transport, environment, justice and home affairs, human rights, democracy and so forth) with the aim of affecting far reaching economic, political and social change in targeted countries.<sup>55</sup>

Viewed from yet another, transatlantic prism, EU efforts to export its rules, institutions and modes of governance can be understood as instruments in the hands of the European pillar of the wider liberal international order fashioned by the United States (with its European and East Asian allies) in the aftermath of the Cold War – organized around liberal-democracy, open markets, social bargains, intergovernmental institutions and cooperative security. Through its Partnership for Peace (PFP) initiative, NATO defense cooperation has in the last decade been similarly utilized to achieve political goals of influence on third countries beyond the alliance, and the new governance agenda of the WB and other regional and global multilateral development institutions, is also becoming overt in its transformative ambitions.<sup>56</sup>

If the imperative of preserving and advancing the genetic code of European integration underlies and permeates the internal order face of the *acquis*, where does the transformative engagement dimension emanate from, and how far does it reach?

In reality, the origins of the external face of the *acquis* predate that of the internal one. The oldest conception of the *acquis* has been the ‘accession *acquis*’ which first emerged in the lexicon of the Community in the October 1969 advisory opinion of the Commission to the Council concerning the application for membership of Denmark, Ireland, Norway and the UK.<sup>57</sup> Indeed, the

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<sup>55</sup> For a detailed discussion of the origin and evolution of these strategies, as well as the instruments deployed by the EU to facilitate rule transfer and internalization see A. Ott & K. Inglis (Eds.), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (2002); H. Grabbe, *European Union Conditionality and the Acquis Communautaire*, 23 *International Political Science Review* 249 (2002); D. Phinnemore, *Stabilization and Association Agreements: Europe Agreements for the Western Balkans?*, 8 *European Foreign Affairs Review* 77 (2003); Magen, *supra* note 12; Ch. Hillion, *Institutional Aspects of the Partnership Between the European Union and the Newly Independent States of the Former Soviet Union: Case Studies of Russia and Ukraine*, 37 *Common Market Law Review* 1211 (2000); E. Adler & B. Crawford, *Normative Power: The European Practice of Region Building and the Case of the Euro-Mediterranean Partnership*, Institute of European Studies, University of California Berkeley, Paper 040400 (2004); Ph. Hilpold, *EU Development Cooperation at a Crossroad: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance*, 7 *European Foreign Affairs Review* 53 (2002).

<sup>56</sup> On NATO see S. Sloan, *NATO, The European Union, and the Transatlantic Community* (2005); G. Phillip & J. Steinberg: *NATO Enlargement* (2001). On the World Bank’s new emphasis on legal, regulatory, and governance reform see K. S. Jomo & B. Fine (Eds.), *The New Development Economics: After the Washington Consensus* (2006); D. Kaufman, A. Kraay & M. Mastruzzi, *Governance Matters V: Governance Indicators 1996-2005*, World Bank Policy Research Working Paper 4012 (September 2006).

<sup>57</sup> Bull EC Suppl. 9/10 1969. See Gialdino, *supra* note 28 (using the term the ‘accession *acquis*’ to describe the oldest use of the concept).

principle that new members must be treated as if they had always been within the Community (and must, consequently assume the same legal obligations and fully share the aspirations of European integration at the moment of accession) can be traced even further back, to April 1961.<sup>58</sup> It was only later that the notion of an internal Community patrimony began to coalesce in official European Council and Commission pronouncements, as well as in the decisions of the ECJ, let alone in treaty language.

The external face of the *acquis* varies considerably in scope and content – as well as function – from its conjoined twin, internal order. Unarguably the most common use of the term has been in the context of enlargement. For the Southern European accessions of the 1980's, the Community of nine demanded that the entire *acquis communautaire* had to be accepted as a condition for accession, in line with earlier practice. By the time the neutral EFTA countries joined the Community of twelve in 1995, the Commission insisted that the entire Union *acquis* be adopted – including the CFSP provisions and the new explicit goals of greater European international action – yet the requirements did not include democratic, human rights and rule of law provisions, and candidates for accession were spared a formal pre-accession process.<sup>59</sup> These were added for the first time in relation to the predominantly post-Communist Central and Eastern European Candidates (CEECs), as a means of both guiding their democratic consolidation and transition to market economies.<sup>60</sup> The June 1993 Copenhagen European Council accordingly stipulated that membership of the Union necessitates that the CEECs not only meet essential democratic and market conditions, but also fulfill a third requisite, demonstrating the ability to assume the obligations of membership, including adherence to the aims of political, economic and monetary union.<sup>61</sup>

This ‘*acquis* criterion’, subsequently elaborated and divided into 31 chapters on which candidates were compelled to negotiate (36 in the case of Turkey), became by far the most detailed and measurable benchmark for the CEECs transformation in conformity with EU rules, institutions and policies. The Copenhagen *acquis* criterion, moreover, has become established as the gold standard by which applicant countries beyond Central and Eastern Europe are meant to be evaluated.<sup>62</sup>

<sup>58</sup> See Commission Press Release of 13 April 1961, (EC Bull, 6-12, 1961). Shortly thereafter, on 18 July 1961, the summit of Community leaders at Godesberg asserted that future applicants for EURATOM or EEC membership should assume “in every respect the same obligations and responsibilities” of existing members (EC Bull, 7-8, 41, 1961).

<sup>59</sup> See Ott & Inglis, *supra* note 55, at 87-102.

<sup>60</sup> An important motive for setting these requirements was the need to assuage the fears of the EU-15 that unless broadly and deeply transformed, prospective members would import with them economic weakness, political instability, crime and ethnic conflict, which could endanger the integrity of the Union.

<sup>61</sup> European Council in Copenhagen, Presidency Conclusions, 21-22 June 1993.

<sup>62</sup> In another Copenhagen summit, that of December 2002, for instance, the European Council declared that “Turkey is a candidate state destined to join the Union on the basis of the same criteria as applied to the other candidate states” and that, regarding the Western Balkan countries “The European Council recalls the criteria defined at the Copenhagen European Council in June 1993 and

As prominent and commented upon as the accession *acquis* undoubtedly is, however, it cannot be said to constitute the entire external dimension of the *acquis communautaire*, or *stricto sensu*, even its clearest example. By definition, enlargement represents a highly peculiar form of foreign policy; one temporally circumscribed and resulting in the turning of the external into the internal. In fact, the rationale of the accession *acquis* can be said to be the same as that of the internal order one – ensuring the continued coherence, integrity and viability of the Union edifice, by preventing incompatible foreign bodies from violating the communal corpus politiek.<sup>63</sup> Rather, it is the striving for transformative-influence that more precisely captures the linkage between the experience of transferring the *acquis* to candidate countries in the pre-accession process and the wider projection-promotion logic of the governance export *acquis* – in which “The *Acquis* becomes, in a way, the motor of a more affirmed external policy.”<sup>64</sup>

In reality, as Petrov demonstrates, the *acquis communautaire* has travelled far and wide beyond enlargement.<sup>65</sup> In terms of scope and density, the most prominent case of *acquis* export outside the enlargement paradigm is found in the European Economic Area (EEA) framework.<sup>66</sup> Formally an association agreement based on Article 310 EC, the EEA enables those EFTA countries party to the agreement (Iceland, Norway, and Liechtenstein) to join large portions of the Single Market, without envisaging EU membership or requiring the establishment of a Customs Union with the Community.<sup>67</sup> From the very inception of negotiations leading to the extension of Single Market privileges to the EFTA countries, it was the *acquis communautaire* which constituted the legal framework to be adhered to by all EEA parties. Indeed, the creation of EC-EEA common rules and their effective enforcement are prime objectives of the EEA Agreement,<sup>68</sup> meaning that the EFTA

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reaffirms the European perspective of the countries of the Western Balkans in the Stabilization and Association Process.” See European Council in Copenhagen, Presidency Conclusions, December 2002. Emphasis added.

<sup>63</sup> A more accurate understanding of the relationship between the accession *acquis* and EU transformative engagement efforts, rather, would be to see the former as the primary and most influential conceptual conduit through which the latter has emerged, and an influential prism through which EU decision-makers, particularly the European Council and the Commission, have come to think about the mechanisms by which the Union may best be able to transform third-countries in conformity with its economic, political and security interests. See in relation to the ENP, Magen, *supra* note 12; J. Kelley, *New Wine in Old Wineskins: Promoting Political Reforms Through the New European Neighbourhood Policy*, 44 *Journal of Common Market Studies* 29 (2006). In relation to the Stabilization and Association Process (SAP) framework in the Balkans see L. Friis & A. Murphy, ‘Turbo-charged negotiations’: *the EU and the Stability Pact for South Eastern Europe*, 7 *Journal of European Public Policy* 767 (2000).

<sup>64</sup> Azoulai, *supra* note 30, at 197.

<sup>65</sup> R. Petrov, *The Dynamic Nature of the Acquis Communautaire in EU External Relations*, 18/2 *European Review of Public Law* 741 (2006); R. Petrov, *Exporting the Acquis Communautaire Through European Union External Agreements*, PhD Dissertation, Department of Law, Queen Mary, University of London (August 2005) (on file with author).

<sup>66</sup> O.J. 1994, L 1/3.

<sup>67</sup> Switzerland, which participated in the negotiation of the EEA, held a national referendum on joining the agreement in 1992, resulting in a “no” vote.

<sup>68</sup> The Preamble of the EEA Agreement explicitly states that “a dynamic and homogeneous EEA”

Member States are expected to adhere to the relevant *acquis communautaire* at the moment of signing the agreement, and to ensure its homogeneous application henceforth.

A different model for exporting the *acquis* beyond EU borders is found in the Sectoral Agreements (SAs) structure established between the Community and Switzerland. The notion of SA's emerged as a substitution to the all encompassing EEA framework, and as a means of avoiding the wholesale subordination of large parts of the Swiss legal system to the dynamic *acquis communautaire* – concerns that underlined much of the 1992 referendum decision to reject the EEA treaty.<sup>69</sup> Based on Article 310 EC Treaty, a first wave of SAs has been signed between Switzerland and the EC and Member States starting in 1999, with seven SAs concluded so far in the areas of: scientific and technological cooperation;<sup>70</sup> aspects of government procurement;<sup>71</sup> mutual recognition in relation to conformity assessment;<sup>72</sup> trade in agricultural products;<sup>73</sup> air transport;<sup>74</sup> carriage of goods and passengers by rail and road;<sup>75</sup> and free movement of persons.<sup>76</sup> A second wave of SAs was signed in October 2004 concerning free trade in services, processed agricultural products, the environment, statistics, the fight against fraud, double taxation of retired EU civil servant pensions, taxation of savings, the extension of Schengen and the Dublin Conventions' *acquis* to Switzerland, education; and the media. The implementation of the relevant *acquis communautaire* amounts to an essential pre-condition for achieving the objectives of the SAs.

EU attempts to export portions of the *acquis communautaire* outside the enlargement framework have extended not merely to its affluent north, but to its poor, volatile south. The aim of establishing a customs union in the 'first generation' Association Agreements with Mediterranean countries entailed the gradual adoption of the EC external trade *acquis* by Turkey, Cyprus and Malta, prior to their attainment of candidature status. With the launching of the Barcelona Process in November 1995, the EU engaged a further nine non-EU neighboring countries – primarily through individual Euro-Mediterranean Association Agreements (EMAs) – in a structured attempt to foster a security,

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shall be based on "common rules and equal conditions of competition", supplemented with "the adequate means of enforcement including at the judicial level." The key method of ensuring the correct functioning of common rules is the maintenance of "a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement."

<sup>69</sup> See S. Breitenmoser, *Sectoral Agreements Between the EC and Switzerland: Contents and Context*, 40 *Common Market Law Review* 1137 (2003); L. Goetschel, *Switzerland and European Integration: Change Through Distance*, 8 *European Foreign Affairs Review* 313 (2003); T. Ehs, *An Unwritten History: The Europeanization of Switzerland*, Paper presented at the 10<sup>th</sup> Biennial EUSA conference, Montreal, May 17-19 2007.

<sup>70</sup> O.J. 2002, L 114/468.

<sup>71</sup> O.J. 2002, L 114/430.

<sup>72</sup> O.J. 2002, L 114/369.

<sup>73</sup> O.J. 2002, L 114/132.

<sup>74</sup> O.J. 2002, L 114/73.

<sup>75</sup> O.J. 2002, L 114/91.

<sup>76</sup> O.J. 2002, L 114/6.

economic and political transformation in the Mediterranean region, without extending the prospect of membership.<sup>77</sup> In light of growing disappointment at the lack of progress in attaining the ambitious goal of the Barcelona Declaration, the original Barcelona Process has been supplemented by a Common Strategy for the Mediterranean Region (adopted by the European Council in Santa Maria de Feira in June 2000) and most recently by the European Neighbourhood Policy (ENP).

Early ENP pronouncements in particular made conscious references to the Copenhagen criteria and the *acquis communautaire* as appropriate guidelines for the ENP countries. In December 2002, for instance, Romano Prodi asserted: “We need to set benchmarks to measure what we expect our neighbours to do in order to advance from one stage to another. We might even consider some kind of ‘Copenhagen proximity criteria’. Progress cannot be made unless the countries concerned take adequate measures to adopt the relevant Acquis.”<sup>78</sup> Similarly, the Wider Europe communication published by the Commission in March 2003 stated explicitly that “the *Acquis* offers a well established model” and conditions the granting of economic and political ties to compliance with the *acquis*: “In return for concrete progress demonstrating shared values and effective implementation of political, economic and institutional reforms, including aligning legislation with the *acquis*, the EU’s neighbours should benefit from the prospect of closer economic integration with the EU.”<sup>79</sup>

Later ENP documents suggest a partial backtracking, adopting a more gradualist, functionalist stance on legal alignment. The Strategy Paper, for example, stresses that legislative and regulatory approximation will be pursued: “on the basis of commonly agreed priorities, focusing on the most relevant elements of the *Acquis* for stimulation of trade and economic integration, taking into account the economic structure of the partner country, and the current level of harmonization with EU legislation.”<sup>80</sup> Initial phases of approximation, therefore,

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<sup>77</sup> The nine are Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia, the Palestinian Authority. The Barcelona Declaration, which established the Euro-Mediterranean Partnership, was adopted on the 28 November 1995. The goals of the EMP are divided into three ‘baskets’: political and security dialogue, economic liberalization, and governance, human rights and democratic reforms. The Euro-Mediterranean Partnership (EMP) is implemented bilaterally through the EMAAs negotiated between the EC and its Member States, and the twelve Euro-Mediterranean countries (the nine listed above, plus Cyprus, Malta and Turkey) on the basis of Article 310 EC Treaty. For detailed commentary on the EMP see R. Youngs & H. Amirah Fernandez, *The Euro-Mediterranean Partnership: Assessing the First Decade*, FRIDE (2005); F. Hakura, *The Euro-Med Policy: The Implications of the Barcelona Declaration*, 34 *Common Market Law Review* 337 (1997).

<sup>78</sup> Address by Romano Prodi, President of the European Commission, *The Wider Europe – A Proximity Policy as the Key to Stability*, Brussels, 5 December 2002.

<sup>79</sup> Communication from the Commission to the Council and the European Parliament, *Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final, (March 2003), at 10.

<sup>80</sup> Communication from the Commission, *European Neighbourhood Policy Strategy Paper*, COM (2004) 373 final (May 12 2004), at 15. The Communication from the Commission to the Council and the European Parliament, on strengthening the European Neighbourhood Policy, COM (2006) 726 final, on the other hand makes no direct mention of the *acquis*.

envisage a focus on specific aspects of the internal market *acquis*.<sup>81</sup> This approach is reminiscent of the phased strategy of legal and institutional reform found in the Stabilization and Association Process in the Balkans.<sup>82</sup>

Further afield, we find EU efforts to encourage alignment with the *acquis communautaire* in the series of Partnership and Cooperation Agreements (PCAs) with Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, the Kyrgyz Republic, Moldova the Russian Federation, Ukraine, and Uzbekistan;<sup>83</sup> in the human rights, anti-corruption and competition rules embedded in the EU-ACP Cotonou Agreement;<sup>84</sup> and even in the bilateral trade cooperation and development agreements concluded with, *inter alia*, South Africa, Mexico and South Korea.<sup>85</sup>

In contrast to the principles of uniformity and indivisibility that undergirdle the internal order dimension (although here too some degree of heterogeneity occurs in practice) the governance export face varies substantially, and deliberately, from one category of external relations to another – trade, development cooperation, association, sector-specific agreements and so forth – and even within individual categories. Since EU external policy seeks to influence a broad range of targeted countries and policy areas, in conformity with EU rules and practices but without the prospect of full EU membership, such variability is both a pragmatic necessity and a political possibility for the Union to maintain. In its external agreements,

<sup>81</sup> Both the Partnership and Cooperation Agreements (PCAs) concluded with the Western NIS states, and the Association Agreements with the Southern Mediterranean countries contain provisions on legislative approximation that go well beyond free trade issues. If initial approximation progresses, these may be used as a legal basis for intensification of alignment in the future.

<sup>82</sup> On alignment with the *acquis* in the context of the Stabilization and Association Process (SAP) established in 1999 for the Western Balkans see D. Phinnemore, *Stabilization and Association Agreements: Europe Agreements for the Western Balkans?*, 8 *European Foreign Affairs Review* 77-103 (2003); Ott & Inglis, *supra* note 55. In practice, also, the EMAAs and subsequent Action Plans negotiated individually with Mediterranean countries vary greatly in their reference to expected alignment with the *acquis*. Jordan and Tunisia's Action Plans, for instance, provides for alignment in a range areas – notably visa issuing and control of migration flow, industrial and consumer products, public procurement, protection of intellectual property rights and tax legislation. In contrast, the Action Plans for Israel make no explicit mention of the *acquis*. Instead, the EC-Israel agreement imposes soft approximation commitments on the parties, to cooperate towards the harmonization of their legislation and standards, notably in the areas of agriculture (Article 46 EC-Israel Agreement) information and telecommunications (Article 52 EC-Israel Agreement). A more specific commitment to alignment is found in the area of financial services. See L. Herman, *An Action Plan or a Plan for Action: Israel and the European Neighbourhood Policy*, 11/3 *Mediterranean Politics* 371 (2006).

<sup>83</sup> EC-Russia PCA (OJ 1997 L 327), entered in force 1 December 1997; EC-Ukraine PCA (O.J. 1998, L 49), entered in force 1 March 1998; EC-Moldova PCA (O.J. 1998, L 181), entered in force 1 July 1999; EC-Armenia PCA (O.J. 1999, L 239), entered in force 1 July 1999; EC-Azerbaijan PCA (O.J. 1999, L. 246), entered in force 1 July 1999; EC-Georgia PCA (O.J. 1999, L 205), entered in force 1 July 1999; EC-Republic of Kazakhstan PCA (O.J. 1999, L 196), entered in force 1 July 1999; EC-Kyrgyz Republic PCA (O.J. 1999, L 196), entered in force 1 July 1999; EC-Uzbekistan PCA (O.J. 1999, L 229), entered in force 1 July 1999; EC-Republic of Belarus PCA (COM (95)137 final), signed in 1995, but in 1996 EU-Belarus relations were stalled following political setbacks; EC-Turkmenistan PCA (COM (97) 693 final).

<sup>84</sup> O.J. 2000 L317/3.

<sup>85</sup> See Petrov (2005), *supra* note 65.

in practice, the EU tailors the scope and density of required alignment with the *acquis* (either explicitly, or implicitly) in accordance with the intensity and purpose of relations it seeks to develop or maintain with its interlocutors. These relations may themselves change considerably over time, not least in a shift from a non-enlargement dynamic to a prospective enlargement one – as in the instance of Turkey or Croatia – in which case the accession *acquis* takes over and the relationship enters a qualitatively different, internal-bound character.

The methodology deployed in EU transformative engagement also varies from one regional framework to the next (with a degree of differentiation sometime evident within particular regional frameworks as well), but is generally characterized by several distinctive features: (1) a top-down dynamic, focusing on intergovernmental bargaining and bureaucratic exchange rather than more diffuse, bottom-up support for civil society; (2) a legalistic, technocratic approach to reform-promotion, using the depoliticized and legalistic language of the *acquis communautaire*; (3) use of ‘reinforcement by reward’ type of conditionality, rather than punitive measures or *ex ante* conditionality;<sup>86</sup> (4) regular monitoring and reporting on progress in meeting reform benchmarks; (5) financial and technical assistance to help fund reforms, and; (6) the progressive establishment and development of ‘socialization forums’ – such as technical committees and sub-committees, secondment of bureaucrats in ‘twinning’ programs, and selective third-country participation in EU programs and agencies.<sup>87</sup>

The driving rationale behind such efforts, like the engines of EU as international actorship more broadly, can be interpreted as stemming from both normative-ideational and rationalist, strategic factors. Drawing on the tenets of constructivist theory, observers such as Manners, Adler and Crawford, have argued for an ideational, values-driven understanding of EU external relations in which the promotion of the *acquis* abroad is understood as a manifestation of the EU’s ‘normative power’; projecting soft and sticky power derived from its liberal-democratic credentials, legacy of successful reconciliation, and symbolic status as post-nationalist supranational entity.<sup>88</sup> In contrast, Youngs, Smith and Harpaz stress the co-existence of normative dynamics with rationalist, interest-based strategic calculation in the EU’s action.<sup>89</sup> Under this conception, the *acquis* is wielded instrumentally to advance the Union’s economic, political and security interests.

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<sup>86</sup> This involves granting tangible benefits *ex post* where the targeted government complies with the conditions, and withholding the benefit where it does not. See F. Schimmelfennig, S. Engert & H. Knobel, *Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia, and Turkey*, 41 *Journal of Common Market Studies* 495, at 496 (2003).

<sup>87</sup> See Magen, *supra* note 12.

<sup>88</sup> See I. Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 *Journal of Common Market Studies* (2002); Adler & Crawford, *supra* note 55.

<sup>89</sup> Youngs, *supra* note 50; K. Smith, *Engagement and Conditionality: Incompatible or Mutually Reinforcing?*, in R. Youngs (Ed.), *New Terms of Engagement* 23-29 (2005); The contribution by Guy Harpaz in this issue.

## E. The *Acquis* as Transformative Engagement Instrument

Regardless of whether we choose the language of diffusion, export or engagement to describe it, presence of the phenomenon is clear: the outward thrust of the *acquis*, in whole or in part (rule projection), the modes of transferring it (rule transfer) and the establishment of mechanisms designed to induce its internalization by third countries (rule adoption) represent a defining feature of a core (perhaps *the* core) dimension of EU external policy and international actorness. Although the *acquis communautaire* does not amount to the entire transformative engagement strategy *per se*, it does constitute both part of the strategy itself, and the content around which the remainder of the strategy is structured. Far from constituting a passive, neutral legal standard, moreover, the *acquis communautaire* is endowed with several features which make it a mechanism of external influence in its own right, and a highly attractive one for the EU to deploy abroad.

### I. A Unifying Community Concept

The *acquis communautaire*'s inherently collective nature provides it with an important structural strength as an EU external influence mechanism. To observe that part of the potency of the *acquis* lies in its very '*communautaire*' may appear on its face almost trite. Yet the point acquires weight when we recall the seriousness with which European national powers advanced the spread of their own models of institutions and laws prior to the advent of modern European integration.<sup>90</sup> By the mid to late 19<sup>th</sup> Century, in fact, colonial expansion and occupation was systematically pursued and justified by the great European powers, not on the basis of military domination alone, but along moral, civilizing lines. Law played an important part in Britain's pursuit of the 'White Man's Burden' as well as France's 'mission civilisatrice', for example, creating intense, sometime bellicose competition within pre-World War II Europe.<sup>91</sup>

Risk of intra-EU fragmentation and conflict over competing national legal cultures, methods and interests, moreover, can hardly be said to have been relegated to the distant past. With 27 EU Member States comes the ever-present danger of conflict over the definition of policy, and the potential for further weakening of Europe's capacity to speak with one voice beyond its borders. Indeed, in some respects the risk of re-nationalization of institutions and laws is greater now than at certain times in the past sixty years. Whereas in the early decades of integration, for instance, Commissioners tended to be senior civil servants, in the more recent past many have been recruited from among senior Member State politicians (Kinnock, Patten, Prodi to cite some examples), and the practice of filling Commission posts through secondments of officials from

<sup>90</sup> See D. Kirby & C. Coleborne (Eds.), *Law, History, Colonialism: The Reach of Empire* (2002); B. Arneil, *John Locke, Natural Law and Colonialism*, 13/4 *History of Political Thought* 587 (1992).

<sup>91</sup> Silvia & Beers Simpson, *supra* note 24.

national administrations has also grown.<sup>92</sup> Whereas national bureaucracies have commonly had centuries to develop their collective political and legal cultures, also, those of the EU have had only several decades; exacerbating risks of international competition between Member State cultures. In this realm of bureaucratic dynamics as in others, accordingly, unifying concepts such as the *acquis*, that do not produce obvious winners and losers, are favored.

Although the collective nature of the *acquis communautaire* does not eliminate the particularistic legal and institutional export desires of Member States entirely, it helps minimize intra-EU antagonism, by providing a shared standard in which, at least in principle, each and every Member State has an equal stake. As a general rule, the EU tends to use the instruments that will provoke the least opposition from national sources,<sup>93</sup> and in this respect the outward projection of the *acquis communautaire* is no exception. The deployment of the *acquis*, therefore, functions as both an inhibitor of individual Member State chauvinism – by avoiding entirely the fractuous debate over which Member State’s rules and policies are best suited for export – and a lubricant for the historic replacement of national legal and institutional models for export, with a collective ‘we agenda’. Both these factors facilitate greater cohesion in projecting European institutions, rules and practices abroad.

## **II. Aiding Bureaucratic Coherence and Commission Domain Expansion in External Relations**

Between the Council and the Commission, and within the Commission itself, moreover, the *acquis communautaire* serves to strengthen inter-institutional coherence, as well as to advancement of the Commission’s interests in expanded external relations policy competences.<sup>94</sup> The nature of the institutions and agenda-setting processes influence to a considerable degree the policy outputs of the Union.<sup>95</sup> By framing external policy in terms of the externalization of the *acquis communautaire*, the Union’s supranational institutions may function more harmoniously, and the Commission in particular can expand its policy domains by acting as an entrepreneurial agenda-setter.

The challenges of ensuring vertical, horizontal and institutional policy consistency in EU external relations are clearly enormous.<sup>96</sup> Any modern political

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<sup>92</sup> See A. MacMullen, *European Commissioners: National Routes to a European Elite*, in N. Nugent (Ed.), *At the Heart of the Union: Studies of the European Commission 28-50* (2000); J. Trondal, *Administrative Integration Across Levels of Governance*, ARENA Report Number 7 (2001).

<sup>93</sup> See L. Cram, *The European Commission as a Multi-Organization*, 1 *Journal of European Public Policy* 195 (1994).

<sup>94</sup> For a more detailed discussion in the context of the ENP see Magen, *supra* note 12.

<sup>95</sup> On the concept of agenda setting and the process of agenda setting in the EU see S. Princen, *Agenda-Setting in the European Union: A Theoretical Exploration and Agenda for Research*, 14/1 *Journal of European Public Policy* 21 (2007); G. Peters, *Agenda-Setting in the European Union*, in J. Richardson (Ed.), *European Union: Power and Policy-Making 77-94* (2001).

<sup>96</sup> On the concepts of vertical, horizontal and institutional consistency, see S. Nuttall, *Coherence*

system faces problems of adequate policy coherence and coordination among its numerous institutions, actors and policy sectors, yet the EU confronts greater challenges than most political systems due to its inherently fragmented, multi-level system, which lacks political-party government, and is characterized by separate national policy styles that are carried over to the supranational level. Indeed, as a fragmented, multi-level political organization with numerous points of access to place policy content on the agenda, the EU system presents an unprecedented challenge to effective control, policy direction, and compliance with decisions particularly in external relations.<sup>97</sup> The plurality of forums and procedures for potential policy-making, together with the heterogeneity of political cultures, generates ever present risks of deadlock, indeterminacy, and potential systemic instability. All of which produces strong organizational pressure for unifying patrimonies like the *acquis*.<sup>98</sup>

Indeed, the *acquis* serves to lubricate and contain potential conflict in EU external relations in two distinct respects. The first concerns institutional consistency between the two main actors driving EU external relations – the Council and the Commission. Institutional consistency problems arise from the fragmented division of external relations competences, with the Council and the Commission each leading different tracks, with different procedures (Community and intergovernmental) and bureaucracies; with neither able to fully dominate the direction of policy. Institutional acrimony may also be fuelled by the fuzzy borders in many policy areas, where the demarcation between pillars is either unclear or not fully respected.<sup>99</sup> In a logic similar to the unifying Community concept, the *acquis communautaire* serves to ameliorate the scope for Council-Commission tensions by providing a dense, and shared standard to which both can refer, and around which both can coalesce.

Secondly, the *acquis* assists the Commission to better manage problems of internal tensions within the institution itself. Students of the internal dynamics of the Commission point out to several potential sources of cleavage, and the deep need of the institution for both unifying concepts, and administrative-load reducing mechanisms. As Hix observes, for instance, the term ‘Commission’ refers to what in reality are at least three different sets of actors (the college of commissioners, the 25,000 strong bureaucracy, and a myriad of specialized agencies). The coexistence of a number of administrative traditions and policy styles, the autonomy of various administrative units and agencies, the differing organizational cultures shaped by sectoral policies, and the persistence of

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*and Consistency*, in Ch. Hill & M. Smith (Eds.), *International Relations and the European Union* 91-112 (2005). In addition to these intra-EU problems of consistency, the EU faces challenges in speaking with one voice in other international organizations and coordinating policy with other multilateral actors. See Smith, *supra* note 11; H. Versluys, *Coherence in EU External Action: The Case of Humanitarian Aid*, Paper presented at the 10<sup>th</sup> biennial EUSA Conference, Montreal 17-19 May 2007.

<sup>97</sup> See Hix, *supra* note 5.

<sup>98</sup> See Peters, *supra* note 95; J. B. Christoph, *The Effects of Britons in Brussels: The European Community and the Culture of Whitehall*, 6 *Governance* 518 (1993) (describing EU policy-making as “loosely-knit, headless, porous, inefficient, often unpredictable and occasionally chaotic”).

<sup>99</sup> Versluys, *supra* note 96.

national alliances within a supposedly ‘international’ organization, all conspire to undermine the Commission’s coherence and power as the intended engine of European action.<sup>100</sup> Pressure to meet an expanding range of tasks with limited resources exacerbates risks of administrative overload, which in turn may damage the effectiveness, credibility and power of the Commission.

A shared discourse and habitual practice of the *acquis*, accordingly, acts as both bureaucratic glue for the different components of the Commission, and as a critical means of reducing administrative overload by repeat utilization of the same rules in both internal and external policy contexts. After Maastricht, the Commission accumulated competences in most fields traditionally controlled by national administrations, but also gathered areas of responsibility unique to the function of the EU – notably control of state aid, and the management of pre-accession assistance to Central and Eastern Europe.<sup>101</sup> By virtue of its control in initiating legislation under the first pillar, managing accession negotiations and representing EU trade and development interests in the international system, the Commission, more than any other Union actor is the day-to-day master of the *acquis*. If policy-making is an exercise in the mobilization of expert knowledge, then by referring to and drawing from the *acquis communautaire*, as the standard of rules to project to the outside world, the Commission is not only reducing the overall administrative load for itself, it is also placed at a privileged position *vis-à-vis* all other EU organized interests – since it is within the Commission that the largest accumulation of technical knowledge and expertise about the content of the *acquis communautaire* exists. In this sense, at least, the Commission behaves as a quintessential example of an ‘epistemic community’, wielding substantial influence simply from its claim to expert technical knowledge.<sup>102</sup> At the same time, the insistence on the *acquis* as the basic framework of standards to which third countries need to conform stems as much from internal administrative necessity as from anything else. For the Commission negotiating different standards with even a fraction of the entire set of external relations maintained by the Union would mean the need to master expertise which would place its, arguably already overstretched, bureaucracy under further stress. It is precisely for this reason that Commission officials are deeply adverse to the possibility of having to repeat the

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<sup>100</sup> S. Hix, *The Political System of the European Union* (2005). *See also* N. Nugent, *The Government and Politics of the European Community* (1999); Th. Christiansen, *The European Commission: Administration in Turbulent Times*, in J. Richardson (Ed.), *European Union: Power and Policy-Making* 95-114 (2001). In fact substantial problems of coordination within the Commission have long generated demands for greater policy coherence and coordination, possibly through a strengthened presidency of the Union (*see* M. Cini, *The European Commission: Leadership, Organization and Culture in the EU Administration* (1996)).

<sup>101</sup> B. Laffan, *From Policy Entrepreneur to Policy Manager: The Challenge Facing the European Commission*, 3 *Journal of European Public Policy* 422 (1997).

<sup>102</sup> P. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *International Organization* 1 (1992) (“An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area.” at 3).

Swiss experience of tailor-made, sector-specific agreements in future negotiations with other EU partners.<sup>103</sup>

By deploying the *acquis communautaire* in external relations beyond enlargement, furthermore, the Commission is expanding its external policy domain and increasing its relative institutional power within the EU system. The Commission has over the last decade sought to adapt enlargement-like concepts and tools to other foreign policy contexts, particularly when confronted with the possibility that its role in external relations would be shrunk as the result of the successful conclusion of accession negotiations.<sup>104</sup> This form of organizational adaptation is consistent with theories of bureaucratic domain expansion, and historical institutionalism scholarship more broadly.<sup>105</sup> Past experience shapes the role perception of institutional actors and creates vested interests and expectations of continued activity. In this sense, as Sedelmeier argues, enlargement should not only be considered the dependent variable in an analysis of EU external relations, but also an independent variable that has moulded the identity of EU institutional actors conducting foreign policy.<sup>106</sup>

The Commission's prolonged engagement in the pre-accession processes – including the elaboration of the *acquis* as a condition for accession – has generated not only substantive expertise within the Commission, but also a cadre of professionals with a sense of mission, group identity, and a crystalized foreign policy agenda, which seeks to further shape European external relations. Enlargement has helped define for the Commission both foreign policy options and its methodologies – including political conditionality, institutional engagement, monitoring, financial and technical assistance, and strategic use of the *acquis communautaire* as an instrument of transformative influence. Once earned, the commission is reluctant to let go of these tools.

### III. An 'Objective Standard' over Which the EU Has Exclusive Control

If internally the communal nature of the *acquis* serves to dampen inter-Member State competition, and facilitates the accumulation of a shared body of rules among them, in its external interactions the EU as a collective can appeal to the communal nature of the *acquis* as evidence that it represents an objective standard, enjoying broad legitimacy.

As Franck's international legal theory asserts, in an international system organized around rules, compliance is secured at least in part by the perception of

<sup>103</sup> I am grateful to Lior Herman for this point.

<sup>104</sup> Magen, *supra* note 12, at 396-7.

<sup>105</sup> See D. North, *Institutions, Institutional Change and Economic Performance* (1990); S. Steinmo, K. Thelen & F. Longstreth (Eds.), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (1992).

<sup>106</sup> U. Sedelmeier, *EU Enlargement, Identity and the Analysis of European Foreign Policy: Identity Formation Through Policy Practice*, Robert Schuman Centre Working Paper 2003/13 (2003).

a rule as legitimate by those to whom it is addressed.<sup>107</sup> The degree of the rule's perceived legitimacy, in turn, depends on a number of substantive and procedural factors, including the conceptual coherence of the rule, the degree to which it is adhered to by others, the clarity with which the rule is communicated, the pedigree of the entity that produced the rule, and the integrity, or fairness, of the process by which the rule was made.<sup>108</sup>

In practice there are both 'push' and 'pull' dimensions to this feature. On the one side, appealing to a seemingly objective, 'fair standard' – including precedent, expert opinion and norms commonly accepted by others – constitutes one of the rudimentaries of effective bargaining. As the non-national, shared patrimony of 27 democratic European states with high international standing who adhere to it themselves, the *acquis communautaire* enjoys a respectable pedigree and a high degree of legitimacy as a species of rules. On the other side, the inherently collective, supranational nature of the *acquis*, as well as its intimate involvement in sixty years of a successful mode of international relations, provides the *acquis* with formidable 'pull' appeal for domestic decision-makers in third countries contemplating alignment. In this sense, the *acquis* resembles a form of international law (whether codified or customary) rather than the law of a single state. This feature of the *acquis* reduces the symbolic and reputational costs of compliance for third country decision makers, making it more palatable, and therefore more influential than it otherwise was likely to be. Rather than subjecting themselves to the humiliation of conforming to another nation-state's rules, by aligning with the *acquis communautaire* domestic actors are invited to convince themselves (and their various domestic constituencies) that they are buying into a discourse shared by a large number of successful states, and that they too would have some stake in a prestigious international community if only they align themselves with the *acquis*.

At the same time as encouraging a sense of partnership and stake-holding in third countries, the *acquis communautaire* possesses the great advantage for the EU of constituting an instrument whose scope, trajectory and interpretation remains exclusively in its own hands. This feature is facilitated by the Union's inter-institutional division of powers and by the dual face of the *acquis* as internal order as well as mechanism of governance export. While in external relations the Commission maintains day-to-day management of the *acquis*, it is a fundamental tenet of EU law that it is the ECJ, and the ECJ alone, which is its ultimate authoritative interpreter. As the Court's ruling on the illegality of accession by the Communities to the European Convention on Human Rights (ECHR) indicates, the ECJ is strongly adverse to any prospect of sharing its jurisdiction to interpret EU law with any entity outside the Union.<sup>109</sup> This constitutional arrangement

<sup>107</sup> See Th. Franck, *The Power of Legitimacy Among Nations* (1990); Th. Franck, *Legitimacy in the International System*, 82 *American Journal of International Law* 705 (1988).

<sup>108</sup> Franck (1990), *supra* note 107, at 38. A corresponding notion in norms research provides that intrinsic qualities of the norm itself (its clarity, specificity and content) determine its influence. See M. Finnemore & K. Sikkink, *International Norm Dynamics and Political Change*, 52/4 *International Organization* 887, at 906 (1998).

<sup>109</sup> Opinion 2/94 on Accession by the Communities to the European Convention on Human Rights

assists the Commission in maintaining a comfortable duality – third countries are invited to share in a communal concept, but can have no say in shaping its nature, scope, development or authoritative interpretation.

#### IV. Rule Scope, Determinacy, and Flexibility

With 80,000 plus pages and growing, the *acquis communautaire* (covering everything from food safety, to corporate governance in the financial services industry, or effective border control) constitutes a legal and institutional corpus of extraordinary scope, extending in its fullest application to practically every area of economic, regulatory and political life in the Western European modern, liberal-democratic state. This attribute – which stems from the density of regulation at the EU level itself – is unparalleled in international society. It means that under the aegis of a single concept, the EU is in principle able to project the whole, or any part of, a comprehensive model of socio-political existence. True, the ability of the EU to impose the *acquis* template on third-countries, even where it exists at all, depends on a host of additional factors, yet the sheer scope of the *acquis* itself strengthens considerably the value of the *acquis communautaire* as transformative engagement instrument.

Moreover, although the specificity of the *acquis* – its ‘rule density’ – is not equal across its various sectors, in general the *acquis communautaire* displays high degrees of specificity.<sup>110</sup> The degree of specificity (or determinacy) of rules and norms promoted by an external actors, impact their ability to influence domestic decision-makers.<sup>111</sup> Determinacy refers to both the formality of the rule (its ‘legalization’ status) and its substantive detail and clarity.<sup>112</sup> The more legalized the rule and the clearer it is about the type and extent of domestic change expected, the higher its determinacy value. Even in the case of the CEECs

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(ECHR) [1996] ECR I-1759. In addressing the question the ECJ stated that:

to give a detailed response to the question of compatibility of the Community’s adhesion to the Convention in terms of the rules of the Treaty, in particular Article 164 and 219 concerning the competence of the Court, there must be laid out sufficient elements on the means through which the Community envisages submitting itself to the present and future mechanisms of jurisdictional control instituted by the Convention. (at 1786).

This demonstrates that the key question for the ECJ is one of autonomy from external influence and maintenance of the monopoly of interpretation of the *acquis* which the Court enjoys in the EU legal order.

<sup>110</sup> See W. Jacoby, *The Enlargement of the EU and NATO: Ordering From the Menu in Central Europe* (2004); W. Jacoby & P. Cernoch, *The Pivotal EU Role in the Creation of Czech Regional Policy*, in R. Linden (Ed.), *Norms and Nannies: The Impact of International Organizations on the Central and Eastern European States* (2002).

<sup>111</sup> See Franck (1990), *supra* note 107, at 52. See also Jacoby & Cernoch, *supra* note 110, at 318; F. Schimmelfennig & U. Sedelmeier, *Introduction: Conceptualizing the Europeanization of Central and Eastern Europe*, in F. Schimmelfennig & U. Sedelmeier (Eds.), *The Europeanization of Central and Eastern Europe* (2005).

<sup>112</sup> See Schimmelfennig & Sedelmeier, *supra* note 111; K. Abbott *et al.*, *The Concept of Legalization*, 54 *International Organization* 401 (2000); Franck (1990), *supra* note 107, at 52.

variations in the uniformity of the *acquis* appear to have significantly impacted leverage. Where the detail of the *acquis* is ‘thick’ on a particular area of policy, studies show stronger leverage for the Commission, whereas ‘thin’ areas display weaker compliance.<sup>113</sup> Determinacy affects the informational nature of the rule promoted by an international actor – with highly determinate rules providing a clear roadmap for reform. In addition, high determinacy aids the effectiveness of conditionality, by enhancing its credibility, reducing the scope for reinterpretation by the targeted government of what constitutes compliance, and aiding monitoring for compliance set against defined benchmarks.<sup>114</sup>

Despite being increasingly dense and more strictly applied to candidate states, the *acquis* has proven to be malleable to strategic content adjustment in response to changing EU influence goals. The substantive development of the Union’s internal legal order explains only partly the flexibility and continuous adjustment of the *acquis* as applied to countries seeking closer institutional ties with the Union. The other part stems from deliberate adaptation of the conditions by the European Council and Commission into areas in which transformation of third country policy is sought. An early example of this phenomenon came in 1995 the Madrid European Council effectively supplemented the *acquis* criterion it set two years, and considered that in order to ensure effective implementation of the *acquis* before entry, applicant countries must also improve the conditions for their integration through the “adjustment of their administrative and judicial structures.”<sup>115</sup> These additional administrative and institutional requirements were emphasized and built upon by subsequent European Councils and Commission monitoring documents.<sup>116</sup>

Similarly, the *acquis* criteria has been subject to increased securitization, particularly since the turn of the Millennium. Although the obligation to protect minority rights does not constitute part of the internal order *acquis*, the CEEC applicants were subjected to stringent rules in this regards. The 1999 Helsinki European Council added a new ‘good-neighbourliness’ dimension to the accession criteria, and Justice and Home Affairs rules have assumed an increasingly prominent role in relation in efforts to transform governance among the Western Balkan SAP countries. Indeed, the devising of new obligations for candidates and potential candidates has attracted the charge that the EU practices a strategic game of conditionality stretching, ‘moving the goal posts’ on its interlocutors, notably Turkey.<sup>117</sup> The EU may not be able to always impose new content on third

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<sup>113</sup> See Jacoby, *supra* note 110; J. Hughes, G. Sasse & C. Gordon, *Conditionality and Compliance in the EU’s Eastward Enlargement: Regional Policy and the Reform of Sub-national Government*, 42/3 *Journal of Common Market Studies* 523, at 525 (2004).

<sup>114</sup> Schimmelfennig & Sedelmeier, *supra* note 111.

<sup>115</sup> Presidency Conclusions, Madrid European Council, 15-16 December 1995, at para. I.25.

<sup>116</sup> See Ch. Hillion, *The Copenhagen Criteria and their Progeny*, in Ch. Hillion (Ed.), *EU Enlargement: A Legal Approach* 1, at 17-18 (2004). See also M. Cremona, *Accession to the European Union: Membership Conditionality and Accession Criteria*, 25 *Polish Yearbook of International Law* 219 (2001).

<sup>117</sup> See F. Tarifa & B. Adams, *Who’s the Sick Man of Europe? A Wavering EU Should Let Turkey In*, 18 *Mediterranean Quarterly* 52, at 70 (2007).

countries of course, but the flexible-content character of the *acquis* undoubtedly strengthens its effectiveness as a governance export tool.

## V. Couching Intrusive Change in Technocratic, De-Politicized Language

The *acquis communautaire*'s technical, legalistic character also facilitates couching what are in reality deeply political reforms in technocratic, de-politicized language. In part, the technocratization and legalization of EU external policy has stemmed from the replacement of the *ad hoc* nature of previous practices with more institutionalized procedure, centralized primarily within the Commission.<sup>118</sup> At the same time, conscious use of the technocratic appearance of the *acquis* has increasingly been made by EU policy makers seeking to increase the impact of EU governance export in its near abroad.

In fact, the transposition of the *acquis communautaire* to applicant countries in the pre-accession process amounted to a sweeping, detailed and deeply political, transformation strategy. As Jiri Pehe attested, in the immediate aftermath of the May 2004 'Big Bang' enlargement round:

While stock-market and privatization transparency, banking reform, anticorruption measures, and simplified bankruptcy laws might not at first glance seem to have much to do with democratic consolidation, in truth they all helped greatly to give democracy solid underpinnings in Eastern Europe.<sup>119</sup>

Yet during the pre-accession negotiations themselves, both Commission officials and applicant state policy-makers were complicit in shrouding the process in highly legalistic, technocratic language; a crypto-political tactic which, if not entirely obscured the power dynamics of EU hegemonic demands for compliance, removed its edge to a considerable degree. By framing the process as one driven by partnership and shared historical destiny (a 'return to Europe'), on the one hand, and at the same time utilizing the highly legalistic, technocratic language of the *acquis* in the day-to-day pursuit of the strategy, enlargement officials aimed to 'depoliticize' the accession process, shield domestic reformists, take the edge off accusations that they were behaving in an 'imperialist' fashion and avoid unfavorable comparisons with the EU's own democratic deficit. For their part, policy-makers in the candidate countries were understandably loathe to be perceived by domestic constituencies as weaklings being tutored in the arts of democracy and civilization by their Western betters. In terms of the self-perception of the motives for reform by the elites in the CEECs, there has been a certain *noblesse oblige* view under which it was improper to accord too high importance to EU conditionality.

The lesson that the more an issue can proceed by bureaucratic stealth – without agitating media or other mobilized resistance – the more likely it is to

<sup>118</sup> See M. Smith, *Diplomacy by Decree: The Legalization of EU Foreign Policy*, 39 *Journal of Common Market Studies* 79 (2001).

<sup>119</sup> J. Pehe, *Europe Moves Eastwards: Consolidating Free Government in the New EU*, 15 *Journal of Democracy* 36, at 38 (2004).

be pursued in a manner that advances European interests, has been internalized and instrumentalized by EU policy-makers, notably the Commission, beyond enlargement. The reasons for this shift have been both institutional and instrumental. The general policy culture of the EU is regulatory, given the dominance of market regulation and the principal instruments available are regulatory.<sup>120</sup> Similarly, while in most national systems problem definition tends to determine which agencies or ministries shape a given area of policy, in the EU concept definition may determine whether the issue is seen as one of 'high politics' (therefore meriting closer scrutiny and intervention on account of risks to national interests) or 'low politics' (in which case it is more likely to fly under the radar of national-level actors, as a more bureaucratic, technocratic and a-political matter. Accordingly, the Commission in particular, has become sensitively attune to couching policy issues in 'low politics' terms, as a means of advancing its policy domains.

Rather than wielding the rhetoric of 'liberty' or 'freedom' in North Africa and the Middle East, or speaking overtly of 'transformational diplomacy',<sup>121</sup> use of the *acquis communautaire* facilitates Commission control, and acts as a means of promoting EU interests while blunting the danger of resistance to external intervention. Indeed, Commission officials engaged in the design and pursuit of the ENP stress the tactical advantages of promoting what amount to highly intrusive demands on national sovereignty through formally depoliticized and legalized language.<sup>122</sup>

## **F. Conclusion: No Acquis Without Communautaire?**

The inquiry into the economic, political and legal reasons for third countries to align, or refrain from aligning, their domestic rules, institutions and policies with the *acquis communautaire*, wholly or partially, falls squarely within the emerging 'top-out' prism of European integration scholarship; one that is concerned with conceptualizing, tracing and evaluating influence of EU institutions, rules and policy-making processes on the laws, institutions, and even identities of third countries and other international organizations beyond Europe. This article has

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<sup>120</sup> See G. Majone, *Regulatory Federalism in the European Community*, 10 *Government and Policy* 299 (1992).

<sup>121</sup> As has been the policy of the United States under the first and second Bush administrations. See the National Security Strategy of the United States of America (2002) and the revised strategy (2006) (available at: <http://www.whitehouse.gov/nsc/nss.html>); and the address of Secretary of State, Condoleezza Rice, *Transformational Diplomacy*, Georgetown University, Washington, DC, 18 January 2006 (available at: <http://www.state.gov/secretary/rm/2006/59306.htm>).

<sup>122</sup> The analysis in this section draws extensively on 16 interviews conducted with senior officials in DG Enlargement and DG External Relations in May and June 2005, as well as discussions with officials, diplomatic representatives in Brussels and policy analysts that took part in the conference 'American and European Approaches to Democratization in the European neighbourhood', held at the Centre for European Policy Studies (CEPS) in Brussels, on 20-21 June 2005. Whilst preserving their anonymity, the author wishes to thank all interviewees and commentators for their valuable insights.

sought to contribute to the nascent “top out” body of literature by advancing three sequential claims regarding the relationship between the *acquis communautaire*, on the one side, and non-member, non-candidate states, on the other side. First, rather than amounting to a reasonably clear, homogenous, fixed and prospectively knowable standard, the *acquis communautaire* is fuzzy and contested. At a time when the deployment of the phrase has become ubiquitous in EU policy and academic discussion, the meaning of the term remains remarkably unsettled, making disciplined assessments of the pros and cons of alignment problematic.

In reality, it was secondly argued, the notion contains two commonly undifferentiated yet strongly distinct personalities, which in turn serve two very different purposes: an inward-looking, ‘internal order’ *acquis* that represents the inherited patrimony of the Community and acts to preserve the unique genetic code of European integration; and a second, ‘transformative engagement’ (or ‘governance export’) personality, whose purpose is the outward projection of EU norms and the advancement of its interests abroad. Far from constituting a passive, technocratic, objective legal standard, moreover, the transformative engagement dimension of the *acquis communautaire* itself amounts to an important galvanizing and influence-inducing mechanism in the hands of EU foreign policy makers. The community-building function inherent in the concept; its legalistic-technocratic aura, scope, determinacy, flexibility and evolutionary nature; its combinability with conditionality; as well as the fact that its authoritative interpretation remains the exclusive prerogative of EU actors – all these combine to make the *acquis (qua acquis)* a potent instrument which the EU can, and does wield, in its efforts to engage and transform targeted states beyond its borders.

As the internal order face of the *acquis* rightly insists, involvement and compliance with the *acquis communautaire* are intimately intertwined with the notion of community, and not merely in etymological terms. At a fundamental level, taking on any part of the *acquis* ought to involve committed, voluntary adherence to the basic goals of European integration – the forging of a shared economic and political destiny for the states and peoples of Europe, grounded in a progressively closer union of fundamental values, governmental systems and legal method. Inside the EU, this commitment is manifested in compliance with supranational decision-making processes and law, legitimated through a multi-level, participatory, governance system. In contrast, the EU’s attempts to export the *acquis communautaire*, in whole or in part, involves a very different, power-projection set of dynamics, which do not entail an equal stake in the community that is constitutive of the concept being promoted. In its external relations, rather, the *acquis* represents an institutionally convenient and instrumental mechanism for promoting EU interests in political, economic and regulatory transformation in third countries. This governance export face needs to be squarely recognized as an instrument of EU transformative influence goals, and be distinguished from the alluring face of inclusion in the Community itself.