Colombia Internacional
ISSN: 0121-5612
colombiainternacional@uniandes.edu.co
Universidad de Los Andes
Colombia

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Diffusing EU Law beyond the Borders of the Union: The Judicialization of the European Trading Area
Colombia Internacional, núm. 81, mayo-agosto, 2014, pp. 27-66
Universidad de Los Andes
Bogotá, D.C., Colombia

Diffusing EU Law beyond the Borders of the Union: The Judicialization of the European Trading Area

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DOI: dx.doi.org/10.7440/colombiaint81.2014.02
RECEIVED: December 11, 2012
ACCEPTED: April 1, 2013
REVISED: February 10, 2014

ABSTRACT: The European Union (EU) lies at the heart of a network of free trade agreements (FTAs), negotiated with partner countries in Europe and beyond. Within such a context, this paper focuses on the extent to which the judicialization of trade policy in the Union and its diffusion externally have impacted on states which are members of the European Free Trade Association (EFTA), reflecting the process of Europeanization as a manifestation of the Union external governance.

KEYWORDS: European Union • free trade agreements • judicialization • european trading area • trade policy diffusion • europeanization • European Free Trade Association

This article is part of the continuing research of the author into how regional integration law is diffused from the regional court into legal systems that are part of the relevant regional integration community and beyond. It was prepared, in part, as a contribution to the EU-funded Jean Monnet Project *Constitutional Rights versus Free Trade in EU-FTAs (CRIFT)*, Application No. 199732-LLP-1-2011-1-BE-AJM-IC; Grant Decision No. 2011-2927. Project Coordinator: Prof. Philippe De Lombaerde, United Nations University, Comparative Regional Integration Studies Institute, Bruges (Belgium).

La difusión del derecho comunitario de la UE más allá de sus fronteras: la judicialización del espacio europeo de comercio

RESUMEN: La Unión Europea (UE) está en el centro de una red de acuerdos de libre comercio (TLC) establecidos con países socios en Europa y el mundo. Este artículo examina el grado en que la judicialización de la política comercial de la Unión y su difusión externa han impactado a los Estados que son miembros de la Asociación Europea de Libre Comercio (AELC), lo cual refleja el proceso de europeización de la región y la política exterior de la Unión.

PALABRAS CLAVE: Unión Europea • acuerdos de libre comercio • judicialización • espacio europeo de comercio • difusión de la política comercial • europeización • Asociación Europea de Libre Comercio

A difusão do direito comunitário na UE mais além de suas fronteiras: a judicialização do Espaço Europeu de Comércio

RESUMO: A União Europeia (UE) está no centro de uma rede de acordos de livre comércio (TLC) estabelecidos com países sócios na Europa e no mundo. Este artigo examina o grau em que a judicialização da política comercial da União e sua difusão externa têm impactado os Estados que são membros da Associação Europeia de Livre Comércio (AELC), o que reflete o processo de europeização da região e da política externa da União.

PALAVRAS-CHAVE: União Europeia • acordos de livre comércio • judicialização • espaço europeu de comércio • difusão da política comercial • europeização • Associação Europeia de Livre Comércio

Introduction[1]

The European Union (EU) lies at the heart of a network of free trade agreements (FTAs), negotiated with partner countries in Europe and beyond (see Tatham 2009; Telò 2009). Within such a context, this paper focuses on the extent to which the judicialization (see Ehrenhaft 1981) of trade policy in the Union and its diffusion externally have impacted on states which are members of the European Free Trade Association (EFTA), reflecting the process of Europeanization (see Schimmelfennig 2010) as a manifestation of Union external governance.

In particular, it examines the ways in which courts in EFTA have responded to express or implicit requirements to interpret national law—harmonized to EU law—in conformity to the rulings of the Court of Justice of the European Union (Court of Justice, CJUE). Consideration will therefore be made to court decisions concerning the bilateral FTAs signed in the 1970s by the then European Economic Community (EEC) with EFTA States (see generally Wahls 1988); the European Economic Area (EEA) Agreement;[2] and the Agreement on Free Movement of Persons (FMPA),[3] which is one of a series of bilateral agreements with Switzerland (Tatham 2009, 185-186). Although these FTAs have differing objectives, they have nevertheless tended to strengthen the EU's regional (and global) trade reach (see Woolcock 2007; Rigod 2012), extending much of its liberal trade regime and standards across the continent.[4]

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1 The author would like to thank, in chronological order, Prof. Philippe De Lombaerde, Associate Director, United Nations University Institute on Comparative Regional Integration Studies, Bruges (Belgium), for having first proposed the submission of this article for publication as well as for his counsel throughout; Laura Wills Otero, Chief Editor, and Norman Mora Quintero, Editorial Assistant, of *Colombia Internacional* for their advice and support in its preparation; and finally the two anonymous reviewers whose erudite observations greatly contributed to the author crystallizing his own views and to contextualizing the piece. The usual disclaimer applies.

2 OJ 1994 L1/3.

3 OJ 2002 L114/6.

4 For the purposes of selecting the FTAs, one of the important criteria used was the accessibility to national superior court decisions in English, French or German. Thus, regrettably, no reference has been made either to the practice of national courts under the 1963 Association Agreement with Turkey (OJ 1973 C113/2) or under the 1995 EC-Turkey Customs Union (OJ 1996 L35/1).

This paper starts by providing a brief explanation that positions these EFTA States within the broad conceptualization of Europeanization as the domestic adaptation to European regional integration (see Vink and Graziano 2008) (Section 1). It follows this exposition by considering the relations between the EU and EFTA, including the distinct links to the EEA-EFTA States and to Switzerland (Section 2). The role of the CJEU in constitutionalizing EU trade policy is then considered from both its internal and external aspects (Section 3). The requirements of judicial homogeneity as an example of EU norm diffusion are approached within the EFTA, EEA and Swiss contexts: while not forming a systematic or exhaustive study, the work addresses the issue of why courts in EFTA (whether national or supranational) have variously used or refused to use EU law and specifically CJEU rulings (Section 4). The last section concludes the article.

1. Europeanization and the EFTA States

Although the focus of the present work is the judicialization of the European trading area, the context within which this process has occurred and continues to evolve is considered by political scientists and international relations experts alike as the Europeanization of structures and methods of behaviour resulting from the impact of the European Union, both internally and externally.

While there are a number of competing ideas from Europe and North America on the conceptualization of the process of Europeanization in political science and international relations literature (see Vink and Graziano 2008), the present author has decided to select the broad and inclusive definition of "Europeanization" presented by Radaelli. He has referred (see Radaelli 2003, 2006) to Europeanization as consisting of processes of construction, diffusion and institutionalization of "formal and informal rules, procedures, policy paradigms, styles and 'ways of doing things.' It also consists of shared beliefs and norms that are first defined and consolidated in the EU public process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public policies (2003, 30)."

This definition describes an interactive process and represents the domestic impact on and adaptation to "European governance," by which the EU provides rules and mechanisms to regulate the behaviour of public and private actors across a whole gamut of integrated policy areas (Schimmelfennig 2010). This "internal" governance

of the EU—the core of which is focused on the single/internal market—has been externalized and projected into its near abroad, covering countries that wish to become EU Member States or those that are unwilling to join but nevertheless also wish to benefit from access to a large, attractive market. "External" governance of the EU aims, then, at approximating legal and administrative standards in third states and entities to those of the Union as a means of managing interdependence and fostering integration below the threshold of membership (Lavenex 2008).

In its attempts to transfer certain norms and rules beyond its borders, the EU can avail itself directly of its *acquis*, its consensually-agreed internal policy templates, already legitimized by their adoption, implementation and enforcement by EU Member States. It is this legitimacy of the norms which acts as a decisive factor for rule adoption or norm diffusion in the absence or weakness of power-based strategies such as membership conditionality. In essence, it is argued that the way in which EU rules are communicated and transferred to non-Member States influences the likelihood of their adoption (see Schimmelfennig and Sedelmeier 2005; Franck 1990).

Consequently, "[w]hen applied to EU external relations, the governance approach implies a high degree of institutionalization and the existence of a common system of rules beyond the borders of the EU and its formal, legal authority" (Lavenex and Schimmelfennig 2009, 795). Such externalization or "external projection of internal solutions" (Schimmelfennig 2010, 326) has been achieved through the vehicle of norm transfer of the relevant core (internal market, competition and flanking policies) *acquis*.

Most studies of the impact of Europeanization have either examined its internal manifestation in EU Member States (Cowles, Risse, and Caporaso 2001; Featherstone and Radaelli 2003; Klaus and Hix 2001; Hanf and Soetendorp 1998; Héritier, Kerwer, Knill, Lehmkuhl, Teutsch, and Douillet 2001; Kohler-Koch 2003; Meny, Muller, and Quermonne, 1996; Rometsch and Wessels 1996) or its external effect on neighbouring or candidate countries, particularly in the recent waves from Central and Eastern Europe (Grabbe 2005; Schimmelfennig and Sedelmeier 2005).[5] This work, however, will concentrate on a less studied field, i.e., the "twi-

5 Other commentators from different disciplines have also added their perspectives: Barbé and Johansson (2003); Kuus (2007); Tesser (2003); Huelss (2012); and Wichmann (2010).

light zone" between prospective and actual membership of the Union which is now generally occupied by the sovereignty-conscious States that make up EFTA. In this sense, the analytical framework already provided for the Europeanization effects on actual or prospective Member States must be reconfigured in order to deal with the specificities of the EFTA case.

This reconfiguration has already been achieved to a great extent by Schimmelfennig (2012) who, in view of their trading relations with the Union, has characterized the EFTA Member States as forming part of the hemisphere of "affordable nationalism," since these countries have rejected the supranationalism of the Union and are wealthy enough to be able to remain outside (Tatham 2009, 173-191). They can be considered as "quasi-members," a status which results from a combination of high economic interdependence with the Union (as evidenced by the deep level of their integration into the single/internal market) and strong popular opposition to full membership, as evidenced by the referendums in Norway (1972 and 1994 against EU membership) and in Switzerland (1992 against EEA membership) which put paid to their formal participation in the respective processes of supranational integration (Tatham 2009, 22, 60, 68, 175-182, 185-186). The remaining EFTA States were thus forced to look to alternative methods in order to manage their deep trading and policy relations while acknowledging that

> the strong asymmetry in market size and trade shares results in the far-reaching formal or informal adoption of highly legalized EU rules by the quasi-members. The basic mechanism behind the Europeanization of the quasi-members is a highly institutionalized form of conditionality (granting equal market access in return for rule adoption) […]. (Schimmelfennig 2010, 328)

The hallmark of the period before the EEA or the series of bilateral agreements with Switzerland, it may be argued, was one of socialization to EEC/EU law through a process of voluntary norm diffusion. Moreover, the present author would still contend that socialization (Kelley 2004; Risse-Kappen, Ropp, and Sikkink 1999; Schimmelfennig, Engert, and Knobel 2006) itself still has a role to play in the Europeanization of EFTA national and regional judiciaries as the basis for norm diffusion, especially in the form of Court of Justice rulings.

Having presented the wide conceptual background to the impulses affecting Europeanization in EFTA and its Member States, this study will concentrate on an even more closely delimited part of this complex process, by focusing on the national and supranational judiciaries in EFTA. In particular, it will consider the extent and under what conditions the Union *acquis* (including Court of Justice rulings) has been (successfully) promoted or diffused in EFTA State courts or the EFTA Court itself in their decision-making processes (Lavenex 2006).

2. Relations between the EU and EFTA

a. Background

Trade relations between the states in the EU and EFTA have always been considered important since the foundation of these two regional organizations in the 1950s and 1960s. Nevertheless, while free trade has remained at the heart of both organizations, their respective development has reflected different aspirations. For the Union, in its original incarnation as the EEC, the pursuance of a free trade policy agenda—based initially on a customs union and a common external tariff *vis-à-vis* third countries—between its Member States was seen as an economic means to a political end, viz, their integration and ostensible union in broadly federal terms. For EFTA, as highlighted in the previous section, the object was to balance their concerns regarding the protection of national sovereignty and/or military neutrality with a desire to lower barriers on trade in certain goods between Member States while maintaining separate national tariff walls *vis-à-vis* third countries.

With the 1973 EEC accession of two EFTA founding members, the United Kingdom and Denmark, together with Ireland, the remaining EFTA States individually concluded bilateral free trade agreements with the then Community. Further steps were taken in 1984 (Preston 1997a) when EFTA proposed a new multilateral dialogue to the EEC and in April that year both groupings committed themselves to the development of the "Luxembourg process." According to their Joint Declaration, the EEC and EFTA sought to cooperate on the harmonization of standards, the removal of technical barriers, the simplification of border formalities and improved action against unfair competition. Underlining their mutual interest in going beyond strictly trade issues, they set out the intention to

establish cooperation in research and development, working conditions, culture, and the environment. Political commitment to the process was represented by the setting up of a High Level Steering Group.

While the Luxembourg process achieved some tangible results, the publication of the Commission's 1985 *White Paper on the Internal Market*, the commencement of the successful negotiations for the Single European Act, and the complete implementation of the Single Market programme projected for the end of 1992 together acted as a catalyst to alter the EFTAn view of membership. Fear of exclusion from this Single Market was matched, at least externally and politically, by the collapse of Soviet rule in Europe with the concomitant relaxation of the neutral constraint on most EFTAns as well as their economic need to undertake more trade with the West to replace the loss of their traditional markets in Eastern Europe (Preston 1997b, 89).

A number of EFTA States were coming to the obvious conclusion that they should apply for EEC membership and had been considering the possibility when a new proposal was made by the then-Commission President, Jacques Delors, in a speech to the European Parliament on 17 January 1989. He stated in respect of EEC-EFTA relations that there were two options: (i) maintaining then-existing essentially bilateral relations, with the ultimate aim of creating a free trade area encompassing the Community and EFTA; or (ii) a new, more structured partnership with common decision-making and administrative institutions to make their mutual activities more effective and to highlight the political dimension of their cooperation in the economic, social, financial, and cultural spheres (17).

Delors noted that the options would change if EFTA were to strengthen its own structures. In that case, the framework for co-operation would rest on the two pillars of the EEC and EFTA. If that were not the case, there would simply be a system based on Community rules that could be extended—in specific areas—to interested EFTA countries and then, at some possible future date, to other European countries. He continued:

> But if we leave the institutional aspect of such a venture aside for a moment and focus on the substance of this broader-based cooperation, several delicate questions arise. It becomes clear in fact that our EFTA friends are basically attracted, in varying degrees, by the prospect of enjoying the

> benefits of a frontier-free market. But we all know that the single market forms a whole with its advantages and disadvantages, its possibilities and limitations. Can our EFTA friends be allowed to pick and choose? I have some misgivings here.
> The single market is first and foremost a customs union.
> Are our partners prepared to abide by the common commercial policy that any customs union must apply to outsiders? Do they share our basic conceptions? The single market also implies harmonization. Are our partners willing to transpose the common rules essential to the free movement of goods into their domestic law and, in consequence, accept the supervision of the Court of Justice, which has demonstrated its outstanding competence and impartiality? The same question arises in connection with state aids and the social conditions of fair competition directed towards better living and working conditions. These are the questions that arise; these are the questions we will be asking. (17-18)

In fact, Delors clearly understood the legal implications for extending the single/internal market rules beyond the geographical confines of the Union, in particular the perceived role of the Court of Justice in this endeavour.

b. EEA Agreement

The eventual EEA proposal was seen as an attempt by the Community both to absorb the recent Iberian enlargement and to complete the implementation of the Single Market programme as well as to divert membership applications from the EFTA States.

However, by the time negotiations started on the EEA in autumn 1990, Austria had already applied for EEC membership in July 1989 and remained, at that time, the only EFTA State that viewed the EEA on parallel tracks to eventual EEC accession. The other EFTAns considered the EEA as a means of enjoying the benefits of the Single Market without the need to address the political implications (sovereignty, neutrality, etc.) as Member States of the EEC (Dinan 2010, 163-164). During 1990 and early 1991, it became progressively clearer to the EFTA States that the EEA would probably not provide them with the relatively low-cost benefits for which they had been hoping (Preston 1997b, 95). Most importantly,

they were generally dissatisfied with the limited "decision-shaping" offered by the EEC and decided that only complete membership would actually give them a voice in the rules which would govern them; and they were fearful of being left out of EMU and consequently any EMU-led economic growth.

By the end of the negotiations in 1991, most of the EFTA States had come to share the Austrian viewpoint, viz., that the EEA was merely a step in the process to full EEC membership (Hveem 1992). The EEA was intended to integrate the then EFTA States— Norway, Sweden, Finland, Iceland, Switzerland, Liechtenstein, and Austria—economically into the Community without giving them a role in its institutions.

In the relevant areas,[6] Community law from all sources—Treaty provisions, legislation, and rules laid down by the Court of Justice, the so-called "*acquis communautaire*"—was made applicable to them.[7] This covered not only the law as it existed when the Agreement was concluded, but also new legislation that might be adopted in the future, as well as future decisions of the Court of Justice. Under the terms of the Agreement, if the EFTA countries refused to accept these new rules, they risked losing their rights in the sector in question. This scheme had great attractions—it created the world's largest trading area[8]—but it also had serious drawbacks. In particular, it meant that the EFTA countries had to apply legal rules over whose conception, drafting, and enactment they had had virtually no say. The EEA structure established a series of further institutions: including an EEA Council and several committees.

In 1991, the EEA Agreement was declared by the Court of Justice to be incompatible with the EC Treaty.[9] The reasons for this were complex but they centred around the ECJ's objection to the creation of a rival court, the proposed EEA Court. Since this would have had jurisdiction to interpret EEA law, it would have had great influence on the development of Community law. The Court of Justice's objections were not assuaged by the fact that the majority of

6 These include free movement of goods (but only regarding products originating in the Contracting States), persons, services, and capital. Agriculture is excluded.
7 In some cases, modifications were made.
8 Though smaller in area than the territory covered by the North American Free Trade Agreement (NAFTA), it has more consumers and a greater gross domestic product.
9 Opinion 1/91, 1991.

judges on the EEA Court would have been judges from the Court of Justice; indeed, this was an added grievance. The Agreement was then amended to meet the Court of Justice's objections and the new version was approved by the Court in 1992.[10] A further setback occurred when the agreement was rejected by the Swiss voters in a referendum, which meant that Switzerland had to drop out.[11]

The EEA Agreement eventually came into force on 1 January 1994 between the Community countries and Norway, Sweden, Finland, Iceland, and Austria. Due to the successful conclusion of parallel negotiations to join the EU, Austria, Finland and Sweden left EFTA on 1 January 1995 when they became Union Member States (although they continued to be members of the EEA): meanwhile Liechtenstein acceded to EFTA and to the EEA after approval by a referendum on 9 April 1995. Thus the EFTA side of the EEA currently comprises Iceland, Norway and Liechtenstein.

The Court of Justice's 1992 Opinion led to the establishment of a two-pillar structure for the EEA with solely EEA-EFTA institutions on one side and Joint EEA bodies on the other.[12] One of the solely EFTA institutions is the EFTA Court, which interprets the EEA Agreement with regard to the EEA-EFTA States and ensures that it harmonizes its interpretations with those of the Court of Justice: this forms one of the focuses of the present work.

c. Switzerland

With the rejection in the 1992 popular referendum on membership of the multilateral EEA, the Swiss federal government was forced back onto the bilateral trade track that Switzerland had been pursuing with the EEC, at least since its 1972 Free Trade Agreement.[13] In dealing with the EU, the federal government

10 Opinion 1/92, 1992. The Agreement was finally signed in Oporto, Portugal, on 2 May 1992.
11 As a result, the Agreement had to be amended by a Protocol signed in Brussels on 17 March 1993.
12 On the EEA Agreement generally, see Norberg, Hokborg, Johansson, Eliasson, and Dedichen (1993). For an outline of the institutions, see the information on the EFTA official website, available at: www.efta.in. For more on the institutional framework, its operation and the need to ensure homogeneity between the EC and EEA-EFTA legal orders, see Blockmans and Łazowski (2006, 108-137).
13 OJ 1972 L300/191.

decided upon sector-by-sector bilateral negotiations—the *leitmotif* of Swiss-EU relations ever since (Tatham 2009, 185-186).

Negotiations commenced in 1994 and were concluded on seven agreements—known as the "Bilaterals I"—in 1999. These agreements cover: (i) free movement of persons;[14] (ii) overland transport;[15] (iii) air transport;[16] (iv) agricultural products;[17] (v) research;[18] (vi) technical barriers to trade;[19] and (vii) public procurement.[20] The Swiss approved the Bilaterals I package of agreements in a referendum in May 2000 and they eventually entered into force on 1 June 2002 (see Breitenmoser 2003; Schwok and Levrat 2001). However, a referendum held on 9 January 2014 determined—by a margin of just 50.3% in favour—that quotas should be re-applied to EU nationals wishing to benefit from the provisions of the FMPA.[21] With the referendum, the continued operation of this bilateral agreement has accordingly been put in jeopardy (Hewitt 2014; Foulkes 2014).

A second set of sectoral, bilateral agreements in nine new areas—the "Bilaterals II" package—were concluded in May 2004 and signed in October 2004 (see Blockmans and Lazowski 2006, 155-157, 169-173). The agreements cover: (i) taxation of savings;[22] (ii) participation in Schengen;[23] (iii) asylum (Dublin Convention);[24] (iv) judicial and administrative cooperation in the fight against fraud;[25] (v) trade in processed agricultural products;[26] (vi) partic-

14 OJ 2002 L114/6.
15 OJ 2002 L114/91.
16 OJ 2002 L114/73.
17 OJ 2002 L114/132.
18 OJ 2002 L114/468.
19 OJ 2002 L114/369.
20 OJ 2002 L114/430.
21 The transitional arrangements under Art 10 FMPA (as amended by the Enlargement Protocols) allowed Switzerland to impose quantitative restrictions on resident permits to EU nationals between five and twelve years after the entry into force of the FMPA. Limits were progressively abolished from 1 June 2007, with final elimination projected to take place on 31 May 2014 (Blockmans and Lazowski 2001, 177-181).
22 OJ 2004 L385/30.
23 OJ 2008 L53/52.
24 OJ 2008 L53/5.
25 OJ 2009 L46/6.
26 OJ 2005 L23/19.

ipation in the European Environment Agency;[27] (vii) statistical cooperation;[28] (viii) participation in the Media programme;[29] and (ix) avoidance of double taxation of retired EU officials.[30] Only with respect to Swiss association to the Schengen *acquis* was a referendum successfully requested—held on 5 June 2005, the Swiss electorate voted 54.6% in favour of the EU-Switzerland Schengen and Dublin Bilateral Agreements.

Legally speaking, each bilateral agreement is the result of a separate negotiation process and the approach is also quite different from the EEA Agreement: since the EU's *acquis* is not automatically the basis of the agreements, the nature of the legal obligations arising under nearly all of the each bilateral agreements comes closer to traditional international than to supranational EU law.[31] Consequently, the principle underlying the relations between the Union and Switzerland is not that of "legal homogeneity" but rather the recognition of the "equivalence of legislation."

Again, unlike the EEA, there is no EU-Switzerland Association Council or overarching Joint Committee or Court. Instead, relations are decentralized and managed within each sectoral agreement by their respective "mixed committees" composed of Swiss and EU representatives. These mixed committees are in charge of managing both the technical and the political aspects of the bilateral agreements through information exchange and, when necessary, the extension of EU legislation relevant for Switzerland. They are also the forum where implementation problems are discussed, and accordingly provide a kind of *ad hoc* monitoring function. The absence of central coordinating institutions reflects the formally weak legalization of Swiss-EU association.

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27 OJ 2006 L90/37.
28 OJ 2006 L90/2.
29 OJ 2007 L303/11.
30 This Agreement was concluded between the Swiss Federal Council and the European Commission.
31 The exceptions are the bilateral agreements on air transport and on Schengen. Interestingly, Articles 2, 8, 9 and 10 of the latter bilateral agreement provide that the mixed committee under such agreement has the power to settle disputes arising from substantially divergent interpretations of the Schengen *acquis* by the Court of Justice and Swiss courts and administrative authorities: it is thus arguable that, in these cases, the mixed committee exercises a quasi-judicial authority.

3. Role of the Court of Justice in Constitutionalizing EU Trade Law

a. Internal Dimension

The Union's Economic Constitution

In furthering the completion and deepening of the Internal Market, the Court of Justice has moulded the EU's economic constitution (Poiares Maduro 1988)—most particularly through its creation and active use of the principles of supremacy and direct effect as the instruments of its work—and has thereby rendered itself an actor in intra-EU trade policy. The Court of Justice's formation of the "constitutional charter"[32] of an EU governed by the rule of law has also been achieved through its recognition of the autonomous nature of the EU legal order (Tatham 2006, 1-147);[33] the principle of the indirect effect of EU law (also known as the "principle of interpretation [of national law] in conformity with EU law");[34] the general principles of law[35] (including human rights[36]); Member State liability for breach of EU law;[37] and the need for national remedies to protect breaches of rights derived from EU law.[38] All these principles have flowed from the decision-making capacity of the Court of Justice as a result of its policy to pursue an integration agenda of encouraging trade flows by reducing or bringing down barriers impeding such flows, especially when—despite express provisions in the Treaties—the common (now internal) market failed to be completed as scheduled. Indeed, in the mid-1980s, the Court of Justice was already able to

32 Case 294/83, 1986; and Opinion 1/91, 1991.
33 Case 26/62, 1963; and Case 6/64, 1964.
34 Case 14/83, 1984; Case 106/89, 1990; Case 334/92, 1993.
35 General principles of EU law are not to be confused with the fundamental principles of Union law, as expressed in the TEU and TFEU, e.g., the principles of free movement of goods and persons. General principles of law constitute the "unwritten" law of the Union and include various principles such as equality (Case 224/00, 2002; Case 388/01, 2003); proportionality (Case 8/55, 1954-1956; Case 9/73, 1973; Case 30/77, 1977; Case 181/84, 1985); subsidiarity (Case 84/94, 1996); and legal certainty (Case 78/74, 1975; Case 43/75, 1976; Joined Cases 66/79, 127/79, 128/79, 1980). Some of these principles are now expressly provided for in the TEU and TFEU.
36 Case 26/69, 1969; Case 11/70, 1970; Case 4/73, 1974; Case 44/79, 1979; and Case 63/83, 1984.
37 Joined Cases 6/90, 9/90, 1991; and Joined Cases 46/93, 48/93, 1996.
38 Case 33/76, 1976; Case 45/76, 1976; Case 158/80, 1981; Case 79/83, 1984.

make the following observation: "The principle of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of law of which the Court ensures observance."[39]

In particular, in its judicious use of direct effect as a strategic instrument in trade policy, it has "created" Union-based economic trade rights, the breach of which are enforceable by affected individuals and private commercial entities before their own national courts,[40] whose role in enforcing such rights before them has been key to the success of the Internal Market. Moreover, the Court of Justice principle of EU law primacy generally privileges over conflicting national constitutional rights,[41] the Union trade rights on the free movement of goods, persons, establishment and capital, as well as the freedom to provide and receive services and the protection of competition (and those linked to them, e.g., the protection of intellectual property rights). While the Court of Justice interprets these freedoms broadly, it is restrictive in determining the justifiable limits which states can impose on them: in other words, impediments to free trade must be kept to an absolute minimum.[42]

National Constitutional Rights and Free Trade

In its pursuit of a free-trade agenda at the EU level, the Court of Justice has been subject to criticism for privileging trade rights over national fundamental rights. Such fears had already arisen in the late 1960s in respect to German courts' fears of infringement of the domestic right to property and other fundamental rights by the Court of Justice's rulings, in particular warnings from the German Federal Constitutional Court (FCC)[43] about the acceptable limits to integration. These concerns mostly failed to dampen the Court of Justice's enthusiastic pursuit

39 Case 240/83, ADBHU [1985] ECR 531, 548.
40 Exceptionally directly before the Court of Justice itself, e.g., Art 263 TFEU.
41 Case 11/70, 1970.
42 For example, Art 36 TFEU on the grounds permitted to maintain national quantitative restrictions and measures having equivalent effect; Arts 45(3) and (4), 51 and 52(1), and 62 TFEU on national restrictions to the free movement of workers and the freedoms of establishment and to provide services justifiable on grounds of public policy, public security and public health as well as the public service exception.
43 Most importantly, FCC 1974.

of its trade policy agenda of forwarding completion of the Internal Market in the face of European institutional inertia during the 1970s and early 1980s.

In response to such national court concerns, however, the Court created the "unwritten" general principles of EU law inherent in the Treaties, thereby giving itself sufficient leeway, for example, to formulate a catalogue of Community/Union rights.[44] In doing so, it attempted to recalibrate the balance between its predominantly trade policy agenda and the recognition of an increasingly social dimension to integration, by guaranteeing human rights in the EEC. Its halting development from the 1970s onwards of a rights catalogue to bind the Community (and the later Union) in its operations took, as its inspiration, the common constitutional traditions of the Member States as well as the specific rights provisions of some Council of Europe (i.e., non-EU) treaties, such as the 1950 European Convention on Human Rights and the 1961 European Social Charter, which also bind the EFTA States.[45] Nevertheless, its case-by-case, piecemeal creation of such a catalogue was not an ideal solution to guaranteeing human rights for the Union and its citizens (Lenaerts and Van Nuffel 2011). While Treaty reform from the Single European Act 1986 onwards allowed for an increasingly important role for rights protection in the Union, it was the formulation of the Charter on Fundamental Rights of the European Union in 2000 that has represented the most decisive step in this process. The Charter had (due to certain national objections) been initially included as a declaration to the Treaty of Nice 2001 but became formally binding on and as part of the Union's legal and institutional system through the entry into force of the Lisbon Treaty 2007.[46] Moreover, the Lisbon amendments finally required the Union to accede in its own right to the European Convention on Human Rights and its judicial enforcement mechanism.[47]

This formal Union-level acceptance of the need to protect human rights has also altered the scenery against which the Court of Justice operates in relation

44 On this issue, see Clapham (1991); Alston, Bustelo, and Heenan (1999).
45 See now Article 6(3) TEU. For comparisons between the two major systems see Senden (2011).
46 Article 6(1) TEU provides that the Charter "shall have the same legal value as the Treaties" (see Peers, Hervey, Kenner, and Ward 2014).
47 Article 6(2) TEU provides the necessary power for the EU to accede to the ECHR (see Gragl 2013).

to rights at the national level. While the Court of Justice[48] had already recognized that the protection of national identities of Member States was a legitimate objective that the EU legal order had to respect,[49] domestic (constitutional) court responses to the deepening integration implicit in the Maastricht and Lisbon Treaties[50] have forced it to reappraise its approach to the respect of domestic constitutional rights in the Union legal order.

This reappraisal has occurred within the contextual evolution provided by Article 4(2) TEU that states, in part: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional […]." In a series of more recent cases, the Court of Justice has accordingly taken into consideration domestic judicial concerns of national identity (including constitutional core principles and rights) *vis-à-vis* the free trade rights under EU treaty law.[51] It has thereby initiated a process aimed at recognizing the legitimate concerns of domestic courts in a proper balancing of EU free trade rights and rights under the national constitution, without calling into question the proper functioning of the Internal Market or impinging upon the operation of EU external trade relations. This reflects an emerging understanding of the EU as a multilevel governance regime, with the Court of Justice and Member State courts actively contributing to its evolution (Pernice 1999).

Such a multilevel understanding of economic governance is designed and reviewed in "multilevel constitutional systems" (Petersmann 2011, 44) and so varies according to whether the relevant economic regulations are governed, as has been seen, by EU constitutional law as interpreted by the Court of Justice or by national or regional law harmonized to EU law as used or rejected by domestic courts or the EFTA Court operating in their own constitutional systems. This extension of the applicability of EU law as a type of common law of trade, as developed through Court of Justice case-law and considered as some sort of

48 Case 473/93, 1996.
49 Case 147/86, 1988; Case 379/87, 1989; Case 159/90, 1991.
50 FCC 1994 and 2010.
51 Case 36/02, 2004; Case 341/05, 2007; Case 438/05, 2007; Case 213/07, 2008; Case 208/09, 2010; Case 391/09, 2011.

latter-day *lex mercatoria* (Stone Sweet 2006, 629-633), represents an extension of EU (commercial) power beyond the borders of the Union (Jacoby and Meunier 2010, 308-309). Consequently, EU law limits the powers of non-Member States having FTAs with the Union that see themselves as being under factual constraint to adopt and implement EU law with a view to minimizing trade barriers and distortions as well as reducing transaction costs to their own disadvantage (Cottier and Hertig 2003, 268).

b. External Dimension

The Court of Justice has not limited itself to constitutionalizing the freeing-up of trade within the Union: it has also turned its eyes towards the Union's trade relations with third countries.

In its foray into external competences, the Court of Justice has positioned itself as an actor in determining the scope of trade policy in respect to express and exclusively Union policies in the form of the common commercial policy[52] and by interpreting the Union's exclusive internal competence to act in an area as being impliedly transferred to the external plane.[53]

The Court of Justice has further bolstered its position by deciding, on a case-driven basis, whether provisions of third-country FTAs with the EU,[54] as well as decisions made by joint institutions set up under such FTAs,[55] can enjoy direct effect in the Union before national courts (even though such protection should be regarded as asymmetric in that the relevant third-country courts, except in certain situations, are not obliged to grant such reciprocal protection to EU nationals before them when claiming infringement of that FTA). This does not, however, amount to a permissive recognition of direct effect for provisions of such FTAs within the Union legal order. Rather, the Court of Justice approaches each case

52 Opinion 1/75, 1975.
53 Case 22/70, 1971.
54 Case 104/81, 1982; Case 270/80, 1982.
55 Case 192/89, 1990. Provisions of Partnership and Co-operation Agreements—which entail looser trade and economic links than under the Europe Agreements with the Central and Eastern European states (which acceded in 2004 and 2007) and the Stabilization and Association Agreements (with the Western Balkans states)—may also enjoy direct effect: Case 265/03, 2005.

on its merits, examining the content of the EU-FTA provision with a similarly-worded provision in the Treaty on the Functioning of the European Union (TFEU), the nature of the FTA, the trade as well as the political and economic relationship of the Union with the third country, and the temporal stage in the deepening of relations, especially (although not exclusively) taking into account the importance of an impending accession (Tatham, 2002/2006).

In contrast, the Court of Justice has been cautious in recognizing the way international trade agreements, of which the EU is signatory, have effect within the Union legal system. The main protagonist in this respect is the World Trade Organization (WTO), whose law may be used as a means of interpretation of EU law[56] but which enjoys no direct effect.[57] In this sense, the Court of Justice sees its role as preserving the economic constitution of the Union and the principles created under it from encroachment by the WTO (and its predecessor, the General Agreement on Tariffs and Trade (GATT)) (Kuijper and Bronckers 2005).

4. Treaty Requirements of Judicial Homogeneity as an Example of EU Norm Diffusion

Diffusion of EU norms not only takes the form of the requirement to harmonize national laws of third states to those of the EU but may also extend to the necessity to align domestic judicial practice in given fields. The way in which courts of EFTA States and the EFTA Court strike the balance between the protection of domestic constitutional rights and the principle of free trade, it is contended, is crucial in their own evolution as trade policy actors. In view of the fact that EU law and its interpretation by the CJEU are regarded by the EFTA States' courts and the EFTA Court itself as international law, domestic constitutional considerations on the reception and position of such law in the national system consequently loom large in the minds of courts applying or refusing to apply it in cases before them. By participating in this recalibration of

56 Case 245/02, 2004; Joined Cases, 447/05; 448/05, 2007.

57 Case 149/96, 1999; Joined Cases 120/06 P; 121/06 P, 2008. The Court of Justice earlier rejected the possibility for Member States to review Community measures within the framework of the GATT: Case 280/93, 1994.

trade relations between EFTA and the EU, domestic courts and the EFTA Court have emulated the role of trade policy actor played by the CJEU in the Union context. Furthermore, they have used this example as a means to pursue a differentiated trade policy dynamic in order to increase or lessen the impact of EU law and its CJEU interpretations to the extent that its perceived impact on local constitutional arrangements is adversely affected.

a. EFTA States' FTAs with the EEC

The 1972 FTAs which the individual states of EFTA negotiated with the EEC in the light of impending accessions of the UK and Denmark (together with Ireland) contain no clause requiring courts of EFTA States to use Court of Justice interpretations of EEC Treaty provisions when seeking to apply similarly-worded provisions of the relevant FTA in the cases before them. As a result, courts in the EFTA States were largely left to determine the application of Court of Justice interpretations on a sector-by-sector and case-by-case basis, variously accepting or rejecting its application.

Refusal of national courts to apply Court of Justice interpretations of EU law to similarly-worded provisions of EU-FTAs may be exemplified by the superior courts of Austria and Switzerland—both monist states—in their dealings with arguments before them based on the provisions of their relevant FTAs with the EEC.[58] For example, the Swiss Federal Court in *Adams*[59] denied the petitioner's claims to apply EEC competition rules as interpreted by the Court of Justice, by means of the FTA, even though there was room for direct application to the extent that private undertakings nullified and impaired trade liberalization that had otherwise been achieved: the FTA was purely a trade treaty, the Court held, and confined to regulating industrial free trade.[60] Although Article 23 FTA reproduced the then EEC competition provisions (now Articles 101, 102, and 107), it merely laid down what practices were incompatible with the proper functioning of the FTA, but did not prohibit them or designate them as unlawful nor, in contrast to the EEC rules, did it declare them void or lay

58 JO 1972 L300/2; JO 1972 L300/189. Also see Seidl-Hohenveldern (1983, 24-25).
59 BGE 104 IV 179 (Swiss Federal Court).
60 For a discussion of the case, see March Hunnings (1977).

down sanctions; rather, it merely authorized the contracting parties to take suitable measures against such anti-competitive practices. Thus Article 23 FTA did not create any right of action for private persons before the Swiss courts and therefore could not be used to justify the passing on of business secrets to the European Commission, in breach of domestic criminal law.

Use of EEC competition law was also invoked in an Austrian anti-trust case[61] where plaintiffs referred to Article 86 EEC (now Article 102 TFEU) by analogy in order to prove their contention that an agreement, according to which a large fig coffee producer granted a fidelity bonus to permanent clients, constituted a cartel. The Austrian Supreme Court held that such an agreement did not constitute a cartel under Austrian law. Austrian law at that time defined a cartel as an agreement serving the common interests of all the partners, whereas the agreement under dispute merely intended to promote the interest of the fig coffee producer. The Court therefore deemed it irrelevant to refer to Article 86 EEC under such circumstances.

In a similar way, an attempt to achieve regional exhaustion of intellectual property rights as developed in EEC law was rejected by the Austrian Supreme Court in *Austro-Mechana*[62] when it held that the FTA with the EEC did not oblige Austria to admit a parallel importation of gramophone records from Germany. The holder of the copyright of these records had transferred his rights for Germany to GEMA and for Austria to Austro-Mechana. The defendant alleged that such splitting of the copyright was contrary to Austria's FTA commitments towards the EEC, submitting that Articles 13 and 20 FTA prohibited the use of industrial and commercial property as a disguised restriction of trade between the contracting parties.

The language of Articles 13 and 20 FTA was nearly identical to that of Articles 30 and 36 EEC (now Articles 34 and 36 TFEU). According to the exhaustion doctrine as expounded by the Court of Justice, owners of an intellectual property right cannot rely on their exclusive right in order

61 Case OGH 30.11.1976 (Supreme Court of Austria); OLG 30.08.1979 (Higher Regional Court of Frankfurt am Main), likewise refused to interpret the Austrian notion of a "cartel" by means of the EEC Treaty.

62 Case No. 4 Ob. 302/79 (Supreme Court of Austria).

to prevent the (parallel) importation and marketing of a product which has been marketed in another Member State by themselves, with their consent, or by a person economically or legally dependent on them.[63] In this particular context, then, the policy of the Court of Justice in ensuring the free flow of trade in the EEC (now in the Union) has been to allow for the broadest opportunities for parallel imports. Against this policy background, the defendant therefore contended that Court of Justice decisions[64]—interpreting the said EEC Treaty Articles as permitting such parallel imports between Member States—should also be applicable to the interpretation of Articles 13 and 20 FTA, following from Austria's commitments in Articles 22 and 27 FTA. The Supreme Court rejected the argument, stating that the creation and exercise of copyrights in the widest sense were not subject to the FTA, at least in so far as the restrictions stipulated by the parties did not extend beyond the substance of the proprietary right.

Likewise the plaintiffs' arguments in respect of quantitative restrictions on imports (Article 13 FTA) and on derogations (Article 20 FTA) within the free trade area were rejected by the Swiss Federal Court in *Bosshard*[65] and in *Physiogel*[66] on the grounds that the provisions of the relevant FTAs—although worded in the same way as the relevant provisions of the then EEC Treaty (now Articles 34 and 36 TFEU)—nevertheless could not be interpreted in the same way as Court of Justice rulings since the FTAs differed substantially from the Treaty in purpose and nature; in this way, the Federal Court expressly excluded application of *Cassis de Dijon*[67] to the FTA. In fact, it took a 2010 amendment of the Swiss Federal Law on Technical Barriers to Trade to extend unilaterally *Cassis de Dijon* to Switzerland, with the result that those products that meet the relevant requirements of EU common rules or, in their absence, the rules of an EU or EEA Member State, can freely enter the Swiss market without having to fulfil any additional

63 See the cases cited to in Lenaerts and Van Nuffel (2011, 221).
64 Joined Cases 55/80, 57/80, 1981; Case 78/70, 1971.
65 BGE 105 II 49 (Swiss Federal Court).
66 *Qualicare AG v. Regierungsrat des Kantons Basel-Landschaft*, BG, Case No. 2A.593/2005 (Swiss Federal Court).
67 Case 120/78, 1979.

Swiss requirements. As this was a unilateral act, it meant that the EU did not recognize the equivalence of the corresponding Swiss legislation.

Yet not all practice of the courts in these EFTA States, with respect to EEC rules, was negative. In a further case,[68] the Austrian Constitutional Court drew direct conclusions from practice pursuant to EEC rules. It had to decide whether the Austrian-German Commercial Treaty of 12 April 1930, granting German citizens the right to acquire real estate in Austria, had become obsolete. The Court held that the Treaty was no longer applicable, as it had been abrogated by desuetude. As proof of such desuetude, the Court *inter alia* relied on the fact that Germany had not asked the EEC Council of Ministers to extend the validity of this Treaty beyond the transition period set out in the EEC Treaty.[69]

Moreover, the Swiss Federal Court has proceeded on a case-by-case basis in deciding whether or not provisions of the EEC-Swiss FTA may enjoy "direct effect" or be "self-executing" in the national system, e.g., in respect of rules of origin,[70] and of the principle of non-discrimination.[71]

b. EEA

According to Article 6 EEA and Article 3(2) of the EFTA Surveillance and Court Agreement, the EFTA Court is, on the one hand, bound to follow Court of Justice precedents ("shall […] be interpreted in conformity with the relevant rulings of the Court of Justice") for the period prior to the signing of the EEA Agreement (2 May 1992) and, on the other hand, required "to pay due account" to the principles laid down by the relevant Court of Justice rulings rendered after that date. These provisions concern either the interpretation of the EEA Agreement itself or of such rules of EU law in so far as they are identical in substance to the provisions of the EEA Agreement.

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68 Case No. B 103/71, 1973 (The Constitutional Court of Austria).

69 OJ 1969 L32/39. This was subsequently revised by the time of the Constitutional Court of Austria decision by Council Decision of 29 September 1970 (JO 1970 L225/24) and Council Decision of 25 October 1971 (JO 1971 L248/7).

70 BGE 111 Ib 323; BGE 114 Ib 168 (Swiss Federal Court).

71 BGE 112 Ib 183 (Swiss Federal Court).

It might appear that the EFTA Court's duty is different depending on when the Court of Justice ruling was made, since an obligation to follow a precedent is not the same as one to pay due account to it. However, the EFTA Court has recognized[72] that the establishment of a dynamic and homogeneous market was inherent in the general objective of the EEA Agreement and has, in turn, taken a dynamic view of the obligations for judicial homogeneity.[73] In practice, the EFTA Court does not distinguish between pre- and post-May 1992 Court of Justice case-law, thereby respecting it in its entirety (Skouris 2005, 124-125) and applying it directly in cases before it, without discrimination as to when the Court of Justice ruling was made. Moreover, the principle of homogeneity has led to a presumption that identically-worded provisions in the EEA Agreement were to be interpreted in the same way as in EU law.[74]

This position has been followed by the Norwegian Supreme Court,[75] which—in one of its first cases where it had to decide on the interpretation of an EEA provision—relied on the Court of Justice ruling in *Keck*[76] when interpreting Article 11 EEA (worded in the same way as Article 34 TFEU) without any discussion of the relevance of the latter ruling in the light of temporal limits on Court of Justice case-law contained Article 6 EEA. This approach was confirmed in later rulings and thus the distinction made in Article 6 EEA has lost its meaning since Norwegian courts have been instructed by the Supreme Court to interpret provisions of the EEA Agreement in conformity with all relevant Court of Justice cases (Graver 2004, 15).

Of even greater interest is the fact that the EFTA Court, like its sister court the Court of Justice, has developed its role in the EEA institutional architecture by the judicious use of and harmonization of practice to Court of Justice case-law (Baudenbacher 2003). Having asserted that the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own,[77] the EFTA

72 Case E-4/01, 2002.
73 Case E-4/04, 2005.
74 Case E-2/06, 2007.
75 *Norsk Retstidende* 1996, 1569 (Supreme Court of Norway).
76 Joined Cases 267/91, 268/91, 1993.
77 Case E-9/97, 1998.

Court subsequently recognized[78] that this distinct legal order was characterized by the creation of an internal market, the protection of the rights of individuals and economic operators and an institutional framework providing for effective surveillance and judicial review.

In fleshing out this economic constitutional order of the EEA, the EFTA Court has emulated the Court of Justice-created fundamentals of the Union legal order and introduced EEA-equivalent concepts of direct effect,[79] supremacy,[80] state liability,[81] and general principles of law[82] (including fundamental rights[83]), as well as the economic freedoms and their permissible limitations.[84] Such activism has allowed the EFTA Court to emulate some of the main constitutional bases of the Union legal order set out in Court of Justice rulings, albeit in a circumscribed manner and based on the fact that, whilst the depth of integration under the EEA Agreement is less far-reaching than under the TEU and TFEU, the scope and objective of the EEA nevertheless go beyond what is usual for an agreement under public international law.[85]

This positive evolution may be contrasted to the practice presented by superior Austrian courts with respect to the EEA Agreement during the country's one-year membership in the EEA. While both the Austrian Supreme Court[86] and the Administrative Court[87] had recognized that provisions of the EEA Agreement would have priority over earlier, conflicting domestic legislation, the situation was different when it came to a conflict between the EEA Agreement and a subsequent national legal provision. For example, the Administrative Court:

78 Case E-2/03, 2003.
79 Case E-1/94, 1994-1995.
80 Case E-1/01, 2002.
81 Case E-9/97. 1998.
82 Case E-3/11, 2011.
83 Case E-8/97, 1998; Case E-2/02, 2003; and Case E-2/03. 2003.
84 Case E-3/00, 2000-2001; Case E-10/04, 2005.
85 Case E-9/97. 1998.
86 Case No. 4 Ob. 88/94 (Supreme Court of Austria).
87 Case No. 94/16/0182 (Austrian Administrative Court).

> The EEA, however, does not have a supranational character. From the nature of its goals and its systematic methods the EEA-Agreement has essentially to be understood as a multilateral treaty under international law in a traditional manner. […] The [Court of Justice supremacy case-law] under Art. 5 EC-Treaty [now Article 4(3) TEU] can in this respect not be applied to Art. 3 EEA-Agreement. Art. 3 EEA-Agreement is to this extent not "in its essential contents" in the sense of Art. 6 EEA-Agreement identical with Art. 5 EC-Treaty. […] It *can therefore not be assumed, that* the national implementation of the Agreement is carried out in such a manner that the *EEA-Agreement takes priority over national law* (moreover, no constitutional provision was adopted stipulating that the regulations of the Agreement have supremacy in the discussed manner […]). [Emphasis in original]. (Case No. 94/16/0182. See Loibl, Reiterer, and Dietrich 1997, 476)

The Administrative Court thus endorsed the opinion that EEA law in Austrian law did not have priority of effect over subsequent national law: only a constitutional amendment, such as that subsequently secured for EU membership (Seidl-Hohenveldern 1995), could have altered this position. The Austrian superior courts, due to the moderate monist nature of the domestic system,[88] persisted in guaranteeing priority of national constitutional provisions over conflicting EEA rules and thereby confirmed its previous practice under the EEC-Austria FTA. This provides a salutary warning on the way in which deepening economic and trade integration—outside the actual EU constitutional area—can be subject to the ever more rigorous demands of domestic constitutional regimes. Were Austria to have remained in the EEA, then the domestic court practice in respect of this Agreement might have developed at variance with that of other states.

c. Swiss-EU Bilateral Agreements

The possibility of local judicial deployment of CJEU rulings in the trade relations between Switzerland and the EU essentially depends on the provisions

88 This is evidenced by the fact that the Constitutional Court of Austria, under Austrian Constitution Article 140a, has the power to review international treaties for their conformity to law or to the Constitution.

of the relevant bilateral agreement, although account must be taken of the doctrine of "*autonomer Nachvollzug*" (unilateral adaptation), essentially of voluntary alignment or harmonization, according to which Swiss authorities since the late 1980s have required that each new item of national law is to be checked for its compatibility with EU norms.[89]

In the area of the free movement of persons, and similarly to the EEA, Article 16(2) FMPA between the EU and Switzerland provides that where "the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention."

The Swiss Federal Court has recognized the direct effect of FMPA provisions before it,[90] as well as the Euro-conform interpretation of national law harmonized to EU law and the possibility of taking into account subsequent changes in EU law when interpreting such harmonized law.[91] Moreover, it has considered the wording of the Preamble to the FMPA,[92] and of Article 16(1),[93] as compelling enough for it—in some cases—to take CJEU case-law into account in its decision-making, in terms of decisions made after the FMPA entered into force on 1 June 2002.[94] Nevertheless (Maiani 2008, 15-17), even chambers in the Federal Court have

89 As early as 1988, the Swiss Federal Council had decided that new laws should be examined as to whether the draft national legislation was compatible with existing EU law, stating, "This effort to achieve parallelism does not aim at an automatic transposition of European law, but to avoid that unwillingly and unnecessarily new legal differences are created, which hinder the aspired mutual recognition of legal norms." Schweizerischer Bundesrat, "Bericht über die Stellung der Schweiz im europäischen Integrationsprozess vom 24. August 1988," (EDMZ, 1988), 380. Nowadays, every communication of a draft new law to the federal parliament contains a so-called "Europe chapter" which examines the law's relationship to existing or draft European legislation.

90 BGE 129 II 249 (Swiss Federal Court).

91 BGE 129 III 335 (Swiss Federal Court).

92 "Resolved to bring about the free movement of persons between them on the basis of the rules applying in the European Community."

93 "In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them."

94 Case No. 2C_196/2009: BGE 136 II 5 (Swiss Federal Court) (abandoning Case 109/01, 2003 and using instead Case 127/08, 2008); and Case No. 2C_269/2009: BGE 136 II 65 (Swiss Federal Court) (using Case 413/99, 2002): see Kaddous and Tobler (2009, 609-616).

failed to follow the 2003 decision on Euro-conform interpretation of harmonized domestic law,[95] and in some cases they have even ignored it.[96] Such a position has also been maintained by the Swiss Federal Administrative Court, which noted: "It may not be deduced from this that Swiss law should have the same content as EU law, which is not directly applicable in Switzerland. Swiss law must rather be interpreted in an autonomous manner."[97]

Conclusion

In the cases dealt with in this work, courts in the EFTA States as well as the EFTA Court have all approached EU law and Court of Justice case-law from the perspective of their being legal sources of another system under international law. This approach, however, produces different results in different systems. In regards to the EEA system, the EFTA Court has developed that system along the constitutional and economic lines already determined by the Court of Justice in reference to the EU. Thus, while maintaining that the EEA system is one of international law, it has nevertheless qualified such an understanding on the grounds of deepening economic integration with the Union trading bloc and has formulated a consideration of another *sui generis* system in international economic trade akin to the EU. Moreover, the recognition of the international law nature of EU law in the internal systems of EFTA States allows for a degree of flexibility in usage or rejection which is not permissible to EU Member State courts in the face of their duty of sincere cooperation under Article 4(3) TFEU.

Nevertheless, it appears that courts in EFTA take such a flexible approach to Court of Justice case-law in order to derive the maximum benefit from it where the case before them requires. This also allows them the latitude to mould their approaches and institutional perceptions along the lines of the Court of Justice in the Union.

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95 Case No. 4C.337/2005; 185. BGE 132 III 379 (Swiss Federal Court); Case No. 4A_78/2007; and BGE 133 III 568, par. 4.6 (Swiss Federal Court).
96 BGE 124 II 193, par. 6 (Swiss Federal Court).
97 Case No. C-2092/2006, par. 3.5 (Swiss Federal Administrative Court).

The acceptance by courts in EFTA of the Court of Justice as their model for a trade policy actor has been facilitated, for example, by its protection of the Union constitution from external (trade) interference. It therefore comes as no surprise that the Court of Justice acceptance of GATT/WTO law to interpret EU law but its rejection of the former's direct effect and primacy in the Union legal order has been largely replicated by the attitude of courts in EFTA to EU law and Court of Justice rulings. Moreover, even the case-by-case approach of the Court of Justice to finding specific provisions of association agreements to enjoy direct effect in the Union system is also echoed by the practice of courts in EFTA. Importantly, too, where the internal court structure of an EFTA Member State has created a number of supreme courts rather than one central one, then diversity of opinions between them on the status of EU law before them (e.g., in Austria before EU accession or in Switzerland) is redolent of the diverging approaches to EU law in Member State supreme courts.[98]

The requirements, express or implied, to apply Court of Justice case-law in proceedings before them have been used by these courts to reinforce or even gain control over the legal or constitutional relationship between national law and the law deriving from the relevant FTA. The arguments of these courts have been framed in varying ways in order to resolve conflicts between obligations under national constitutional law and international trade law, either in deference, as evinced by a very strong compulsion to interpret the FTA-derived law in a Euro-conform manner, or in defence, as exemplified by a rejection of Court of Justice rulings to interpret trade agreement provisions similarly-worded to those in the TFEU.

Even without the rigours of international trade and the major foreign policy decision to redirect their economic and political future towards the EU, superior or supranational courts of EFTA balance the demands of the free market with those of the rule of law and the rights protected under the relevant constitution or EEA Agreement. They are inevitably drawn into the international political arena that, in previous times, was basically an executive-led competence in external trade policy, possibly subject to parliamentary ratification.

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98 Compare the early reactions to European law of the French Cour de cassation (*Jacques Vabre* [1975] 2 CMLR 336; and *Von Kempis* [1976] 2 CMLR 152) to those of the Conseil d'Etat (*Syndicat Général de Fabricants de Semoules de France* [1970] CMLR 395; and *Cohn-Bendit* [1980] 1 CMLR 543).

Courts have used their perceived protection of the national (or EEA) public interest as a means of determining when constitutional rights may be compromised in favour of trade rights or when they can instead be enforced as necessary barriers to trade.

The "de-politicization" of trade policy through its concomitant judicialization and constitutionalization has allowed courts in EFTA to seize upon a role in trade policy determination similar to the one enjoyed by the Court of Justice, enabling them to become actors in the process of determining the rate and extent to which the Europeanization of this policy sphere evolves. On the one hand, by using Court of Justice rulings, such courts seek to ensure the effectiveness of the FTA through consistent or Euro-conform interpretation, thereby extending their own citizens' rights to trade and to benefit from the economic freedoms as well as encouraging trade flows; on the other hand, by declining to use such rulings, these courts deny the extension of rights and preferences to EU-based individuals and companies, thereby justifying discrimination against EU citizens under the cloak of the protection of sovereignty or fundamental constitutional rights and thus limiting trade flows with the EU.

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