

Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries

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Abstract. This article explores the role of the EU as a global actor in international relations and a promoter of its own standards and values abroad. In particular, this article studies selected substantive and procedural means of exporting the *acquis communautaire* into the legal systems of third countries. It is argued that the substantive means refer to the fundamental ways of implementing the *acquis* into third country legal orders. The procedural means relate to specific technical/procedural tools which either directly or indirectly encourage the implementation of the *acquis* into third country legal orders. The article concludes that these substantive and procedural means are not uniformly applicable, but are rather exercised in accordance with the specific objectives of EU external agreements. Analysis of the selected EU external agreements illustrates that their objectives unquestionably constitute a driving force behind understanding the role and mechanism of the substantive and procedural means of exporting the *acquis communautaire*.

I Introduction

The process of exporting the *acquis communautaire*¹ into legal orders of third countries is an indispensable part of the challenging role of the EU as a global

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¹ In accordance with the EU's Glossary of Definitions, 'The Community *acquis*' is the body of common rights and obligations which bind all the Member States together within the European Union. It is constantly evolving and comprises not only EU primary, secondary binding and non-binding legislation but also the ECJ's case law. EU Glossary <europa.eu/scadplus/glossary/community_acquis_en.htm>, accessed 18 December 2007. For recent publications on the topic see C. Gialdino, 'Some Reflections on the *Acquis Communautaire*' (1995) 32 CML Rev., pp. 1089–1121; C. Delcourt, 'The *Acquis Communautaire*: Has the Concept Had Its Day?' (2001) 38 CML Rev., pp. 829–870; S. Weatherill, 'Safekeeping the *Acquis Communautaire*' in T. Heukels, N. Blokker and M. Brus (eds), *The European Union after Amsterdam* (Kluwer Law International, The Hague, London and Boston, 1998), pp. 153–178, 161–162; L. Auzolai, 'The *Acquis* of the European Union and International Organisations' (2005) 11/2 ELJ, pp. 196–231; H.G. Krenzler and M. Everson, 'Preparing for the *Acquis Communautaire*: Report of the Working Group on the Eastward Enlargement of the European Union', *RSC Policy Paper*, No. 98/6, European University Institute, <www.iue.it/RSCAS/WP-Texts/98_06p.htm>, accessed 18 December 2007; K. Mortelmans, 'Community Law: More than a Functional Area of Law, Less than a Legal System' (1996) 1 LIEI, pp. 23–48; R. Petrov, 'The Dynamic Nature of the *Acquis Communautaire* in EU External Relations' (2006) 18/2 *European Review of Public Law*,

actor.² Indeed, the adoption of the *acquis* encourages third countries to revisit the compatibility of their national rules and standards to those of the EU, in order to share ‘the Union’s common values’.³ Furthermore, the export of the *acquis* contributes to the establishment of a friendly legal environment between the EU and third countries, therefore encouraging the flow of investment and the mutual liberalization of markets.

Deeper insight into the legal and procedural instruments of this phenomenon could clarify many problems, which are relevant for various fields of European integration. The simple question ‘how does the EU export its *acquis communautaire*?’ could help us in understanding the logic behind many tools of the EU external policy towards third countries, in particular, the impact of objectives of EU external agreements on the process of exporting the *acquis*. For this purpose, this article will focus on a few selected substantive and procedural means by which the EU exports the *acquis* into the legal systems of third countries. The phrase ‘substantive means’ refers to the fundamental ways in which the *acquis* is implemented into third country legal orders. ‘Procedural means’ relates to specific technical/procedural tools which either directly or indirectly encourage the implementation of the *acquis*. We shall equip our examination by the following procedural means: formal/informal involvement in the EU legislation procedure, the exchange of information, and technical and financial assistance on behalf of the EU.

In general, the purpose of this article is not to provide an exhaustive analysis of the substantive and procedural means of exporting the *acquis communautaire* into third country legal systems. This subject matter is vast and constantly evolving, reflecting the dynamic nature of EU external policy. Therefore, we endeavour to highlight only fundamental features of this complicated but highly interesting process by illustrating the most frequently applied means of exporting the *acquis* deduced from EU external agreements and EU external policies.

II Substantive Means of Exporting the *Acquis Communautaire* into Third Country Legal Systems

Below we examine and systemize the major substantive means of exporting the *acquis communautaire* into third country legal systems in EU external

pp. 741–771; R. Petrov, ‘The External Dimension of the Acquis Communautaire’, *Max Weber Programme Working Papers*, No. 07/02, European University Institute, <cadmus.iue.it/dspace/handle/1814/6931>, accessed 18 December 2007; A. Mahen, ‘Transformative Engagement Through Law: The Acquis Communautaire as an Instrument of EU External Influence’ (2007) 9/3 *European Journal of Law Reform*, pp. 361–392.

² On this matter see M. Cremona, ‘The Union as a Global Actor: Roles, Models and Identity’ (2004) 41 *CML Rev.*, pp. 553–573.

³ Article 2 of the Lisbon Treaty.

agreements. These means serve as the basic tools to ensure the implementation of the *acquis* into third country legal orders. For the purpose of our study we propose distinguishing two types of the *acquis* applicable within EU external agreements, namely fixed and dynamic. Consequently, the objectives of external agreements and the need to export either a fixed or dynamic *acquis* imply different substantive means of exporting.

1. Export of the Fixed Acquis Communautaire into Third Country Legal Systems

The export of the fixed or so-called ‘pre-signature’ *acquis* into third country legal systems means that parties to external agreements agree to fix the scope of the *acquis communautaire* at the point of the formal signature of an agreement. However, the scope of the fixed *acquis* does not exclude its further revision in the course of the evolution and enhancement of bilateral relations between the EU and the third country. A political decision to set specific objectives in external agreements, or to exercise an evolutionary clause (the establishment of a customs union or free trade area or close sectoral economic cooperation), could force the parties to revise the entire scope of the relevant *acquis*.

The substantive means of exporting a fixed *acquis* are not common to all EU external agreements. In general, they are inherent to external agreements which aim to promote close economic or political relations between the EC and third countries, but which do not foresee the eventual integration of the latter into the EU. That is to say, the export of the fixed *acquis* serves to fit the specific objectives of EU external agreements (the establishment of a customs union, free trade area or mutual recognition regime), but not their dynamic objectives (association or full EU membership). As an example, the fixed pre-signature *acquis* is intrinsic to the European Economic Area (EEA) Agreement⁴ and the EC–Swiss Sectoral Agreement (SAs),⁵ which are not aimed at the full EU membership of the third country. On the other hand, EU external agreements targeted at either full membership or an association with the EU (Stabilization

⁴ OJ 1994, L 1/3.

⁵ The Agreement on Scientific and Technological Cooperation; 2) the Agreement on Specific Aspects of Government Procurement; 3) the Agreement on Mutual Recognition in Relation to Conformity Assessment; 4) the Agreement on Trade in Agricultural Products; 5) the Agreement on Air Transport; 6) the Agreement on the Carriage of Goods and Passengers by Rail and Road; 7) the Agreement on the Free Movement of Persons. On October 2004 Switzerland signed ‘second wave’ agreements with the EC: on free trade in services; on processed agricultural products; on the environment; on statistics; on the fight against fraud; on the double taxation of retired EU civil servant pensions; on the taxation of savings; on the extension of Schengen and the Dublin Conventions’ *acquis* to Switzerland; on education; and on the media. For the latest information on the negotiation process see under <www.europa.admin.ch>, accessed 18 December 2007.

and Association Agreements (SAAs),⁶ Europe Agreements (EAs)⁷) prioritize the export of a dynamic *acquis* into third country legal systems.

In general, the fixed *acquis* is embedded either in the main text or the annexes to the EU external agreements. Both constitute an integral part of the third country legal orders, subject to respective national constitutional requirements. EU external agreements/annexes specify the scope of the *acquis communautaire* applicable to the third country (object, subject, exemptions) and indicate the hierarchy of the relevant *acquis*, thereby clarifying its binding force for a third country legal order. For instance, within the EEA Agreement the binding *acquis* is labelled ‘acts referred to’. The relevant soft *acquis* (Commission communications and recommendations, Council resolutions and recommendations) is identified as ‘Acts of which the Contracting Parties shall take note’. However, one must always be aware that a reference to a specific EC Act in external agreements/annexes does not automatically imply the identical application of an EC Act within a third country legal order.⁸ As EU external agreements and the EU institutions frequently reiterate, the relevant EC Act should be applicable in accordance with the objectives of the EU external agreement.⁹

The primacy of the fixed *acquis communautaire* within third country legal orders derives from their national constitutional arrangements.¹⁰ The effective implementation and uniform interpretation of the relevant *acquis* within third country legal systems also depends on their national constitutional procedures. Furthermore, we believe that progress in bilateral relations with the EU directly

⁶ At the moment of writing the SAAs have been concluded with FYROM (COM (2001) 90 final) and Croatia (COM (2001) 371 final). (The FYROM and Croatia SAAs entered into force on 3 May 2001 and on 12 December 2001 respectively. The SAA with Albania was signed on 12 June 2006 and is in the process of ratification.

⁷ The EAs concluded with the following Central and East European countries (CEECs): Poland (OJ 1993 L 348/2, in force since 1 February 1994); Hungary (OJ 1993 L 347/2, in force since 1 February 1994); the Czech Republic (OJ 1994 L 360/2, in force since 1 February 1995); the Slovak Republic (OJ 1994 L 359/2, in force since 1 February 1995); Romania (OJ 1994 L 357/2, in force since 1 February 1995); Bulgaria (OJ 1994 L 358/3, in force since 1 February 1995); Lithuania (OJ 1998 L 51/3, in force since 1 January 1998); Latvia (OJ 1998 L 26/3, in force since 1 January 1998); Estonia (OJ 1998 L 68/3, in force since 1 January 1998); and Slovenia (OJ 1999 L 51/3, in force since 1 February 1999). Now, all EAs have expired after the accession of the CEECs into the EU.

⁸ For example, the Introduction to Annex XIV of the EEA Agreement (OJ 1994, L 1/3) warns that ‘preambles, the addresses of the EC Acts, references to territories or languages of the EC, references to rights and obligations of EC Member States, their public entities, undertakings and individuals in relation to each other; and references to information and notification procedures are specific to the EC legal order’ and therefore cannot be identically applied to EFTA member states.

⁹ See EEA Agreement Protocol 1 ‘On horizontal adaptations’ of the EEA Agreement. Case 270/80 *Polidor Ltd. v. Harlequin Record Shops* [1982] ECR 329.

¹⁰ For instance, see Articles 7 and 103 EEA Agreement. See Protocol 35 of the EEA Agreement.

influences the third country's attitude towards the implementation of the *acquis*. In other words, it could be argued that any decision to accomplish the effective implementation of the relevant *acquis* is both political and legal.

2. *Exporting the Dynamic Acquis Communautaire into Third Country Legal Systems*

The timely implementation of the fixed pre-signature *acquis* does not automatically imply the coherence of a third country's legal order with the dynamic *acquis communautaire* following the formal signature of an EU external agreement.¹¹ A link between the pre-signature *acquis* and the dynamic *acquis* could eventually be lost if the former is not regularly amended and uniformly applied within third countries' legal orders. For this reason, EU external agreements refer to the substantive means of ensuring the uniform application and timely incorporation of the dynamic 'post-signature' *acquis*. Analysis of EU external agreements allows us to consider the following means of exporting the dynamic *acquis communautaire*: a) homogeneity; b) binding and soft-harmonization commitments; c) approximation clauses; d) a mutual recognition regime.

a) *Homogeneity*. The EEA Agreement is the only EU external agreement to employ so-called homogeneity as a means of ensuring the actual adaptation of the dynamic post-signature *acquis communautaire* into the legal orders of the European Free Trade Area (EFTA) member states.¹² It should be clarified that the principle of homogeneity is not exclusive to the adaptation of the dynamic *acquis*. It is applicable in the course of the implementation of both fixed and dynamic *acquis* into EFTA member states' legal orders. In the context of the latter, the principle of homogeneity means that as soon as a new relevant EC rule has been formally adopted by the Council or the European Commission, the EEA Joint Committee must take a decision concerning the appropriate amendment of the EEA Agreement, 'with a view to permitting a simultaneous application' of legislation in the EC and the EEA countries.¹³ The principle of homogeneity presumes the equality of the parties to this process, since the incorporation of the relevant *acquis* cannot take place at all in the absence of an agreement between the EC on the one hand and the EEA countries 'speaking with one voice' on the other.¹⁴ Overall, the application of homogeneity has proved to be a well-functioning means of developing the legal systems of the EEA countries and the EC in parallel.

¹¹ On the nature of the EC dynamic *acquis* see Petrov, note 1 above.

¹² In the meantime, the EFTA comprises Iceland, Norway, Switzerland and Liechtenstein.

¹³ Article 102(1) EEA Agreement.

¹⁴ Article 93(2) EEA Agreement.

The concept of homogeneity is based on two elements: 1) the timely implementation of EC legislation into the EEA Agreement, ‘in order to guarantee the legal security and homogeneity of the EEA . . . as closely as possible to the adoption by the Community of the corresponding Community legislation’;¹⁵ and 2) the uniform interpretation of the adopted *acquis* and the EFTA rules.

Other EU external agreements do not replicate the EEA homogeneity formula in full. This could be explained by the relatively high costs incurred by the permanently expanding EU in implementing the homogeneity procedure. The EU has not been eager to apply the homogeneity formula in its relations with third countries on the eve of the unprecedented institutional and legislature reforms envisaged in the EU Constitutional Treaty. Instead, the EU has embarked upon a more cautious strategy. It simply employs specific elements of the homogeneity which are in line with specific objectives of the relevant EU external agreements. In our opinion, EU external agreements, which envisage either close economic cooperation (an EC–Turkey customs union), or close sectoral cooperation (EC–Swiss SAs), encourage the uniform interpretation of the third country’s legal system with the dynamic EC *acquis*. For example, the aim of establishing a customs union with the EC allows Turkey to ensure, on a unilateral basis, the timely implementation and uniform interpretation of the relevant dynamic EC *acquis*. Provisions of Decision 1/95 which are identical in substance to the corresponding provisions of the EC Treaty should be interpreted in conformity with the relevant ECJ case law to ensure the proper functioning of the EC–Turkey Customs Union.¹⁶ Furthermore, Turkey must ensure that the principles of the EC Treaty are upheld, along with the principles contained in the secondary legislation and the case law developed on this basis.¹⁷

On the other hand, the objective of bilateral sectoral cooperation between the EC and Switzerland (relating to the EC–Swiss SAs on the free movement of persons and air transport) could justify non-binding commitments on behalf of Switzerland regarding the uniform interpretation of the dynamic post-signature *acquis communautaire* within the Swiss legal system. For example, the EC–Swiss Joint Committee has full discretion to ‘determine the implications’ of post-signature ECJ case law on the functioning of the EC–Swiss SAs.¹⁸ In other words, Switzerland is not bound by the dynamic post-signature *acquis communautaire*. The relevant *acquis* adopted after the date of signature of this agreement is to be communicated to the EC–Swiss Joint Committee for its final political decision.

¹⁵ Article 102(1) EEA Agreement.

¹⁶ Article 66 Decision 1/95 (OJ 1996 L 35/1).

¹⁷ Article 41 Decision 1/95.

¹⁸ Article 16(2) of the EC–Swiss SA on the free movement of persons (OJ 2002, L 114/6), Article 1(2) of the EC–Swiss SA on Air Transport (OJ 2002, L 114/73).

To sum up, we emphasize that the principle of homogeneity has not become universally applicable in EU external agreements, owing to its complexity and the need for relatively close cooperation with third country legal systems. Instead, recent EU external policy has tended to apply selected elements of the homogeneity mechanism that suit specific objectives of its external agreements (access to mutual markets, mutual recognition, sectoral cooperation, etc.).

b) Binding and soft-harmonization commitments. The application of binding and soft-harmonization commitments in EU external agreements is one of the frequently used means of exporting the dynamic *acquis* into third country legal systems.¹⁹ We propose distinguishing between binding and soft-harmonization commitments in accordance with the criteria below. First, binding and soft harmonization commitments are differentiated by the specific wording of an agreement's provisions. For instance, binding harmonization commitments in the SAAs are emphasized by phrases such as 'shall ensure', 'shall take measures', 'shall take the necessary measures', 'undertake to authorise', and 'the SAA Council may decide to oblige'. Soft-harmonization commitments are distinguished by non-binding terminology as well as by the wide discretion granted to third countries in the course of implementing the *acquis communautaire*. In general, soft-harmonization commitments are contained in phrases such as: 'shall take the necessary measures in order to gradually achieve', 'shall seek to promote the use of Community regulations', 'will establish a plan', 'will cooperate in order to align the standards of . . . on those of the Community', 'cooperation . . . shall have as its aim . . . the gradual harmonisation', 'the Parties may cooperate', and 'the cooperation shall focus'.

Second, binding harmonization commitments set a deadline for the implementation by the third country of the relevant *acquis*. For example, the EC–Swiss SA on technical barriers obliges Switzerland to 'adopt, no later than six month after signature of this Agreement, arrangements that are equivalent to Community legislation on the technical conditions governing road transport'. The Parties to the EC–FYROM (Former Yugoslav Republic of Macedonia) SAA and the Partnership and Cooperation Agreements (PCAs)²⁰

¹⁹ For the comprehensive account of the concept of 'harmonization' see L. Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in M. Cremona, J. Fletcher and L. Mistelis (eds.), *Foundations and Perspectives of International Trade Law* (Sweet and Maxwell, Andover, 2001,), pp. 3–27.

²⁰ EC–Russia PCA (OJ 1997 L 327), entered in force 1 December 1997; EC–Ukraine PCA (OJ 1998, L 49), entered in force 1 March 1998; EC–Moldova PCA (OJ 1998, L 181), entered in force 1 July 1999; EC–Armenia PCA (OJ 1999, L 239), entered in force 1 July 1999; EC–Azerbaijan PCA (OJ 1999, L. 246), entered in force 1 July 1999; EC–Georgia PCA (OJ 1999, L 205), entered in force 1 July 1999; EC–Republic of Kazakhstan PCA (OJ 1999, L 196), entered in force 1 July 1999; EC–Kyrgyz Republic PCA (OJ 1999, L 196), entered in force 1 July 1999;

undertake a commitment to accede within five years to the specified list of multilateral conventions on intellectual, industrial and commercial property rights.²¹ Turkey is expected to ‘incorporate into its internal legal order the Community instruments relating to the removal of technical barriers to trade’ within five years from the date of entry into force of Decision 1/95.²²

On the other hand, soft-harmonization commitments are worded to avoid any explicit deadlines for the implementation of the *acquis communautaire*. Instead, soft-harmonization commitments provide sufficient flexibility for a third country to achieve the objectives of the agreement. For instance, Parties to the EC–Korea Trade Development and Cooperation Agreement (TDCA) ‘shall examine’ measures to harmonize health and plant health, as well as environmental standards and rules with a view to facilitating trade. This should be achieved taking account of the legislation in force for both Parties, and in conformity with WTO rules.²³ The harmonization process within the EU–Mexico TDCA is aimed at the mutual liberalization of trade and the establishment of a favourable investment legal environment.²⁴

Third, we argue that harmonization commitments must be read in line with the objectives of EU external agreements. This especially relates to situations where the objectives of the external agreements evolve in accordance with the revision of EU policy towards third countries. For instance, the aim of ‘gradual integration into the Community’ has from the outset presumed the eventual full legislative compatibility Central and East European countries (CEECs) with the selected areas of the *acquis communautaire* which are of particular importance for the association, such as consumer protection,²⁵ standards and conformity assessment,²⁶ and customs law.²⁷ In a short period of time, the nature of harmonization commitments within the EAs has been revisited alongside the reconsideration of political relations between EU and EA members. This has changed following the EU’s political decision to offer CEECs candidate country status. Thereafter, the same wording of

EC–Uzbekistan PCA (OJ 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).

²¹ Articles 71 FYROM and Croatia SAAs. For the list of the conventions see Annex III EC–Ukraine PCA.

²² Article 8(1) Decision 1/95.

²³ Article 21(2) EC–Korea TDCA (OJ 2001 L 090).

²⁴ Article 15(b), (c) EC–Mexico TDCA (OJ 2000 L 276).

²⁵ For example, Article 94(1) EC–Estonia EA.

²⁶ For example, Estonia is obliged to use and implement EC technical regulations and standards, as well as conformity assessment procedures within the areas of cooperation. In general, the CEECs can adhere to *de minimis* EC standards, but they are free to develop and implement higher standards if necessary in the course of adopting EC standards (Article 75 EC–Estonia EA).

²⁷ For example, Article 92 EC–Hungary EA.

the approximation provisions in the EAs has been read in different ways according to the enhanced objectives of cooperation, inter alia eventual full EU membership. This means that, following the Copenhagen Summit, approximation provisions in the EAs have been given a new dimension. In particular, the CEECs have committed themselves to the whole 'accession *acquis*' to fulfil the requirements of EU membership. One may argue that the political reconsideration of EA objectives has not altered the legal nature of the harmonization/approximation commitments. Indeed, from the outset, the CEECs have accepted the political commitment to adopt the 'accession *acquis*'. However, after some period of time, the parties have embarked upon specific legal commitments in order to meet the requirements for full EU membership. The EU has drafted the National Plans for Adoption of *Acquis* (NPAAs) and has carefully monitored their implementation with regard to each Central and East European candidate country. This means that the political decision to launch membership negotiations depends on the successful implementation of the NPAAs by Central and East European candidate countries.

The EU external agreements that target neither full EU membership nor common economic structures (customs union, free trade area) between the EC and third countries do not impose binding harmonization commitments. They are justified by very few binding commitments on behalf of the EU towards the third country. Simply speaking, these agreements could offer a third country very little in return for pursuing the binding harmonization programme. For example, the objectives of the PCAs and TDCAs regarding closer economic and political cooperation imply adequate non-binding harmonization commitments. These agreements provide that the parties may cooperate on issues ranging from the promotion and protection of investments and developing conditions on open and competitive public procurement to the facilitation of cultural cooperation.

To sum up, harmonization commitments are an efficient way of exporting the *acquis communautaire* into third countries' legal systems. Of course, this is conditional upon the effective application of these commitments by the third country. Most of the EU external agreements envisage soft-harmonization commitments, thereby encouraging third countries to embark upon the voluntary harmonization of their legislation to that of the EU. Achieving the objectives of EU external agreements depends on the effective enforcement and implementation by third parties of the harmonization commitments. Nonetheless, we believe that third countries possess some degree of discretion in enforcing soft-harmonization commitments in accordance with their own policy priorities and needs. In other words, third countries may pursue the enforcement of soft-harmonization commitments in parallel with developing

bilateral political relations with the EU (such as the example of the PCA countries).²⁸ ‘Conditionality clauses may significantly elevate the effective enforcement of non-binding harmonization commitments. In this case, the EC may enhance the format of its relations with certain third countries, and may subsequently reconsider the binding force of its harmonization commitments. These processes have already taken place with regard to the CEECs and some Mediterranean countries.

c) Approximation clauses. So-called ‘approximation clauses’ may be considered the most frequently applied means of exporting the *acquis communautaire* into the legal systems of third countries. Approximation clauses differ from harmonization commitments in several aspects. First, approximation clauses represent a distinct binding/non-binding legal provision in EU external agreements. Second, approximation clauses have more or less similar structure and wording throughout EU external agreements. Third, approximation clauses can be found under a separate title in EU external agreements, namely under the heading ‘approximation of laws/legislative cooperation’.²⁹ Fourth, the general objective of an approximation clause is to encourage a signature to an EU external agreement to approximate its legislation to the *acquis communautaire* on a voluntary basis. In other words, contrary to harmonization commitments, approximation clauses do not envisage the mutual convergence of the parties’ legislation to an EU external agreement. Notably, the EC–Israel EuroMediterranean Association Agreement (EMAA) envisages the possibility of the mutual approximation of laws, thereby equating the Israeli legal system to that of the EC, and also envisaging at least the possibility of exporting the Israeli legal heritage into the *acquis*.³⁰ However, this is more an exception rather than the rule in EU external relations.

d) Mutual recognition agreements. The conclusion of mutual recognition agreements (MRAs) between the EC and third countries serves as an alternative substantive method of exporting the *acquis communautaire* for third countries which would never embark upon the harmonization of their legislation to that of the EU. Generally, MRAs are concluded with third countries with an advanced level of economic and political development, and which are unlikely to join the EU in the foreseeable future (USA, Canada, Australia,

²⁸ R. Petrov, ‘Recent Developments in the Adaptation of Ukrainian Legislation to EU Law’ (2003) 8/2 EFA Rev., pp. 125–142.

²⁹ For instance, these are: the EAs Title V ‘Payments, Capital, Competition and other economic provisions, Approximation of Laws’; the SAAs Title VI ‘Approximation of Laws and Law Enforcement’.

³⁰ The approximation clause in the EC–Israel EMMA (OJ 2000 L 147/1) reads: ‘The Parties shall use their best endeavours to approximate their respective laws in order to facilitate the implementation of this Agreement’ (Article 55 EC–Israel EMMA).

Japan, Switzerland, Israel and New Zealand). The mutual recognition regime presumes the existence of mutually recognized legal principles and standards between the parties. Mutual recognition agreements target the establishment of mutually recognized regulatory and conformity assessment systems which are underpinned by the increase in confidence between mutual recognition agreement partners. To this end, the EC mutual recognition agreements encourage third countries to use relevant international conformity assessment standards, guides and recommendations, as well as harmonized EC and international conformity assessment procedures. In general, the mutual recognition regime focuses on specific areas that are important for ensuring the liberalization of mutual trade between the EC and third countries. For example, these areas are: conformity assessment, standardization, metrology, quality control, agricultural products and professional qualifications.

The EU institutions have been clear on the focal importance of the MRAs for trade with important trading partners. For instance, the European Commission has claimed on many occasions that the adoption of MRAs is one of the Community's strategies for pursuing its trade objectives in the areas of standards and conformity assessment.³¹ As far as the EU and third countries are concerned, the utility of MRAs for opening up foreign markets is conditional on the full confidence in the other party's conformity assessment processes, i.e. comparable concepts of product testing and approval, and comparable or mutually acceptable systems of certification. Therefore, only a sufficiently high level of trade between the EU and a third country could justify the significant costs of setting up a mutual recognition agreement. Historically, the EC has signed a moderate number of MRAs with third countries, all of which it considers important trading partners with an advanced level of economic and political development. EU foreign policy does not consider the conclusion of MRAs a part of its conditionality policy towards third countries. In other words, the EU launches mutual recognition agreement negotiations only on the proviso that the third country undertakes considerable economic, political and legal reforms. For example, some EU external agreements provide that at some stage, 'when the circumstances are right', the parties may conclude agreements for the mutual recognition of certifications.³² The EC conditionality goes further in EC-ACP countries (African, Caribbean and Pacific) legislative cooperation which cites mutual recognition agreements in sectors of mutual economic interest in successful ACP countries' liberalization efforts.³³

In the end, a mutual recognition regime may be considered one of the most sophisticated substantive means of *acquis* export, since it requires a

³¹ For example see European Commission Communication 'Community External Trade Policy in the Field of Standards and Conformity Assessment' COM (1996) 564 final.

³² For instance, see Article 40 of the EC-Ukraine PCA.

³³ Article 47 of the Cotonou Agreement (OJ 2000 L317/3).

considerable degree of confidence on behalf of the EC in the legal system of a third country. However, it does not prevent the EC from associating the opening of negotiations on a mutual recognition regime with its conditionality policy towards third countries. In general, conditionality clauses in EU external agreements are constructed in such a way as to encourage the voluntary harmonization of third country legal systems with that of the EC, in return for the vague prospect of a mutual recognition regime.

III Procedural Means of Exporting the *Acquis Communautaire*

Despite their secondary nature, the procedural means of exporting the *acquis* provide a strong case in proving our findings in this article. Similar to what has been argued above, we suggest that the procedural means of *acquis* export are not common to all EU external agreements, but rather they mirror specific objectives of the EU external agreements.

1. Formal/Informal Involvement of Third Countries in the EC Decision-making Process

The most advanced and sophisticated procedural mechanism for the involvement of third countries in the EC decision-making process is elaborated in the EEA Agreement. The far-reaching objectives of the EEA Agreement, which ensure access of the EFTA countries to the EC internal market, entail the comprehensive adoption by the latter of the relevant *acquis*. For this purpose, the procedure of homogeneity ensures the export of the pre-signature *acquis* and the timely implementation of the post-signature *acquis* into the legal systems of the EFTA countries.

The incorporation of the *acquis communautaire* within the EEA Agreement takes two procedural forms: ‘decision shaping’ and ‘decision taking’.³⁴ These procedural forms are exercised within a twin-pillar EEA structure, which comprises EC and EFTA institutions. This means that both decision-shaping and decision-taking within the EEA are conducted under close cooperation between EC and EFTA bodies. At the same time, neither the EFTA institutions nor the EEA member states are involved in EC decision-making. In accordance with Article 99(1) of the EEA Agreement, decision-shaping provides a forum

³⁴ These expressions were used by J. Forman in his article ‘The EEA Agreement Five Years On: Dynamic Homogeneity in Practice And Its Implementation By The Two EEA Courts’ (1999) 36 CML Rev., pp. 751–781 at p. 756. Therein he referred to the ‘decisions shaping’, as it is termed, with regard to the adoption of the *acquis* at EC level and ‘decision taking’ as regards the EEA Joint Committee decisions themselves.

for early consultations of the Commission with the EFTA countries' experts. The Commission '*shall informally* (emphasis added) seek advice from the EFTA experts in the same way as it seeks advice from the EC Member States for the elaboration of its proposals'.³⁵ This means that the EFTA member states' experts may access Commission committees for the purpose of taking part in drafting the relevant EC legislation.³⁶ Participation in the committees ensures the efficient incorporation of new EC legislation. At the present moment, representatives of the EFTA member states have access to some 360 committee working groups, as well as to numerous scientific committees.³⁷ Then the Commission transmits to these experts a copy of a drafted legislative proposal (not necessarily drafted in close cooperation with the experts) in the areas covered by the EEA Agreement. Thereafter, a preliminary exchange of views on the proposal takes place in the EEA Joint Committee 'at the request of one of the Contracting Parties'.³⁸ However, it is not clear if such an exchange of views may be influenced by possible negative feedback made by the EFTA experts.

The objective of the 'decision-taking procedure' is to ensure the 'legal security and the homogeneity of the EEA'.³⁹ Within this procedure, the EEA Joint Committee takes decisions to ensure as closely as possible the simultaneous application of the new and old *acquis communautaire* within the annexes of the EEA Agreement.⁴⁰ For this purpose, the Commission is responsible for 'early warnings' to EFTA countries, via the EEA Joint Committee, whenever the EU legislature adopts new legislation on an issue governed by the EEA Agreement. Thereafter, the EEA Joint Committee is expected to make every effort to ensure the amendment of a relevant EEA Agreement annex.⁴¹

None of the EU external agreements replicates the depth of the formal/informal involvement of third countries into the EC legislative process in the EEA Agreement. This is because the homogeneity procedure was a part of the political compromise reached exclusively between the EC and the EFTA signatories to the EEA Agreement. Instead, the latest EU external agreements envisage a degree of third party involvement in the EC decision-making process, which is in line with the specific objectives of these agreements, and which is also in accordance with bilateral political arrangements between

³⁵ Article 99(1) EEA Agreement.

³⁶ Articles 100, 101 EEA Agreement.

³⁷ For example, in 2002 EFTA countries experts participated in work of 281 EC committees (EEA Joint Committee Annual Report 2002, <secretariat.efta.int/Web/Publications/AnnualReport/>, accessed 18 December 2007).

³⁸ Articles 99(2) and 99(3) EEA Agreement.

³⁹ Article 102(1) EEA Agreement.

⁴⁰ Article 102(1) EEA Agreement.

⁴¹ Article 102(3) EEA Agreement. This procedure requires the unanimous agreement of all the EFTA countries in order to make a decision.

the EU and third countries. The aim of a customs union between the EC and a third country could entail a considerable degree of involvement by that third country's experts in the EC decision-making process. For instance, in accordance with Decision 1/95, Turkish experts should be informally consulted by the EC at the drafting stage of EC legislation where this falls in an area of direct relevance to the operation of the EC–Turkey Customs Union. It must be noted that the Commission is not obliged to follow the advice of the Turkish experts. The experts may be involved in the work of a number of technical committees, which assist the Commission in the exercise of its executive powers, in areas of direct relevance to the functioning of the Customs Union.⁴²

The EC–Swiss SAs imply the informal binding involvement of Swiss experts in the drafting of the dynamic *acquis communautaire*. Under the EEA Agreement, the Commission is obliged to consult the EFTA member states' experts on the early stages of preparation of any new relevant EC law whereas, in contrast, the EC–Swiss information exchange procedure means that Switzerland must be notified of the *acquis* once it already has been adopted.⁴³ During the preparatory drafting stage of the *acquis*, Swiss experts may be informed and consulted 'as closely as possible' before and after the meetings of EU experts. It is only 'at the request of one of the Contracting Parties [that] a preliminary exchange of views may take place in the Joint Committee'.⁴⁴

The remaining EU external agreements consider neither the formal nor the informal involvement of third countries in EC decision-making processes. Recent EU external agreements avoid references to such commitments. Instead, EU external agreements offer wider options for the mutual exchange of information, and technical/financial assistance, to encourage the export of the *acquis* into the legal orders of third countries (PCAs, SAAs, TDCAs). The EU external development agreements contain mere statements of intent for mutual legislative cooperation. For example, the Cotonou Agreement calls for 'developing functioning links between ACP and European standardization, conformity assessment and certification institutions', and to exchange information on their legislation,⁴⁵ experiences and policies.⁴⁶

We conclude with two points. First, the EC is reluctant to extend to the latest EU external agreements the involvement of third country experts, which we can

⁴² Article 60 Decision 1/95.

⁴³ Similarly to the EEA Agreement, Article 17 of the EC–Swiss SA on Free Movement of Persons envisages the exchange of information not only on developments in legal acts but also in the ECJ case law.

⁴⁴ Article 23 of the EC–Swiss SA on air transport.

⁴⁵ Article 50(2) Cotonou Agreement.

⁴⁶ Article 51 Cotonou Agreement.

witness in the EC decision-making procedure applied in the EEA Agreement and in the decisions taken by the EC–Turkey Association Council. The example of the EEA Agreement has probably proved costly and too advanced for the specific format of relations between the EU and a third country. This might indicate that the EU considers this procedural means suitable only for external agreements with a high level of mutual economic integration (customs union or access to mutual markets). Even the EU external agreements with the objective of eventual EU membership (SAAs, EAs) do not foresee the level of formal/informal involvement similar to that cited in economic integration agreements (EAA Agreement, EC–Turkey customs union). Second, the degree of involvement of third country experts in EU decision-making is linked to the nature of the harmonization/approximation commitments, and to the entire objectives of the EU external agreements. If these agreements envisage binding harmonization/approximation commitments, and if they pursue close economic integration (EEA Agreement, EC–Swiss SAs, Ankara Agreement), then some degree of formal/informal involvement is possible. On the other hand, EU external agreements that impose soft approximation/harmonization commitments, and which avoid the prospect of close economic integration (PCAs, EMAAs, TDCAs), do not include the possibility of involvement in EU decision-making. In this regard, our study shows that the latest EU external agreements offer other options (informational assistance, technical and financial support) to third countries which have embarked upon the process of voluntary harmonization, in order to fulfill soft approximation/harmonization commitments. We consider these alternatives in detail below.

2. *Exchange of Information*

The exchange of information is one of the most frequently applied procedural means of exporting the *acquis communautaire* into the legal systems of third countries. EU external agreements envisage various methods of information exchange. Similar to what has been argued above, we believe that the procedures of information exchange are linked directly to the aims of the EU external agreements. To prove our findings we shall consider the substance of the procedure of information exchange within selected groups of EU external agreements.

In the EEA Agreement, the EC–Turkey Customs Union and the EC–Swiss SAs, the exchange of information serves as a fundamental procedural tool, in order to achieve the uniform interpretation and timely implementation of the *acquis communautaire* in EU external agreements.

The procedure of information exchange underpins the whole mechanism of

the homogeneous interpretation of the EFTA countries' legislation, as well as the post-signature *acquis* in the EEA Agreement.⁴⁷ For this purpose, the EEA Joint Committee keeps the ECJ and the EFTA Court case law under constant review. Furthermore, a court or tribunal from an EFTA country, if it considers necessary, may ask the ECJ to rule on the interpretation of an EEA Agreement provision identical in substance to the *acquis communautaire*.⁴⁸ The ECJ has been protective regarding its own monopoly on the interpretation of the *acquis*, and the potential threat from the EEA Court, as envisaged in the first draft of the EEA Agreement.⁴⁹ These problems were subsequently rectified in the second version of the EEA Agreement. The twin-pillar structure set up in the second version of the EEA Agreement clearly distinguishes the EC from the EFTA member states from an institutional point of view, and no longer affects either the exercise of power by the EC and its institutions, or the interpretation of the *acquis communautaire*. Thus, the ECJ has acknowledged that within the twin-pillar approach the autonomy of the EC legal order is secure.⁵⁰

In accordance with Article 106 of the EEA Agreement, the system of information exchange comprises the following stages: a) transmission to the Registrar of the ECJ judgments of the listed courts on the interpretation and application of the EEA and the EC founding treaties, as well as the Acts concerning provisions identical in substance to those in the EEA; b) the Registrar of the ECJ classifies these judgments, including as far as necessary the drawing up and publication of translations and abstracts; c) the Registrar of the ECJ issues the relevant documents to the competent national authorities, which are to be designated by each Contracting Party.

In the EC–Turkey Customs Union the procedure of information exchange is equivalent to that of the EU Member States. This means that Turkey must submit information to the Commission in all cases where the Member States must do so. In return, the Commission is obliged to share its reports and assessments with Turkey.⁵¹ The Parties are committed to publish all information related to the instruments employed.⁵²

The procedure of information exchange within the EC–Swiss SAs does not equate to the consultation and information procedure set up within the EEA

⁴⁷ Recital 15 EEA Agreement and Article 105(1) EEA Agreement encourages the Parties 'to arrive at as uniform an interpretation as possible of the provisions of the Agreement and those provisions of Community legislation which are substantially reproduced in the Agreement'.

⁴⁸ Article 107 EEA Agreement. See Protocol 34 'On the possibility of courts and tribunals of EFTA states to request the Court of Justice of European Communities to decide on the interpretation of EEA rules corresponding to EC rules'.

⁴⁹ Opinion 1/91 [1991] ECR 6079, at 30–46.

⁵⁰ Opinion 1/92 [1992] ECR 2821, at 18–35.

⁵¹ The distribution of information on behalf of Turkey to other EC Member States is achieved via the Commission. Only in urgent cases is the rapid transfer of information envisaged (Annex I (5) to Decision 1/95).

⁵² See Annex I (6) to Decision 2/97 (OJ 1997 L 191/1).

Agreement and the EC–Turkey customs union. Within the EC–Swiss SAs, the information exchange procedure of the newly adopted *acquis communautaire* must be formally notified to Switzerland and vice versa within eight days. However, the EC–Swiss Joint Committees have full discretion on deciding whether to implement the new EC *acquis* into the Swiss legal system.⁵³

In the EAs and SAAs, the procedure of information exchange constitutes an intrinsic part of the technical assistance package on behalf of the EU. This technical assistance package is aimed at assisting CEECs and SAA countries in their approximation efforts, and drafting their national legislation in accordance with EU standards,⁵⁴ to meet the aims of eventual EU membership. Neither EAs nor SAAs envisage formal/informal involvement in EU decision-making procedures. Instead, the procedure of information exchange in the EAs and SAAs presumes the EU's informational assistance to the CEECs and SAA countries on the correct application and enforcement of the *acquis communautaire* and EC policies. Besides, the procedure of information exchange also covers the public education dimension. For instance, the EAs and the SAAs are supplemented by the so-called 'information and communication' procedure which is aimed at providing the general public with basic information on the EU and on the EC policies and institutions through educational events, training and conferences.⁵⁵

EU external agreements which do not envisage the eventual integration of a third party into the EU do not provide a procedure of information exchange, but offer informational assistance within specific sectors of cooperation between the parties. For instance, the EC–South Africa TDCA envisages the mutual exchange of information procedures on customs, investment opportunities, postal cooperation and policy, consumer policy, cooperation on the recognition of degrees and diplomas, and health. The PCAs refer to informational assistance on behalf of the EU on investment opportunities, mining, transfer of technologies, regional policies, employment, media and customs. Besides, Parties to the PCAs promote the exchange of information on standards, inspection and certification in the field of telecommunications and information technology.⁵⁶

We conclude that the procedure of information exchange is applied in line with the objectives of the EU external agreements. The above analysis shows that the EU external agreements which aim at the establishment of a customs union, close sectoral cooperation and access to markets between the EC and a third country (EEA Agreement, EC–Swiss SAs, Ankara Agreement) all envisage a binding procedure of information exchange, which is in turn

⁵³ Article 12 EC–Swiss SA on technical barriers.

⁵⁴ For example, see Article 86 EC–Estonia EA or Article 83 EC–Hungary EA.

⁵⁵ For example, Article 93 EC–Estonia EA and Article 82(3) Croatia SAA.

⁵⁶ For example, Articles 54(1), 57(2), 63(3), 70(2), 71(2), 74, 76(2) EC–Ukraine PCA.

underpinned by the informal involvement of third country experts in the EC decision-making process. On the other hand, EC association, development, and partnership agreements (PCAs, EAs, SAAs, PCAs and others) refer to a non-binding 'information assistance' procedure which does not commit but gives an opportunity for a party to the agreement to be informed and consulted on new EC legislation. In practice, information assistance within EC association, sectoral cooperation, development and partnership agreements have become a one-sided process with a strong educational dimension, where a third country acts as a mere recipient of what the EU institutions select to offer. The information assistance procedure aims to support the so-called 'voluntary harmonization' by supplying information on the *acquis communautaire* without any binding commitments on behalf of the EU. In our opinion, these dimensions clearly illustrate that the EU carefully tailors the format and objectives of the procedure of information exchange to specific objectives of its EU external agreements.

3. Technical, Administrative and Financial Assistance on Behalf of the EU to Third Countries

The export of the *acquis communautaire* into the legal orders of third countries is supported by technical and financial assistance packages on behalf of the EU. The EU provides technical and financial aid through more than 30 different legal instruments. Some of them are thematic, such as the European Initiative for Democracy and Human Rights (EIDHR). Most of them are geographical, such as the European Development Funds (which are, for instance, applied to the ACP countries), or purposefully tailored technical and financial assistance programmes (MEDA, PHARE, Community Assistance for Reconstruction, Development and Stabilization (CARDS), and Technical Assistance to the Commonwealth of Independent States (TACIS)). In the last case, the objectives and scope of the EU technical and financial assistance packages may have common elements, but they differ in substantive issues, in line with the objectives of either EU external agreements or the status of political and economic relations between the EU and the third country. Technical assistance is provided under the auspices of EU-funded assistance programmes, encompassing a variety of activities, ranging from investment in infrastructure to assistance in legal drafting and education.⁵⁷ In general,

⁵⁷ In general, EU technical assistance covers the following activities: the exchange of experts, the exchange of experience and know-how, the provision of early information especially on relevant legislation, the organization of seminars, training activities, aid for the translation of EU legislation in the relevant sectors, assistance in drafting national legislation in accordance with the *acquis communautaire*, and the modernization and restructuring of specific sectors (agriculture, agro-industrial) in consistency with the EU rules and standards.

EU technical and financial assistance targets the creation of good governance in third countries. However, there is a serious criticism of shortcomings on transparency and bureaucratization within the technical assistance itself, in particular in the tendering procedures. Some projects are ineffective, since they have not been adapted to local needs and specifics, and consultants are not sufficiently qualified. As some commentators correctly note, this situation hampers the promotion of EU values to the wider world.⁵⁸

IV Conclusion

This article focused on selected substantive and procedural means of exporting the *acquis* into the legal systems of third countries. We argued that the former referred to the fundamental ways of implementing the *acquis communautaire* into third country legal orders. The latter related to specific technical/procedural tools which either directly or indirectly encourage the implementation of the *acquis* into third country legal orders. We believe that the substantive and procedural means of exporting the *acquis* are not uniformly applicable, but are rather exercised in accordance with the specific objectives of EU external agreements. Indeed, our analysis of EU external agreements confirms that their objectives unquestionably constitute a driving force behind understanding the role and mechanism of the substantive and procedural means of exporting the *acquis*. Among all these, homogeneity remains the most advanced tool for exporting the *acquis* since it achieves these objectives not only through the alignment of the EFTA member states' national laws with the dynamic *acquis* but also through judicial dialogue between the ECJ and the EFTA Court. Nevertheless, the most recent EU external agreements do not replicate the entire homogeneity procedure found in earlier agreements. Instead, they apply selected elements of the homogeneity procedure in order to achieve the specific objectives of the EU external agreements. On the one hand, objectives to bring about closer economic and political cooperation (customs union, free trade area, mutual recognition regime) imply that third countries will accept binding substantive and procedural means to implement the *acquis communautaire* into their own legal system. On the other hand, the objectives of EC partnership, cooperation and development agreements envisage less ambitious substantive and procedural means (non-binding harmonization/approximation of laws commitments, supported by technical and educational assistance on behalf of the EU; they also do not envisage the involvement of a third country in EC decision-making procedures). In the former case, the EU expects candidate countries to import the fixed and

⁵⁸ K.N. Metcalf, 'Influence through Assistance: The EU Assistance Programmes' (2003) 9/3 EPL, pp. 425–442.

dynamic *acquis communautaire* as widely and as soon as possible, whereas the latter EU external agreements encourage third countries to embark upon a process of voluntary harmonization through the gradual adoption of the relevant *acquis*.⁵⁹

In conclusion to this article, it is also important to emphasize several important observations. The first relates to the *acquis communautaire*. EU external agreements target how the fixed and dynamic *acquis* are exported into the legal systems of third countries. The former is static and does not alter from the moment of signing. The latter constantly develops, to reflect the never-ending evolution of the *acquis communautaire*. Almost all EU external agreements prioritize the substantive and procedural means, which ensure the adoption of the dynamic *acquis* (homogeneity, binding/soft harmonization, approximation clauses and mutual recognition). This shows that the EU is eager to ensure that third countries keep track of, and quickly implement, the latest developments in the EU legal order.

Another observation is that the substantive and procedural means of exporting the *acquis communautaire* are supported by strong conditionality requirements. The further enhancement of bilateral relations between the EU and a third country, in particular the opening of negotiations on a mutual recognition regime, depends on the success of approximation efforts. Therefore, EU external agreements contain conditionality provisions such as ‘account shall be taken of the progress achieved by the Parties in the approximation of their laws’,⁶⁰ or ‘the Community shall examine periodically whether [a party to an agreement] has indeed introduced such legislation [in the public utilities sector]’.⁶¹

These observations highlight our initial suggestion that the EU considers the export of the *acquis communautaire* an intrinsic part of its foreign policy towards third countries. Indeed, the substantive and procedural means of exporting the *acquis* into EU external agreements inspire third countries to adopt as much as possible of the dynamic *acquis* in order to create a comparable and friendly legal environment beyond existing and potential EU boundaries.

⁵⁹ A. Evans, *The Integration of the European Community and Third States in Europe: a Legal Analysis* (Clarendon Press Oxford, 1996), pp. 381–383. In general, A. Evans is critical regarding the nature of voluntary harmonization within the EAs. In his opinion, voluntary harmonization is ill-adapted to structural economic problems faced by these countries.

⁶⁰ Article 56(3) Croatia SAA.

⁶¹ Article 72 Croatia and FYROM SAAs.