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***“Judicial Variations on the Theme of Regional Integration”:
Diffusing the EU Model of Judicial Governance***

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Allan F. Tatham*

ABSTRACT

The ebbs and flows of the tide of “new governance” in political science have been washing up against the shores of European integration for a number of years. Within this flow, the notion of multilevel governance – as expounded by Hooghe, Marks and Blank – has been a particular draw for law academics. In their turn, they have re-interpreted multilevel governance and applied it to the EU legal and institutional context, giving rise to discussions on multilevel constitutionalism, contrapunctual constitutional principles, constitutional hierarchy, deliberative polyarchy, etc. This study first (in Section II) contextualizes the judicial dimension of the EU’s model of governance, centred on the Court of Justice of the European Union (“CJEU”). It then describes (in Section III) the main aspects of this model and the importance of its case-law in developing its position within the Communities and later the Union. This model has been broadly diffused beyond the confines of the Union itself – thus, having looked at the factors impacting on its diffusion in the present context (section IV), the study continues with a short focus not only on its jurisdictional aspects (section V) but even more interestingly on the employment of the Court’s foundational case-law by other regional courts (section VI). Taking these points into account, the study finishes with a short Conclusion (section VII).

KEYWORDS: Regional Integration Courts, Judicial Governance, Supranational Law

“Judicial Variations on the Theme of Regional Integration”: Diffusing the EU Model of Judicial Governance

Allan F. Tatham

I. Introduction

The ebbs and flows of the tide of “new governance” in political science¹ have been washing up against the shores of European integration for a number of years. Within this flow, the notion of multilevel governance – as expounded by Hooghe, Marks and Blank² – has been a particular draw for law academics. In their turn, they have re-interpreted multilevel governance and applied it to the EU legal and institutional context, giving rise to discussions on multilevel constitutionalism,³ contrapunctual constitutional principles,⁴ constitutional heterarchy,⁵ deliberative polyarchy,⁶ etc. This study first (in Section II) contextualizes the judicial dimension of the EU’s model of governance, centred on the Court of Justice of the European Union (“CJEU”). It then describes (in Section III) the main aspects of this model and the importance of its case-law in developing its position within the Communities and later the Union. This model has been broadly diffused beyond the confines of the Union itself⁷ – thus, having looked at the factors impacting on its diffusion in the present context (section IV), the study continues with a short focus not only on its jurisdictional aspects (section V) but even more interestingly on the employment of the Court’s foundational case-law by other regional courts (section VI). Taking these points into account, the study finishes with a short Conclusion (section VII).

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¹ S. Hix, “The Study of the European Union II: The ‘New Governance’ Agenda and its Rival” (1998) 5 *Journal of European Public Policy* 38-65.

² L. Hooghe, G. Marks & K. Blank, “European Integration from the 1980s: State-Centric v. Multilevel Governance” (1996) 34 *Journal of Common Market Studies* 1-38.

³ I. Pernice, “Multilevel constitutionalism in the European Union” (2002) 27 *European Law Review* 511-529; and I. Pernice, “The Treaty of Lisbon: Multilevel Constitutionalism in Action” (2009) 15 *Columbia Journal of European Law* 349-407.

⁴ M. Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action,” in N. Walker (ed.), *Sovereignty in Transition*, Hart Publishing, Oxford (2003), chap. 21, 501-537; and J. Komárek, “European Constitutionalism and the European Arrest Warrant: In Search of the Limits of ‘Contrapunctual Principles’ ” (2007) 44 *Common Market Law Review* 9.

⁵ D. Halberstam, “Constitutional Hierarchy: The Centrality of Conflict in the European Union and the United States,” in J.L. Dunoff and J.P. Trachtman (eds.) *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge University Press, Cambridge (2009), chap. 11, 326-355.

⁶ O. Gerstenberg, “Expanding the Constitution Beyond the Court: The Case of Euro-Constitutionalism” (2002) 8 *European Law Journal* 172, at 181-184; and C.F. Sabel & O. Gerstenberg, “Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order” (2010) 16 *European Law Journal* 511, at 543-550.

⁷ For a stimulating analysis of the export of the CJEU model to regional communities in the Americas and Africa, see K.J. Alter, “The Global Spread of European Style International Courts” (2012) 35 *West European Politics* 135-154.

II. Governance and the European Union

1. Context

Governance is identified⁸ as being the binding decision-making at the level of the public sphere and analyzed in its various forms. There are forms of governance and dispersion of decision-making away from prior state-centric government – with its centralized authority, command and control – towards a more modern type of multilevel governance to describe the new process of governing in complex entities, such as that which exists in the European Union.⁹

This multilevel approach to governance is characterized by “international interdependence” which notion puts at the centre of the debate the argument that state authority is eroding through internationalization of production and financial transactions, internationally regulated trade, international organizations, international binding law, hegemonic powers and power blocks. The challenge comes from transnational and self-government policy networks emerging, e.g., in the EU. In fact, it is possible to consider three displacements of control and state power in the Union: upwards, towards Union institutions and actors; downwards, towards regions, cities and communities; and outwards, to institutions operating under considerable discretion from the state.¹⁰

Consequently, European integration is a polity-creating process,¹¹ in which authority and policy-making influence is shared across the multiple levels of governments – sub-national, national and supranational. While national governments remain formidable participants to the EU policy-making process, control has slipped away from them to the supranational actors. The states have lost some of their authoritative control over individuals in their respective territories showing that the locus of political control has changed. Individual state sovereignty is diluted in the EU by collective decision-making, among the national governments and by the autonomous role of the three main supranational institutions that are decision-makers in the EU, the European Parliament, the European Commission and the CJEU.

2. CJEU and EU Governance

Yet even for the CJEU, multilevel governance remains a challenge in its application and development of EU law.¹² In earlier times, the CJEU readily acknowledged the classical conception of the law which looked for a unitary source of ultimate authority, based on a hierarchical system, and which placed courts at the centre of systems of accountability. Through its adherence to such conception of the law, it was able successfully to emulate it as it

⁸ L. Hooghe & G. Marks, “Unraveling the Central State, but How? Types of Multilevel Governance” (2003) 97 *American Political Science Review* 1-11.

⁹ The European Commission recognized, a number of years ago, the need to address the issue of good governance in the Union for which see European Commission, “European Governance: A White Paper,” Brussels, 25 July 2001: COM(2001) 428 final. In general, see also the contributions in B. Kohler-Koch & R. Eising (eds.), *The Transformation of Governance in the European Union*, Routledge, London and New York (1999); C. Joerges & R. Dehoussse (eds.), *Good Governance in Europe’s Integrated Market*, Oxford University Press, Oxford (2002); and D. Curtin & R.A. Wessels (eds.), *Good governance and the European Union: reflections on concepts, institutions and substance*, Intersentia, Antwerp (2005).

¹⁰ J. Pierre & B.G. Peters, *Governance, Politics and the State*, Macmillan, Basingstoke (2000).

¹¹ L. Hooghe & G. Marks, *Multi-level governance and European integration*, Rowman & Littlefield, Lanham (MD) and Oxford (2001).

¹² J. Scott & D.M. Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union” (2002) 8 *European Law Journal* 1, at 8-9.

formulated such principles as direct effect, supremacy, pre-emption, uniform interpretation, fundamental human rights, etc.¹³ The multilevel governance approach challenges this traditional conception of law as it is predicated upon a disposal and fragmentation of authority, based on fluid systems of power sharing, and is thus proffers a heterarchical system that often looks outside of courts to secure real accountability: it thus challenges the former distinction between law-making on the one hand and rule application and implementation on the other. The challenge for the CJEU and the national courts¹⁴ in this pluralist legal system is to use the law to dampen conflict and promote efficacious problem-solving absent a unitary (coercive) sovereign while, at the same time as answering this challenge, keeping a careful eye on maintaining the normative coherence of the law.

The role of the CJEU as the EU model of judicial governance has been instrumental in promoting the transformation of the Communities (and later Union) from international, to supranational, and arguably to constitutional, order. Nevertheless, its ability to work within the emergent EU multilevel governance system, by engaging with private and public actors at differing levels – including national courts, academia and legal professions – has underpinned its enduring attraction as a model for diffusion outside the Union.

III. The CJEU as a Model

1. The feasibility of transfer

Caution is often advised when considering any attempt at transposing the EU institutional and legal framework in view of the fact that the creators of regional economic communities beyond the Union very often overlook the incremental nature of the process of regional integration in Europe.¹⁵ Granted the possible relevance of Union institutions and arrangements can only truly be assessed by taking into account the specific European environment, in terms of a kaleidoscope of political, historical, cultural, legal economic, social and administrative factors. However, the nature of a model should not be considered as a mere copy or reproduction of what has occurred before but might rather be regarded as “a general source of ideas, concepts, examples, and even specific constitutional arguments.”¹⁶ While it may be argued that the pure adoption or cloning of a particular model cannot guarantee any particular outcome,¹⁷ nevertheless it could be argued that the ideas behind, operation of and general jurisprudential development of a particular judicial model can be held up as an example for other similar courts to follow, particularly the trajectory of the model’s case-law evolution within the confines of the relevant treaty or treaties establishing it.

¹³ See generally, A.F. Tatham, *EC Law in Practice: A Case-Study Approach*, HVG-ORAC, Budapest (2006), chap. 1, 1-43; chap. 2, 44-95; and chap. 3, 96-147.

¹⁴ M. Everson, “Adjudicating the Market” (2002) 8/1 *European Law Journal* 152, at 155.

¹⁵ J. Ziller, “The Challenges of Governance in Regional Integration. Key Experiences from Europe,” Second Annual Conference of the Euro-Latin Study Network on Integration and Trade (ELSNIT), Florence, 29-30 October 2004, *EUI Law Working Paper* No. 2005/11, at 6.

¹⁶ H. Klug, “Model and Anti-Model: The United States Constitution and the ‘Rise of World Constitutionalism’” 2000 *Wisconsin Law Review* 597, at 599.

¹⁷ *Ibid.*, at 599-600.

2. The nature of the model

In the present work, the hallmark of the EU concept¹⁸ of integration is its use of law as a prominent tool to achieve its aims.¹⁹ The main element of such concept is the CJEU, created as a permanent and independent judicial body charged with ensuring the proper interpretation as well as the validity of EU law: although, like classical international courts, Member States may bring actions before it, the CJEU is also accessible by Union institutions such as the European Commission and European Parliament and even, where they are the ultimate addressees of EU rules and decisions, companies and individuals.

Perhaps most importantly, national courts may engage in a judicial dialogue with the CJEU through the preliminary reference procedure under Art. 267 TFEU. In this process national courts, seised of a case with an EU legal element and brought before them by natural or legal persons, may (or, if a last instance court, must) refer questions to the CJEU on the interpretation of EU law, the answers to which they are bound to apply in the case before them. This mechanism has allowed the CJEU to develop, over the years, a network of courts – centred on itself – composed of independent judges and relying on a very expert legal profession and a highly-motivated EU legal academic community.

Moreover, it is by means of these references that the CJEU has created, by an expansive and teleological interpretation of the Treaties (and secondary EU law) many of the basic principles of the EU legal order, including those which feature prominently in this study, viz., the supremacy of EU law and its direct effect as expounded in a series of cases dating from the early 1960s and referred to collectively in the present study as the foundational case-law of the CJEU: *Van Gend en Loos*,²⁰ *Costa v. ENEL*,²¹ *Simmenthal*,²² *Internationale Handelsgesellschaft*²³ and *Factortame*.²⁴

In its judicious use of direct effect as a strategic instrument in trade policy, the CJEU has “created” Union-based economic trade rights the breach of which are enforceable by affected individuals and private commercial entities before their own national courts²⁵ whose role in enforcing such rights before them has been key to the success of the Internal Market. Moreover, the CJEU principle of EU law primacy generally privileges – over conflicting national constitutional rights²⁶ – 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 CJEU interprets these freedoms broadly, it is restrictive in determining the

¹⁸ A.F. Tatham, “Exporting the EU Model: A Judicial Dimension for EU International Relations?” (2010) LXIII *Studia Diplomatica* No. 3-4, 137-158.

¹⁹ Ziller, footnote 15 above, at 44.

²⁰ Case 26/62 *N.V. Algemene Transport - en Expedite Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR 1.

²¹ Case 6/64 *Costa v. ENEL* [1964] ECR 585.

²² Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

²³ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

²⁴ Case C-213/89 *R. v. Secretary of State for Transport, ex parte Factortame Ltd. (Factortame No. 1)* [1990] ECR I-2433.

²⁵ Exceptionally directly before the CJEU itself, e.g., Art. 263 TFEU.

²⁶ Case 11/70 *Internationale Handelsgesellschaft*, footnote 23 above.

justifiable limits which states can impose on them: in other words, impediments to free trade must be kept to an absolute minimum.²⁷

As an acknowledged by-product of furthering the completion and deepening of the Internal Market, the CJEU has moulded the EU's economic constitution²⁸ and has thereby transformed the Treaties into the "constitutional charter"²⁹ of an EU governed by the rule of law.

This steady and almost inexorable process of constitutionalization³⁰ has not gone unchallenged, either by national courts or by the Member States themselves.³¹ Yet, despite these apparent challenges, the CJEU has (in general) been very successful in having its approach to multilevel constitutionalism in the EU accepted by national judiciaries.³²

The judicial governance model of the CJEU is accordingly a vital component and purveyor of the EU mode of integration. Its success has been based on *inter alia* a developed system of independent national and EU courts; an expert, active legal profession; the proper implementation and enforcement of CJEU rulings before national courts by their agreement or acquiescence (since no Union power exists to compel domestic judges to obey CJEU rulings); and the development in legal processes and, in fact, in the various legal cultures in the Union whether based on the common law or civil law and their different permutations.³³ Such factors are unlikely to be precisely replicated in the circumstances of regional organizations located in the Americas and in Africa. Given such clearly different scenarios for the regional economic communities and their courts that will be considered here, why would a regional community court outside the Union wish to apply the original CJEU constitutional case-law on supremacy and direct effect in cases before them?

²⁷ 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.

²⁸ M. Poiares Maduro, *We the Court: the European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty*, Hart Publishing, Oxford (1998).

²⁹ Case 294/83 *Parti écologiste Les Verts v. European Parliament* [1986] ECR 1339, at para. 23; Opinion 1/91 *Re Draft Treaty on a European Economic Area* [1991] ECR I-6079, at paras. 20–21; and Joined Cases C-402/05 P and C-415/05 P *Kadi v. Council and Commission* [2008] ECR I-6351, at para. 81.

³⁰ See, e.g., T.C. Hartley, "Federalism, courts and legal systems: the emerging constitution of the European Community" (1986) 34 *American Journal of Comparative Law* 229–247; J.H.H. Weiler, "The Transformation of Europe" (1991) 100 *Yale Law Review* 2403; F. Mancini, "The Making of a Constitution for Europe" (1989) 26 *Common Market Law Review* 595; E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution" (1981) 75 *American Journal of International Law* 1; and A. Stone Sweet, *The Judicial Construction of Europe*, Oxford University Press, Oxford (2004), at 50–96.

³¹ N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford University Press, Oxford (1999); J. Rideau (ed.), *Les Etats membres de l'Union européenne. Adaptations – Mutations – Résistances*, L.G.D.J., Paris (1997); and A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, Oxford (2000).

³² See K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford (2001); and the contributions in A.M. Slaughter, A. Stone Sweet & J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford (1998).

³³ Ziller, footnote 15 above, at 44–49.

IV. Factors contributing to the wide diffusion of the EU model of judicial governance

Before looking at the regional courts and their case-law which are the focus of this study, it is apposite to discuss factors which have led to the wide diffusion of the EU model of judicial governance. The bilateral processes of rule and experience transfer between sending State or regional community and recipient are paradigms of legal transplants, migrations or cross-fertilizations.³⁴ Such experience transfer,³⁵ especially in the shape of its foundational case-law, underlines the pivotal role of the CJEU model through which it has acted as the main potential mediating influence on the regional courts of other economic communities, in the development of their own responses to the implications of integration.

A number of factors play an important role in determining whether or not judges on regional courts outside the EU are interested in using CJEU cases, particularly *Van Gend en Loos* and *Costa v. ENEL*, in their decision-making. The economic provisions and judicial frameworks of the founding Treaties for these regional organizations are particularly relevant since they tend to follow (to varying degrees) those provided for in the Treaty on European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”). In fact, there is broad agreement that the CJEU has been the inspiration for the model of judicial governance of regional courts in Africa³⁶ and Latin America.³⁷ Although these extra-Union regional courts encompass other distinct jurisdictions whether derived from international courts or arbitration tribunals, they contain at their core the unmistakeable influence of the CJEU.

In addition, factors related to the existence between judges in these areas of a community of languages, legal culture, legal education and training, and judicial interpretation and reasoning together provide a fertile ground for considering the likely migration or otherwise of European (legal) integrationist concepts, as developed by the CJEU within the context of the EU.

In this respect, Latin America was historically subject mostly to colonial dominance by Spain and Portugal, achieving independence from the Iberian States in the 19th century. However, the colonial powers left their marks on the legal and linguistic landscape of their former possessions. As a result, Latin America (apart from Brazil) is largely Spanish speaking, and drew its inspiration at the time of independence from Napoleonic France and its codes, and then in the twentieth century from Germany and Italy, and lately in constitutional matters from Spain.³⁸ This linguistic connection – Spanish and Portuguese are both EU official languages in which all Union official publications (including CJEU rulings) are made available – is further

³⁴ A. Watson, *Legal Transplants: An Approach to Comparative Law*, Scottish Academic Press, Edinburgh (1974); J. Bell, “Mechanisms for Cross-fertilisation of Administrative Law in Europe,” in J. Beatson & T. Tridimas (eds.), *New Dimensions in European Public Law*, Hart Publishing, Oxford (1998), chap. 11, 147; S. Choudhry, “Migration as a new metaphor in comparative constitutional law,” in S. Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge (2007), chap. 1, 1; and D. Nelken, “Comparatists and Transferability,” in P. Legrand & R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, Cambridge (2003), chap. 12, 437.

³⁵ N. Walker, “The migration of constitutional ideas and the migration of the constitutional idea: the case of the EU,” in S. Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge (2007), chap. 12, 316.

³⁶ M. Kamto, “Les cours de justice des communautés et des organisations d’intégration économiques africains” (1998) 6 *African Yearbook of International Law* 107-150.

³⁷ A.F. Tatham, “In the judicial steps of Bolívar and Morazán: Supranational Court Conversations Between Europe and Latin America” (2011) 13 *European Journal of Legal Reform* 157-171.

³⁸ See generally, M.C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, University of Texas Press, Austin (2004), especially Parts II and III.

enhanced by educational connections since a number of judges sitting on the benches in the supreme, constitutional and regional courts in Latin America have either attended universities in Europe, or conducted research at institutes there. Moreover, having studied their domestic laws in Spanish or Portuguese, they are fully conversant with the (direct and indirect) European influences on their legal systems. Thus a benign atmosphere for cross-fertilization or migration of legal ideas already exists.

Much the same can be said of the anglophone and francophone states of Africa which bring their own particular colonial experience of the common law or the civil law system into the integration projects in which they are involved. However, the continuing use of British (as well as Commonwealth) case-law and French *jurisprudence* and *doctrine* before national courts in Africa; the educational and training links existing between the African states and those in the Commonwealth and *la Francophonie*; and the fact that French and English are also official languages of the Union, yet again allows judges sitting on regional benches in Africa to feel equally at home in considering the utility of CJEU rulings in their decision-making as their Latin American counterparts do.

This benign atmosphere for the migration of ideas from the CJEU is further emphasized by the existence of links between the three continents from the perspective of migration of legal ideas and transjudicial communication that have been apparent for decades in the field of human rights. The 1950 European Convention on Human Rights and the model and case-law of the European Court of Human Rights have played a pivotal role in the drafting and creation of similar conventions, courts and jurisprudence in Latin America with the Inter-American Court of Human Rights enforcing and interpreting the 1969 American Convention on Human Rights³⁹ and in Africa with the African Court on Human and Peoples' Rights⁴⁰ and its application of the African Charter on Human and Peoples' Rights 1981.⁴¹ In this field of inter-regional judicial dialogue,⁴² the European Convention and Court have directly impacted on their American⁴³ and African⁴⁴ counterparts in institutional set-up and jurisprudential development. Interestingly for the future, this interaction or migration of ideas has not been a one-way process, the European Court of Human Rights citing to its American and African counterparts in its judgments.⁴⁵

Despite hints at such well-prepared ground for receiving the CJEU model and its case-law, other – more political – factors play an important role in these scenarios for diffusion. In fact regional courts in Africa and the Americas have used or may conceivably use the foundational case-law of the CJEU before them as an extra tool, aimed at helping to continue to emphasize their

³⁹ J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge (2003).

⁴⁰ Following adoption in 2008 by the African Union of a Protocol to the Statute of this Court, the ACHPR was to be incorporated into the Court of Justice of the African Union: For a discussion of the merits of the merger, see K. Kindiki, "The Proposed Integration of the African Court of Justice and the African Court of Human Rights: Legal Difficulties and Merits" (2007) 15 African Review of International and Comparative Law 138.

⁴¹ (1982) 21 *International Legal Materials* 58.

⁴² On how courts dialogue in the EU context, see generally A.F. Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland*, Martinus Nijhoff, Leiden (2013).

⁴³ H. Gros Espiell, "La Convention américaine et la Convention européenne des droits de l'homme. Analyse comparative," *Recueil des Cours de l'Académie de Droit international*, The Hague (1989), Vol. 218, at 220ff.

⁴⁴ J. Sarkin, "The Role of Regional Systems in Enforcing State Human Rights Compliance: Evaluating the African Commission on Human and People's Rights and the new African Court of Justice and Human Rights with Comparative Lessons from the Council of Europe and the Organization of American States" (2008) 1 *Inter-American and European Human Rights Journal* 199-217.

⁴⁵ See, e.g., E.A. Bertoni, 'The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards' (2009) *European Human Rights Law Review* 332

commitment to the regional integration project, to legitimate their decision-making through direct reference to the regional court *par excellence* in integration, and thereby to seek to de-politicize their judicial activism or at least to assist them in their defence against charges of arrogating to themselves the power to read the regional economic community treaty in a way unforeseen when originally drafted by the Member States. The CJEU foundational case-law can therefore be used to bolster a decision impacting on the basic competences of the relevant regional community: this could be the extension of protection of individual economic or human rights not expressly foreseen by the founding community treaty or an innovative ruling changing the inter-relationship between community institutions. In such situations, the regional court uses CJEU foundational case-law to protect it from attack by national and regional political institutions. This motive is especially important for regional courts where they exist as the only truly (operative) supranational institution in the community, absent an effective regional institution equivalent to the European Commission or European Parliament (with the legitimacy of direct election rather than national delegation). The CJEU foundational case-law is thus an aid in preserving their independence and freedom of manoeuvrability in furthering integration while seeking to keep at bay an abusive politicization (either by national or regional institutional interests) of control over them.

V. Diffusion of the CJEU institutional model

Before examining the case-law on integration of a number of regional courts in Latin America and Africa as examples of the diffusion of the EU model of judicial governance, it appears to be almost a *sine qua non* for such diffusion that the institutional and jurisdictional aspects of the CJEU be emulated by the relevant courts before they are able to “receive inspiration” from the CJEU foundational case-law.

For the present study, five regional courts from Latin America and Africa have been chosen as they have, from the institutional perspective, emulated the CJEU to a greater or lesser extent.

From Latin America, there are two courts. First, the *Corte Centroamericana de Justicia* (or “CCJ”) which was established in Managua, Nicaragua and is the regional court of the Central American Integration System (*Sistema de la Integración Centroamericana* or “SICA”).⁴⁶ Although those who drafted the 1992 Statute of the Court⁴⁷ tried to emulate the CJEU considering it as a worthwhile model,⁴⁸ the CCJ – from various aspects – has inherited from its short-lived predecessor of 1907⁴⁹ jurisdiction that renders it an international tribunal and even a court of arbitration. In such way, the CCJ has a much broader remit than the CJEU, inherent in which is a more political role between the Member States. Secondly, there is the Court of Justice

⁴⁶ SICA’s origins lie in (i) General Treaty on Central American Integration (Treaty of Managua), 13 December 1960: M. Halperin (Ed.), *Instrumentos Básicos de Integración Económica en América Latina y el Caribe*, 2nd ed., BID-INTAL, Buenos Aires 1992, pp. 233-252; and (ii) Charter of the Organization of Central American States (San Salvador Charter), 12 December 1962: 552 *United Nations Treaty Series* 15. However, the Organization was resurrected and radically altered in 1991: Tegucigalpa Protocol to the Charter of the Organization of Central American States, 13 December 1991: 1695 *United Nations Treaty Series* 382.

⁴⁷ Convention on the Statute of the Central American Court of Justice, 10 December 1992, 1821 *United Nations Treaty Series* 280.

⁴⁸ K. Nyman Metcalf & I. Papageorgiu, *Regional Integration and Courts of Justice*, Intersentia, Mortsel (2005), at 28.

⁴⁹ Convention for the Establishment of a Central American Court of Justice, 1907 *Papers Relating to Foreign Rel. U.S.* 697 (1910). See generally, S. Maldonado Jordison, “The Central American Court of Justice: Yesterday, Today and Tomorrow?” (2009) 25 *Connecticut Journal of International Law* 183.

of the Andean Community (*Tribunal de Justicia de La Comunidad Andina* or “ACCJ”)⁵⁰ that was established in Quito, Ecuador, through the 1979 Treaty creating the Court.⁵¹ On the basis of the 1996 Cochabamba Protocol⁵² to the 1969 Cartagena Agreement,⁵³ the ACCJ acquired new competencies and is much more closely modelled on the CJEU.

For Africa, there are three regional courts. First, the largely anglophone Court of Justice of the East African Community (“EACJ”)⁵⁴ that is the regional court for the East African Community (“EAC”). Re-established in 2000⁵⁵ and now also including Burundi and Rwanda (both Belgian colonies before independence), the EAC already has a functioning customs union. In July 2010, it launched the East African Common Market Protocol, expanding the customs union that would lead to the free movement of labour, capital, goods and services within the EAC. Thereafter, the Member States intended to move to a common currency by 2012 and eventual political federation in 2015. However, a combination of insuperable political problems and the deterioration in the economic outlook have led to a delay in implementing this timetable.

Lastly two mainly francophone regional courts complete the list. On the one hand, there is the UEMOA Court of Justice (“UEMOA CJ”)⁵⁶ which services the West African Economic and Monetary Union (known by its French acronym “UEMOA”⁵⁷). UEMOA is a customs and monetary union that comprises mostly francophone countries in West Africa. It promotes economic integration between its Members through the use of a common currency, the CFA Franc,⁵⁸ and seeks to create a common market, greater economic competitiveness (through open and competitive markets). The Union also aims at harmonising laws and convergence of macroeconomic policies and indicators, and of fiscal policies.

⁵⁰ The ACCJ was originally established through the 1979 Treaty creating the Court of Justice of the Andean Community and its powers extended through the 1996 Cochabamba Protocol to the 1969 Cartagena Agreement (the original Andean Subregional Integration Agreement).

⁵¹ L.R. Helfer & K.J. Alter, “The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community” (2009) 41 *New York University Journal of International Law & Politics* 871-930.

⁵² Cochabamba Protocol to the Treaty creating the Court of Justice of the Cartagena Agreement, 28 May 1996. Available at: <www.comunidadandina.org>. Visited 4 August 2013.

⁵³ Andean Sub-regional Integration Agreement (Cartagena Agreement), 26 May 1969: (1969) 8 *International Legal Materials* 910. The Andean Pact was replaced by the Andean Community of Nations in the mid 1990s: Trujillo Protocol to the Cartagena Agreement, 10 March 1996. Available at: <www.comunidadandina.org>. Visited 4 August 2013.

⁵⁴ The EACJ was established under Art. 9 of the 1999 East African Community Treaty; its jurisdiction is dealt with in chapter 8 of that Treaty (Arts. 23-47). The EAC Treaty is available at: <www.eacj.org>. Visited 29 July 2013.

⁵⁵ The first EAC had originally operated between 1967-1977 and the original Treaty had also provided for a regional court: S. Ross, “The Common Market Tribunal – the Solution to Conflict between Municipal and International Law in East Africa” (1972) 21 *International and Comparative Law Quarterly* 361-374.

⁵⁶ The UEMOA Court of Justice was re-established in Arts. 16 and 38 of the 2003 modified UEMOA Treaty (originally signed in 1994) and its jurisdiction is provided in Additional Protocol No. 1 relating to the UEMOA Supervisory Organs, Arts. 5-19. All relevant materials on UEMOA are available at: <www.uemoa.int>. Visited 29 July 2013.

⁵⁷ In French, “UEMOA” represents “*l’Union économique et monétaire ouest-africaine*.”

⁵⁸ The CFA franc, where “CFA” stands for “*Communauté financière d’Afrique*” (“Financial Community of Africa”), is strictly speaking, two different currencies: the West African CFA and the Central Africa CFA franc. These two CFA francs have the same exchange rate with the euro (1 euro = 655.957 CFA francs), and they are both guaranteed by the French treasury. Such was confirmed by the EU, even though France itself now uses the euro as its currency in Council Decision 98/683/EC of 23 November 1998 concerning exchange rate matters relating to the CFA Franc and the Comorian Franc: *Official Journal of the European Communities* 1998 L320/58. However, it should be noted that the West African CFA franc cannot be used in Central African countries, and vice versa. A third CFA, with its own separate central bank, exists for the Comoro Islands.

On the other hand, there is the OHADA Common Court of Justice and Arbitration (“OHADA CCJA”).⁵⁹ The Organization for the Harmonization of Business Law in Africa, generally referred to by its French acronym, “OHADA”⁶⁰, was set up in 1993 by 14 mostly francophone States in Central and West Africa.⁶¹ OHADA’s principal objectives are to harmonize and modernize business laws in Africa so as to facilitate commercial activity, attract foreign investment and secure economic integration in Africa. Its activities are seen as complementary to a number of other groups, e.g., UEMOA, although the possibility of conflict of jurisdiction between the courts of such regional organizations is more than theoretical.⁶²

As already indicated with respect to the CJEU model, there are two main competences which set that Court apart from classic international courts and which have, in general, been imported or emulated by regional organizations in Latin America and Africa. First the possibility of direct actions before the regional courts for judicial review of acts of the regional organization’s organs is available before all the courts listed.⁶³ Secondly, the preliminary reference procedure from national courts – either to request the interpretation of regional community law or to test its validity or (usually) both – is available in all jurisdictions.⁶⁴ Indeed the CJEU model for this procedure, under Article 267 TFEU, more specifically provides that all courts may make such a reference but those courts, against whose decisions there is no judicial remedy, must make a reference: of these regional courts, the ACCJ and UEMOA CJ are particularly faithful in following this distinction.

VI. Diffusion of the CJEU foundational case-law

1. Central American Court of Justice

Despite its relatively fewer decisions when compared with its sister court in the Andean region, the CCJ has clearly been guided by the fundamental case-law of the CJEU and even that of its Latin American counterpart, the ACCJ. In a 2001 case, it held:⁶⁵

The Court of Justice of the European Communities, the Luxembourg Court, has confirmed it in a repeated manner since the case of *Costa v. ENEL* of 15 August 1964 in which ... it has established that that all claims by States to insist upon their constitutional criteria as prevailing above the norms of Community law is a fermenting agent for dislocation, contrary to the principle of membership to which the Member States submitted themselves freely and in a sovereign manner. Moreover, the Luxembourg Court in its historic case *Van Gend en Loos* has clearly established that the Community Treaties conferred on individuals rights that the national courts had to protect, not only when the pro-

⁵⁹ The OHADA Common Court of Justice and Arbitration was established under Art. 3 of the 1993 OHADA Treaty (as amended in 2008) and its jurisdiction is set out in Arts. 6-7 and 14-20 of the same. All relevant treaty materials on OHADA are available at: <www.ohada.org> or <www.ohada.com>. Visited 20 July 2013.

⁶⁰ In French, the acronym “OHADA” represents “*l’Organisation pour l’Harmonisation en Afrique du Droit des Affaires*.”

⁶¹ Two other States – Guinea and Guinea Bissau – have subsequently joined, the latter being lusophone.

⁶² Kamto, footnote 36 above, at 147-150.

⁶³ CCJ Statute Art. 22 b); ACCJ Treaty Arts. 17-22; EAC Treaty Arts. 28 and 30; UEMOA Treaty, Protocol 1, Art. 8; and OHADA Treaty Arts. 14-20.

⁶⁴ CCJ Statute Art. 22 k); ACCJ Treaty Arts. 32-36; EAC Treaty Art. 34; UEMOA Treaty, Protocol 1, Art. 12; and OHADA Treaty Art. 14(2) but, in the last example, the CCJA must only provide a consultative opinion to national courts.

⁶⁵ CCJ, 27 November 2001, Nicaragua v. Honduras – Asunto del Tratado de Delimitación Marítima entre la República de Honduras y la República de Colombia.

visions in question considered them as legal subjects, but also when they imposed a well-defined obligation on the Member States. The Court of Justice of the Cartagena Agreement [ACCJ] has equally confirmed this on many occasions in the cases *1-IP-87*, *2-IP-88* and *2-IP-90*.

In Case 5-11-96,⁶⁶ the CCJ reaffirmed its decisions contained in Cases 4-1-12-96;⁶⁷ 2-24-5-95;⁶⁸ and 2-5-8-97;⁶⁹ together with the opinion of a number of EU law academics as regards the guiding principles of Central American Community law. Having noted that such Community law was separate with its own autonomous legal order, the Court noted its primacy “since Community norms occupy a place of priority with respect to national norms, given that its application is given preference or priority with respect to the national law of the Member States, primacy of an absolute character includes respect for constitutional norms” because the effects of Community law could be annulled or avoided by the Member States. In dealing with direct effect and its implications, the CCJ held:

Its immediate applicability, as it automatically becomes – in a clear, precise and unconditional form – internal norms of the Member States, without needing any [domestic]act to incorporate the Community norms into national law, without them being confused with national law and without the national authorities having compulsorily to apply national law; its direct effect or applicability, as the Community norms can create in themselves rights and obligations for individuals, or impose on Member States their realization and implementation by which they have full effect.

Finally, the Court referred to the principle of state liability, “formulated by the CJEC, which affirms that the States are obliged to make good damages caused to individuals as a consequence of the breach of Community norms”. All these principles had been recognized in the doctrine of the CCJ which, according to Article 3 of the Convention on the Statute of the Court, had binding effect on all states, organs, and organizations that formed part of or participated in the SICA as well as for subjects of private law.

The CCJ has even gone so far as to employ the methodological approach to interpretation of Community law as that used by the CJEU⁷⁰ and was able to maintain that “between the law of integration – Community law – and national laws, harmony must exist since the law is a whole which must be analysed principally in a systematic and teleological manner, like a single normative body.”⁷¹

⁶⁶ CCJ, 10-5-11-96, Coto Ugarte v. Consejo Superior Universitario de la Universidad de El Salvador – Demanda por el Desconocimiento del Convenio Sobre el Ejercicio de Profesiones Universitarias y Reconocimiento de Estudios Universitarios y del Protocolo al Tratado General de Integración Económica o Protocolo de Guatemala.

⁶⁷ CCJ, 4-1-12-96 concerning PARLACEN and the Guatemala Constitutional Court.

⁶⁸ CCJ, 2-24-5-95 concerning SICA, the Tegucigalpa Protocol and ALIDES.

⁶⁹ CCJ, 2-5-8-97 concerning SIECA and the Convention on the Central America Regime for Tariffs and Customs.

⁷⁰ See generally, T. Tridimas, “The Court of Justice and Judicial Activism” (1996) 21 *European Law Review* 199.

⁷¹ CCJ, 27 Novembre 2001, Nicaragua v. Honduras – Asunto del Tratado de Delimitación Marítima entre la República de Honduras y la República de Colombia.

2. Andean Community Court of Justice

The ACCJ much earlier than the CCJ set out its own understanding of Andean Community law, its nature and effect, following closely the CJEU rulings already mentioned.⁷² In ruling *08-IP-96*,⁷³ the ACCJ held that: “an autonomous legal order, with its own system of making laws, enjoys a specific force of penetration into the internal legal order of the Member States born of its own nature, which is manifested in its immediate applicability and, fundamentally, in its direct effect and primacy.”

Just like the CJEU, the ACCJ has held that the principle of supremacy derives from its direct application.⁷⁴ In case *76-IP-2005*,⁷⁵ the ACCJ stated that: “The principle of direct applicability assumes that the Andean Community norm goes on to form part of the internal order of each and every Member State of the Community ... and therefore Community law prevails as such and gives rise in every national judge the duty to apply it.” In fact, the ACCJ has not been reticent in explaining in detail its understanding of Andean Community law and has been heavily influenced in this by the case-law of the CJEU. In decision *02-IP-90*,⁷⁶ the ACCJ set out at length how primacy of Community law was to act in practice:

Integration law, as such, cannot exist if the principle of its primacy or prevalence over the national or internal laws of the member States is not accepted... In those matters whose regulation devolves upon Community law, according to the fundamental or basic norms of the integrationist order, it automatically produces a displacement of competency, which passes from the national to the Community legislator. The organized Community invades or occupies, so to speak, the national legislative ground, by reason of the subject, displacing in this way domestic law. The national legislator thus remains incompetent to modify, substitute or derogate from Community law in force on its territory, whether under the pretext of reproducing it or regulating it, and the national judge, whose duty is the application of Community laws, is obliged to guarantee the full effect of the Community norm... The law of integration does not annul national laws, which are intruded into the domestic order: just that it makes them inapplicable those laws which are contrary to Community norms. This does not prevent, of course, within the national order every norm that is incompatible with Community law to be considered unconstitutional.

It reinforced its opinion on primacy of Andean Community law by express reference to and direct quotation from *Costa v. ENEL* in the later decision, *03-AI-96*,⁷⁷ in which the ACCJ stated:

The legal basis for the doctrine of supremacy/primacy of Community law was given through the ruling of the CJCE on 15 July 1964 in the Costa case. In it, according to which ‘the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, how-

⁷² J.J. Calle y Calle, “La Supranacionalidad y la Jurisdicción del Tribunal de Justicia de la Comunidad Andina” (2000) 50 *Revista Peruana de Derecho Internacional* No. 116, 53.

⁷³ ACCJ, *08-IP-96*, caso ‘ELCHE’, G.O.A.C. 261 del 29 de abril de 1997.

⁷⁴ See generally, J.R. Reyes Tagle, “El Principio de Supremacía del Derecho Comunitario y las Constituciones de los Estados Miembros de las Comunidades Europea y Andina” (2006) 56 *Revista Peruana de Derecho Internacional* No. 133, 190.

⁷⁵ ACCJ, *76-IP-2005*, de 22 de junio de 2005.

⁷⁶ ACCJ, *02-IP-90*, G.O.A.C. N 69, de 11 de octubre de 1990.

⁷⁷ ACCJ, *03-AI-96*, G.O.A.C. No. 261, 29 de abril de 1997.

ever framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

In analysing the sources of Andean Community law, the ACCJ had previously stated in decision *01-IP-96*⁷⁸ that the treaties constituting the Andean Community together with their amending protocols⁷⁹ were at the summit of the whole Community legal order, and constituted the original basis of Community law. It noted that among Europeans, such norms were referred to as the ‘Community Constitution’, in order to indicate their independent nature and their being the primary source of law, from which the other sources of Community law were derived and to which these subsidiary sources were subject. Redolent of *Van Gend en Loos* and *Costa v. ENEL*, the ACCJ continued to explain further the nature of Andean Community law:⁸⁰

It can be affirmed that the basic characteristic of the Community legal system is the one that the States in a sovereign manner cede part of their regular competencies transferring them from the sphere of internal state action to the sphere of Community action through the putting into practice and development of the aims of sub-regional integration. In this way, the constitutive treaties – primary law – join the legal acquis issued by the organs of Community control like the Commission and the Junta of the Cartagena Agreement, that by means of legal norms of the supranational order – derived law – regulate matters that have originally formed part of the exclusive competence of the Member States, which States resolved in a sovereign manner to transfer them as a ‘competency of attribution’ to the said organs.

The ACCJ has also addressed the principles of direct effect and direct applicability and has underlined the close links between them. It noted in decision *02-N-86*⁸¹ that the norms of the Andean legal order, (whatever their form, i.e., treaties, protocols, agreements, conventions or resolutions) were, as a rule, of direct effect and directly applicable in all the Member States from their publication in the Official Gazette of the Cartegena Agreement. As a result, they were of binding and immediate effect for the Member States, the organs of the Agreement and individuals.

Subsequently, in decision *03-AI-96*,⁸² the ACCJ – using the CJEU rulings in *Van Gend en Loos* and *Simmenthal* – explained how it understood direct applicability and direct effect to operate in the Andean Community context:

In the European area, the principle of direct applicability has been recognized since the ruling *Van Gend en Loos*, 1963, of the CJEC, and specified in the ruling *Simmenthal*, 1978, in which it maintained that direct applicability means that rules of Community law

⁷⁸ ACCJ, *01-IP-96*.

⁷⁹ As indicated specifically in Art. 1a) and b) of the Treaty creating the Court of Justice of the Cartagena Agreement.

⁸⁰ Similarly in decision *03-AI-98*, the ACCJ stated: “This legal order nourishes itself from two sources: from one source ‘original’, ‘primary’ or ‘constitutional’ that stands formed by the provisions contained in the Cartagena Agreement and in the Treaty on the Court of Justice, with their respective amending protocols.

The other source is the one which springs from ‘derived’ or ‘secondary’ law, including the Decisions of the Council of Foreign Affairs Ministers and of the Commission of the Cartagena Agreement and from the Resolutions emanating from the Junta, now the Secretary General.

The arranging in order of importance between some or other norms springs from the actual content of the first article of the Treaty creating the Court, from which a relation of subordination is deduced between original law and derived law.”

⁸¹ ACCJ, *02-N-86*.

⁸² ACCJ, *03-AI-96*, G.O.A.C. No. 261, 29 de abril de 1997.

must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.

It continued by observing that the principle of direct effect was related to the legal proceedings that parties could initiate to protect the infringement of their rights under Community law. In other words, Andean Community law would generate rights and obligations for individuals as happened through the national legal norms and thus allowing for the possibility that such individuals could directly demand their observance before their respective national courts.

Nevertheless, it is clear that the ACCJ's initial enthusiasm for the CJEU foundational case-law has foundered on the steep rocks of Andean reality, having failed to enlist the support of key stakeholders and compliance constituencies in the signatory states:⁸³ it has shied away from recognizing both the Cartagena Agreement and linked treaties as constitutional documents for the Andean Community, and the full implications of the *Simmenthal* decision and its progeny.⁸⁴ The ACCJ has thus been left⁸⁵ with issuing "mostly narrow, technical rulings and [avoiding] the expansionist lawmaking of its jurisdictional cousin [CJEU]."

3. East African Court of Justice

The EACJ is perhaps the most striking example of a regional community court whose independence has been directly impacted by the EAC state executives. In the face of strong external political pressure, the EAC judges attempted to remain faithful to their integrationist vocation. The saga concerns the EACJ's refusal to accept the selection of the nine Kenyan members of the East African Legislative Assembly, which institution is the EAC legislative organ and whose members are elected for a five-year term by their respective national parliaments in accordance with EAC Treaty Art. 50:

The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.

In *Nyong'o*,⁸⁶ the EACJ issued an interim injunction to prevent the swearing in of the Kenyan members as Assembly members on the grounds that the Kenyan selection rules were *prima facie* contrary to EAC Treaty Art. 50. National political reaction was swift: within a month, the EAC Summit had adopted a series of Treaty amendments that were ratified by all states before the end of March 2007. The main thrust of these amendments was to add extra grounds for removing or suspending an EAC judge, under new Art. 26(1)(b), where they were also held national judicial office and is removed or resigns from that position on grounds of misconduct or inability to perform their functions. Such changes were aimed at the two Kenyan EACJ

⁸³ K.J. Alter, L.R. Helfer & O. Saldías, "Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice," (2012) 60 *American Journal of Comparative Law* 629, at 661.

⁸⁴ Ibid., at 654-659.

⁸⁵ Ibid., at 661.

⁸⁶ *Professor Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*, EACJ Reference No. 1 of 2006, 26 November 2006.

judges: one was subsequently cleared at national level while the other continued to be subject to an inquiry that had not progressed further after five years.

Despite these and other amendments, the EACJ proceeded to deliver its final decision in *Nyong'o* in 2007⁸⁷ after these changes had been ratified and held that a breach of EAC Treaty Art. 50 had occurred. In this case and contrary to the submissions of the respondent, Art. 52(1) of the Treaty did not apply: this latter provision states, *inter alia*, that “any question that may arise whether a person is an elected member of the Assembly ... shall be determined by the institutions of the Partner State that determines questions of the elections of members of the National Assembly.” Thus, according to *Nyong'o*, the EACJ had jurisdiction to rule on the case and not the High Court of Kenya.

In considering the basic principle of international law that a state party to a treaty cannot invoke the provisions of its domestic law to justify its failure to perform its treaty obligations, the EACJ stated:⁸⁸

We were referred to several judicial decisions arising from national law that contravened or was inconsistent with European Community law, as persuasive authorities on this subject. (See *Algemene Transporten Expeditie Onderneming van Gend en Loos vs. Nederlandse Administratie der Belastingen* [1963] ECR 1; *Flaminio Costa vs. ENEL* [1964] ECR 585; and *Amministrazione delle Finanze dello Stato vs. Simmenthal* [1978] ECR 629). In some cases the national law in issue was in existence when the Community law came into force, while in others it was enacted after the Community law. In either case where there is conflict between the Community law and the national law the former is given primacy in order that it may be applied uniformly and that it may be effective.

The Court then turned, for the purposes of illustration, to the *Factortame* litigation⁸⁹ in which the CJEU had ruled that the full effectiveness of Community law would be impaired if a rule of national law could prevent a court, seised of a dispute governed by Community law, from granting interim relief. Compared to *Factortame*, the EACJ opined, the first respondent in the instant case appeared to be on weaker ground.

In concluding its judgement, the EACJ was forced to observe first that the lack of uniformity in the application of any EAC Treaty Article was a matter of concern since it was bound to weaken the effectiveness of EAC law and, in turn, undermine the objectives of the Community. Secondly it further observed that the Partner States had to balance individual state sovereignty with integration:⁹⁰ “While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them to play a role.”

Evidently, the EACJ found it necessary to rephrase *Van Gend en Loos* and *Costa v. ENEL* in this last paragraph to indicate the implicit consequences of the integration proposed by the EAC Treaty, aims which the Partner States had clearly accepted when drawing it up and vesting a regional court with jurisdiction to interpret it. Moreover, the EACJ appears to accept that the

⁸⁷ *Professor Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*, EACJ Reference No. 1 of 2006, 30 March 2007.

⁸⁸ *Ibid.*, at 41-42.

⁸⁹ Case C-213/89 *Factortame*, note 24 above.

⁹⁰ *Professor Peter Anyang' Nyong'o*, footnote 87 above, at 44.

EAC should move in this direction of integration through its reference to the foundational CJEU case-law and using such case-law as inspiration, support and guide.⁹¹

The Treaty amendments following on from the initial ruling in *Nyong'o* thus provide evidence that even with communities whose aims, institutional framework and legal provisions are clearly inspired by the EU, replication of the European model is fraught with more dangers than those faced by the CJEU, even in the formative years developing its foundational case-law in constructing an autonomous legal system for the enforcement of rights at European and national level.

4. OHADA CCJA and UEMOA CJ

Having seen the experience of the EACJ with CJEU foundational case-law, the francophone regional jurisprudence in this field will now be addressed. For example, the OHADA CCJA has held that “the mandatory force of the [OHADA] uniform acts and their superiority over the provisions of national laws”⁹² – which is equally called “a rule of supranationality” directly derived from Art. 10 of the OHADA Treaty – in view of the fact that that Article “contains a rule of supranationality because it provides for the direct and mandatory application in the Contracting States of the uniform acts and establishes, moreover, their supremacy over the antecedent and later provisions of domestic law.”⁹³ Such concepts are clearly linked to *Costa v. ENEL*⁹⁴ and *Simmenthal*.⁹⁵

The UEMOA Court for its part, obviously in line with and informed of the CJEU case-law,⁹⁶ ruled that:⁹⁷

[I]t is important to underline that the Union [UEMOA] constitutes in law an organization of unlimited duration, endowed with its own institutions, with legal personality and capacity and above all with powers born of a limitation of competences and of a transfer of responsibilities of Member States which have intentionally granted to it a part of their sovereign rights in order to create an autonomous legal order which is applicable to them as it is to their nationals.

⁹¹ In fact the EACJ has continued to use CJEU case-law, both expressly and impliedly, in its own decision-making in order to develop its own regional jurisprudence: on the recent use of *Van Gend en Loos* within the EAC context of dealing with preliminary references from national courts and what are effectively the principles of direct effect and state liability, see *Attorney General of Uganda v. Kyahurwenda*, EACJ (Appellate Div.), Case Stated No. 1 of 2014, 31 July 2015.

⁹² OHADA Court, *Avis consultatif*, No. 002/99/EP, 13 octobre 1999 (Demande d'Avis de la République de Mali).

⁹³ OHADA Court, *Avis consultatif*, No. 001/2001/EP, 30 avril 2001 (Demande d'Avis de la République de Côte d'Ivoire).

⁹⁴ Case 6/64 *Costa v. ENEL*, footnote 21 above, in which the CJEU stated: “The precedence of Community law is confirmed by [Article 288 TFEU], whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States’. This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.”

⁹⁵ Case 106/77 *Simmenthal*, footnote 22 above, where the CJEU held: “A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.”

⁹⁶ E. Chevalier, “La déclinaison du principe de primauté dans les ordres communautaires: l'exemple de l'Union Economique et Monétaire Ouest Africaine,” *Cahiers de droit européen* 2006, No. 3-4, 343-362.

⁹⁷ UEMOA CJ, *Avis No. 002/2000*, 2 février 2000 (Demande d'Avis de la Commission de l'UEMOA relative à l'interprétation de l'article 84 du traité de l'UEMOA).

The relationship of this wording to the CJEU in *Costa v. ENEL* is quite patent yet the UEMOA CJ is usually reticent in referring expressly to CJEU rulings in its own judgements. For example, this Court has even repeated the expression that the CJEU used in the *Les Verts* case,⁹⁸ referring to the UEMOA Treaty as the “constitutional charter of the Union.”⁹⁹

In a further case,¹⁰⁰ the UEMOA CJ clearly laid down the principle of primacy of community law over the national laws of the Member States, recognising in it an absolute character. According to the Court, UEMOA law had primacy over all “national administrative, legislative, jurisdictional and even constitutional norms.” Underlying the general duty of Community loyalty incumbent on Member States in putting community law into effect,¹⁰¹ the Court noted: “The States have the duty to make sure that a norm of domestic law incompatible with a norm of Community law which meets the commitments that they have undertaken, cannot be legitimately be in conflict with Community law.” The Court evidently understood that the duty of community loyalty included national judges applying the principle of primacy and thus, in case of a conflict between UEMOA law and a national legal rule, the judge was required to “give precedence to the former over the latter by applying the one and disapplying the other.”

With both these francophone regional courts, it is clear that the use of CJEU rulings in their own case-law is regarded as a given. Imbued with a similar strategic mission, the OHADA CCJA and the UEMOA CJ – together with the support of the respective (West) African legal academic communities through articles and monographs – have essentially incorporated CJEU decisions into the body of regional community case-law, without necessarily acknowledging their source in Luxembourg. That these African regional courts should do so necessarily reflects, in part, on the way in which both judges (extrajudicially) and legal academia weave the established case-law of the CJEU into their own work: this seems to be accomplished without more than a cursory nod to the relationship between commonality in the laws and institutions between the three regional groups.

Evidently, OHADA and UEMOA judges are more than open to using the decisions of the Luxembourg Court in their construction of and/or confirmation of the supranational nature of their community laws and their direct effect in national systems. Reference, both express and implied to the EU judicial model, resonates within their regional systems and could be seen as reinforcing their independence vis-à-vis other institutions. In other words, since the treaties – as with the TEU and TFEU – have endowed these two African regional courts with the same or similar powers to the CJEU, the signatory states were already well aware of the judicial development of EU law and could not actually object when the OHADA or UEMOA courts started to develop regional integration along similar lines. Indeed, use of CJEU case-law could be regarded as inevitable since neither francophone African regional court was obliged to create the legal underpinnings of a regional legal order from scratch.

⁹⁸ Case 294/83 *Parti Ecologiste Les Verts v. European Parliament* [1986] ECR 1339.

⁹⁹ UEMOA CJ, Avis No. 003/2000, 27 juin 2000 (Demande d’Avis de la Commission de l’UEMOA relative à l’interprétation des articles 88, 89 et 90 du traité relatifs aux règles de concurrence dans l’Union).

¹⁰⁰ UEMOA CJ, Avis No. 001/2003 du 18 mars 2003 (Demande d’Avis de la Commission de l’UEMOA relative à la création d’une Cour des comptes au Mali).

¹⁰¹ The principle of Union loyalty with respect to Member States is provided for under Art. 4(3) TEU (ex Art. 10 EC) as follows: “The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.” It extends, *inter alia*, to the judiciary: Case 103/88 *Fratelli Costanzo v. Comune di Milano* [1989] ECR 1839.

VII. Conclusion

The promotion of the EU's own model of co-operation, partnership and regional integration,¹⁰² one relatively untainted by the stigma of colonialism attaching to its Member States,¹⁰³ includes its own particular judicial model that implicitly carries with it the opportunity for each regional court to develop the legal ways to regional integration, using the CJEU case-law if not as precedent then at least as inspiration. In fact, Rosecrance has already noted¹⁰⁴ the possible paradox in the fact that "the continent which once ruled the world through physical impositions of imperialism is now coming to set world standards in normative terms. There is perhaps a new form of European symbolic and institutional dominance even though the political form has entirely vanished." Since legal integration and the constitutionalization of the basic Treaties of the European Union were achieved by the CJEU, the prospects for regional courts in Africa and Latin America remain pregnant with possibilities, given the wording of their own regional (economic) community treaties and the regional courts' jurisdiction in many ways similar to that of the CJEU.

Where such institutions exist, the regional court judges may be taken as allowing them to fashion (as a bench) the space for deployment of regional economic integration law. Their potentially activist approach to the creation and development of this law reinforces their own commitment, in contradistinction to that of the Member State governments as well as to that of some of the regional community institutions, to the realization of the integration project. Such commitment is especially significant, e.g., when the Member States themselves fail to live up to their Treaty commitments and the regional court, as exemplified by the CJEU, intervenes directly as a spur to deepening or enhancing the dimension of integration.¹⁰⁵ Through teleological interpretation in particular, a regional court can therefore mould the community legal order – at least in the initial stages – justified on the basis that the court is no more than interpreting the Treaty provisions themselves.

Nevertheless, the issue of judicial activism, through expansive interpretation of a regional economic community treaty, is likely to raise concerns when national or regional political bodies consider the action of the judges as having gone beyond what was permissible under the court's treaty-given powers.¹⁰⁶ In this scenario, critical consideration of such activism carries with it an implicit condemnation of the legitimacy of the judgements made. Regional judges, subtly aware of the strength of their own standing and the limitations occasioned by the circumstances in which they operate, may therefore act instead with restraint in interpreting the relevant community treaty.

In situations of this type, the well-established foundational case-law of the CJEU (by which,

¹⁰² C. Bretherton & J. Vogler, *The European Union as a Global Actor*, Routledge, London and New York (2004), at 8.

¹⁰³ Ibid., at 34.

¹⁰⁴ R. Rosecrance, "The European Union: A New Type of International Actor," in J. Zielonka (ed.), *Paradoxes of European Foreign Policy*, Kluwer Law International, The Hague/London/Boston (1998), chap. 1, 15, at 22.

¹⁰⁵ Case 2/74 *Reyners v. Belgian State* [1974] ECR 631; Case 33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299; Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337; and Case 43/75 *Defrenne v. SABENA (No. 2)* [1976] ECR 455; and Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon")* [1979] ECR 649.

¹⁰⁶ See generally with respect to the CJEU, K. Lenaerts, "Some Thoughts About the Interaction Between Judges and Politicians in the European Community" (1992) 12 *Yearbook of European Law* 1-34; and K. Alter, "Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice (1998)," in K. Alter, *The European Court's Political Power*, Oxford University Press, Oxford (2009), chap. 6, 109-136.

largely in the formative years of the 1960s and 1970s, it converted the founding Treaties into “the basic constitutional charter”¹⁰⁷ of the then Community) can be drawn upon by other regional courts as a means of justifying and bolstering their own judicial activism in attempting to create distinct (supranational) regional legal orders.

Although the situation in Latin America or Africa is clearly different to that in the EU during the 1960s-1980s, regional courts are still faced with the challenge of how to engage with their key allies in the Member States – e.g., national judges, national and regional bar associations, legal academia – in promoting regional integration. Failure to create such interactive support networks, in reality, seriously undermines regional courts’ effectiveness in promoting and popularizing legal integration beyond a select and limited grouping.¹⁰⁸

¹⁰⁷ See footnote 29 above.

¹⁰⁸ Cf. A. Vauchez, “The Making of the European Union’s Constitutional Foundations: The Brokering Role of Legal Entrepreneurs and Networks,” in W. Kaiser, B. Leucht & M. Gehler (eds.), *Transnational Networks in Regional Integration: Governing Europe 1945-83*, Palgrave Macmillan, Basingstoke (2010), chapter 6, 108-128, with the limited achievements of the ACCJ: L. Helfer, K. Alter & M.F. Guerzovich, “Islands of effective international adjudication: Constructing an intellectual property rule of law in the Andean Community” (2009) 103 *American Journal of International Law* 1-47.