Exporting the EU Model: A Judicial Dimension for EU International Relations?
Allan F. Tatham, Pázmány Péter Catholic University, Budapest

Introduction

Regional integration in Europe continues to be a dynamic process, possessing an incremental nature, by which Member States of the European Union have gradually established their institutional and legal arrangements as the framework and basis for integrating their markets and developing common policies in ever increasing fields, while broadening the membership across the continent.1 Perhaps one of the hallmarks of this Union method of integration2 and the greatest difference between the EU and other regional organisations to this day is “the sophistication and intensity of its institutional fabric underpinned by an organic system of law.”3

This paper will explore the judicial dimension of the export of the EU model of integration to other regional organisations from the perspectives of both institutional dynamic and case-law evolution. In this respect, the judicial frameworks of regional organisations in Latin America and Africa are particularly relevant since they tend to follow (to varying degrees) that provided for in the Treaty on the Functioning of the European Union. In addition, factors related to the existence between judges in the three continents of a community of languages, legal education and training, and judicial interpretation and reasoning together provide a fertile ground for considering the likely migration of European (legal) integrationist concepts, as developed by the Court of Justice of the European Union (“CJEU”) within the context of the EU.

Through a brief examination of the relevant courts’ case-law, the paper intends to show that the putative impact of the export or migration of the integrationist activism of the CJEU to regional courts in Latin America and Africa represents for the EU a further (and potentially potent) judicial dimension in its interaction with such regional players.

The EU Model of Integration: Legal Aspects

The Union method of integration has used law as a prominent tool to achieve its aims.4 This has been done in a combination of three ways. First, the type of secondary legislation used by the Union to harmonise the different laws of the Member States – regulations, directives and decisions – are different from those of classical international treaties. These EU legal instruments, especially directives, have been designed to attempt to combine homogeneity in rules in the Union with flexibility in their implementation. Next, there is the creation of the Court of Justice of the European Union (“CJEU”), an independent judicial body charged with ensuring the proper interpretation as well as the validity of EU law: although, like classical

---

2 Ziller (2005), at 33-53.
4 Ziller (2005), at 44.
international courts, Member States may bring actions before it, the Court 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.

Lastly but perhaps most importantly, national courts may engage in a judicial dialogue with the CJEU through the preliminary reference procedure. In this process national courts, seised of a case with an EU legal element, 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, many of the basic principles of the EU legal order: the supremacy of EU law; direct effect; indirect effect; general principles of law (including human rights, absent the present Charter); state liability for breach of EU law; the need for national remedies to protect breaches of rights derived from EU law, etc.\(^5\)

The model of the CJEU is a vital piece of the EU model of integration. Nevertheless 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.\(^6\) Failure to take such matters into account, together with the historical and socio-economic perspectives of European integration, bode ill for any attempt to transpose the unique EU institutional and legal framework to another system, a matter which will be addressed in legal terms later.

Exporting the EU model

In fact the EU itself is at pains to reject officially that this “export” is part and parcel of its arrangements with other international organisations. In 1995, it listed several necessary factors for the success of regional economic integration schemes:\(^7\) (a) the existence of genuine common interests; (b) compatible historic, cultural and political patterns; (c) political commitment; (d) peace and security; (e) the rule of law, democracy and good governance; and (f) economic stability. Recreating the world in the EU’s image is basically not feasible given the absence of certain of the above factors in other regional organisations. The Commission has thus argued:\(^8\)

The efforts of the EU to promote and support regional integration among developing countries should not at all be interpreted as an attempt to “export” the European integration model. Clearly, there are different approaches towards integration and

---


\(^6\) Ziller (2005), at 44-49.


economic development. It should be recognised that the European model, shaped by the continent’s history, is not easily transferable nor necessarily appropriate for other regions. On the other hand, to the extent that the European model of integration has become an unavoidable “reference model” for virtually all regional initiatives, the EU should share with other interested parties its experience on: improving the functioning of regional institutions … and sharing the benefits from integration.

Consequently, the EU does not seek to promote its particular model but rather the general lessons from its experience: viz., regional economic agreements to liberalise trade in order to encourage growth and development; and regional institutions as a way to overcome historical grievances and to enhance good governance and the rule of law. In both ways, the EU seeks to use these methods as a way of underpinning peace and security for states in regional groupings.

Despite this official reluctance to seek the express export of the EU model, nevertheless “there are few regions of the world where the apparently spectacular progress of the European Community towards economic and political union has failed to evince a response.”11 The EU itself, in its external affairs, groups countries together on a regional basis: this is “a striking and unusual feature of its foreign relations; no other international actor does this to the same extent.”12 On the one hand, promoting regional co-operation is one area where the EU is well positioned to shape and encourage the apparently increasing regionalisation in the world while also building its identity as a global actor and leader. As Söderbaum et al. point out:

Interregionalism not only justifies and promotes the EU’s “actorness” (both within [the] EU itself and to the rest of the world), but also strengthens the legitimacy of other regions which, in turn, promotes further region-building and interregionalism has implications not only for the foreign policy of the EU, but also for the organization of the world polity where regional actors such as the EU gain legitimacy.

On the other hand, the EU is able to strengthen or protect its economic power since fostering regional co-operation “tends to go hand in hand with facilitating trade and investment by EU economic actors.”14 For example, driven by competition with the USA for markets and influence in Latin America, and fear of exclusion from it has been (at least in part) the stimulus for EU promotion of regional co-operation in that area.15 The EU’s interest in Africa has its origins in the trade relations developed from the inception of the EEC with former

12 Smith (2008), at 76.
14 Smith (2008), at 80.
Promoting regional co-operation is evidently an EU external relations objective deriving directly from its own internal identity: “the most successful regional grouping in the world seeks to impart its own experiences to others.”17 Thus the EU’s soft power, the attractiveness of its model,18 reinforces its pursuit of the objective. The promotion of regional co-operation is a classic example of “structural diplomacy”19 where the EU largely acts by persuasion relying on legal frameworks (e.g., bilateral and multilateral treaties), diplomacy and financing to support regional groupings and encourage co-operation within regions. Although, post-Lisbon, the field of EU external relations has received greater permanence and profile with the High Representative assisted by a new European External Action Service, the number of participants in the field and the demands for intra-European co-ordination remain high. Thus beyond the Member States, the European Council, and main EU organs, certain inter-regional dialogue formats (e.g., the Barcelona process) involve a great number of other actors ranging form the business world to cultural and other non-governmental organisations and the national parliamentary level.

Within this milieu, the CJEU may be seen as a passive participant or actor but whose contribution to the deepening of EU external relations vis-à-vis regional organisations is significant. Indeed, the successful nature of the EU integration model (despite the many setbacks over the decades) is viewed from outside the Union as a model, if not for export by the EU, then for “import” or “emulation” by various regional organisations. Part of this success is expressed institutionally by the CJEU and legally by the different instruments provided for integration and the principles developed by the CJEU. It is now necessary to turn to explain – from the point of view of legal scholarship – the issue of how institutions and law from one legal system may influence other systems. Then the particular judicial institutional and legal imports from the EU by regional organisations in Latin America and Africa will be addressed.

Exporting legal concepts and institutions between legal systems

Without examining in depth the pros and cons of the different techniques that legal comparativists employ when seeking to explain the transfer and reception of foreign legal concepts into another system, three should be indicated. First the concept of “legal transplantation”20 which considers that legal transplants move or transfer a rule or a system of law from one country to another and is based on diffusion according to which most changes in most legal systems occur as the result of borrowing. Moreover such widespread transfer

17 Smith (2008), at 109.
indicates an absence of an intimate link between law and the broader society. Despite objections to this concept,\(^2\) it has been noted that:\(^2\)

[W]e must be careful not to slip into the error of believing that legal practices can be so rooted in their ‘cultures’ that they can never be transplanted … [I]n raising doubts about ‘transplantation’ of legal institutions, we run the risk of neglecting what is unquestionably a fundamentally important issue: legal systems do permit transcultural discussion and transcultural change. Indeed, they undergo transcultural change all the time. [Emphasis in original.]

Secondly “cross-fertilisation”\(^2\) could be considered a better alternative, implying a more indirect process to transplantation, namely that – “an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on.” Such a process often gives rise to greater convergence between the receiving legal system and the external stimulus but this is not always the case.

Lastly the “migration”\(^2\) of legal ideas encompasses a much broader range of relationships between the recipient jurisdiction and constitutional ideas. The benefits of this migration metaphor may be summarised:\(^2\)

Migration … is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike the other terms current in the comparativist literature such as ‘borrowing’, ‘transplant’ or ‘cross-fertilization’, it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather … it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.

Migration also serves this role by allowing the movement of ideas across legal orders without necessarily connoting control on the part of the originating order.\(^2\) Migration may this be the most sensitive description of how courts and judges interact with each other across jurisdictions.

---


\(^{22}\) J. Whitman, “The Neo-romantic Turn,” in P. Legrand & R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, CUP, Cambridge (2003), chap. 10, 312, at 341-342. While acknowledging that legal rules change as they migrate, Whitman concludes (ibid, at 342, emphasis in original):\(^2\) “some kind of borrowing is surely taking place and we need some account of what is going on.” Nelken (D. Nelken, “Comparatists and Transferability,” in P. Legrand & R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, CUP, Cambridge (2003), chap. 12, 437, at 443) also notes that – “legal transfers are possible, are taking place, have taken place and will take place.”\(^2\)


\(^{24}\) Choudhry (2007), at 21.


Such judicial dialogue (or transjudicial communication) amounts to communication between courts, whether national or supranational, across borders;27 the present work looks at horizontal communication between courts of the same status across regional borders. The focus, in such circumstances, is properly on the awareness of each other’s decisions but with no formal requirement to follow or even to take account of each other’s case-law.

Choice of jurisdictions

The choice of regional organisations was initially dictated by to the type of treaty provisions concerning the relevant economic community and their similarity to the model which exists in the European Union; within the regional organisation, it was then necessary to look at the relevancy of the CJEU model in particular and why the model and its case-law was emulated by looking at such matters as legal cultural affinities, linguistic knowledge and intellectual connections. Further issues such as regional court jurisdiction delineation and resultant influences on regional court decision-making, are addressed in later sections.

Historically both Latin America and Africa were subject to colonial dominance by the main European powers, with the former area generally achieving independence from the Iberian States in the 19th century and the latter continent doing so between the 1950s and 1970s. The colonial powers left their marks on the legal and linguistic landscape of both areas. On the one hand, 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;28 on the other hand, Africa was mainly divided between France and its codes and the United Kingdom and its common law tradition which legal divisions are still apparent to this day.29 This linguistic connection – French is the language of the CJEU and English and Spanish are also both EU official languages in which all EU official publications (including CJEU rulings) are made available – is further enhanced by educational connections since a number of judges sitting on the benches in regional courts in Latin America and Africa have either attended universities in Europe, or conducted research at institutes there. Moreover, having studied their domestic laws in French, Spanish, English, etc., they are fully conversant with the (direct and indirect) European influences on their legal systems. Thus a benign atmosphere for cross-fertilisation or migration of legal ideas already exists.

This is further emphasised by the existence of links between all 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 and Africa. Thus the African Court on Human and People’s Rights applies the

1981 African Charter on Human and People’s Rights while the Inter-American Court of Human Rights enforces and interprets the 1969 American Convention on Human Rights. Not only do the European Convention and Court impact on their African and American counterparts but the latter two courts have influenced each other in their case-law development.

Consequently, against this background, it has been possible to select certain courts for comparison: in Latin America, these are the Andean Community Court of Justice (“ACCJ”) and the Central American Court of Justice (“CCJ”); while in Africa, from an institutional perspective, these are the courts for the regional organisations of CEMAC, the EAC, COMESA, OHADA and UEMOA. However due to lack of time, space and activity of some of these African regional courts, the case-law of only the OHADA Common Court of Justice and Arbitration and UEMOA Court of Justice will be examined.

34 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). The Andean Community currently comprises Bolivia, Colombia, Ecuador and Peru.
35 The CCJ was established under Article 12 h) of the 1991 Tegucigalpa Protocol to the (1951, renewed 1962) Charter of the Organisation of Central American States; its powers are set out in the 1992 Convention on the Statute of the Court.
37 The CEMAC Court of Justice was originally set up under Art. 5 of the 1994 CEMAC Treaty and Arts. 73 and 74 of the Convention governing the Economic Union of Central Africa, annexed to that Treaty. The 2008 CEMAC Treaty establishes the Court under Art. 10 and Arts. 46 and 48. The jurisdiction of the Court is set out in the Convention governing the Court of Justice of CEMAC, Arts. 4 and 14-24. CEMAC (Communauté Économique et Monétaire de l’Afrique Centrale, the Economic and Monetary Community of Central Africa) covers a number of mainly francophone States in Central Africa.
38 The EAC Court of Justice was established under Art. 9 of the 1999 East African Community Treaty and its jurisdiction is dealt with in chapter 8 of that Treaty (Arts. 23-47). The EAC covers Burundi, Kenya, Tanzania, Rwanda and Uganda.
39 The COMESA Court of Justice was set up under Art. 7 of the 1994 COMESA Treaty and its jurisdiction is set out in Arts. 19-44 of that Treaty. COMESA (Common Market of Eastern and Southern Africa) comprises countries running from Libya and Egypt in the north to Zambia and Zimbabwe in the south.
40 The OHADA Common Court of Justice and Arbitration was established under Art. 3 of the 1993 OHADA Treaty and its jurisdiction is set out in Arts. 6-7 and 14-20 of the same. OHADA (Organisation pour l’Harmonisation en Afrique du Droit des Affaires, Organisation for the Harmonisation of Business Law in Africa) comprises mainly francophone States in Central and West Africa; unlike other regional organisations, its main aim is to harmonise business law in its contracting states.
41 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. UEMOA (Union économique et monétaire ouest-africaine, West African Economic and Monetary Union) comprises mostly francophone countries in West Africa.
Commonalities in jurisdiction

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 organisations in Latin America and Africa. First the possibility of direct actions before the regional courts for judicial review of acts of the regional organisation’s organs is available before all the courts listed.\(^2\) 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 except under the OHADA Treaty.\(^3\) Indeed the CJEU model for this procedure, under Article 267 TFEU (ex-Article 234 EC), provides that all courts may make such a reference but those courts, against whose decisions there is no judicial remedy, must make a reference: this wording is closely followed by the CEMAC, COMESA and UEMOA courts.

Commonalities in case-law

It is most instructive to examine briefly how CJEU case-law has impacted indirectly, as well as directly, on the jurisprudence of the regional courts in Africa and Latin America. The OHADA Common Court of Justice and Arbitration has held that “the mandatory force of the [OHADA] uniform acts and their superiority over the provisions of national laws”\(^4\) – which is equally called “a rule of supranationality” directly derived from Art. 10 of the OHADA Treaty – in view of the fact that “it contains a rule of supranationality because it provides for the direct and mandatory application of the uniform acts and establishes, moreover, their supremacy over the antecedent and later provisions of domestic law.”\(^5\) Such concepts are clearly linked to two of the most famous cases in the jurisprudence of the CJEU: *Costa v. ENEL*\(^6\) and *Simmenthal*.\(^7\)

The Andean Court has for its part underlined the close links between direct applicability and direct effect which are such guarantees for putting in place effectively the rules on integration. And to affirm that “between the principle of direct applicability and that of direct effect, there exists a close connection: the Andean Community norm, being directly applicable within the Member States, has for its immediate effect the protection of citizens in the sub-region thanks to rights that are conferred on them. It is a question of the legal means which grants them the possibility of demanding their application before national judges.”\(^8\)

\(^2\) CCJ Statute Art. 22 b); ACCJ Treaty Arts. 17-22; CEMAC Court Convention Art. 4(1); EAC Treaty Arts. 28 and 30; COMESA Treaty Arts. 24 and 26; UEMOA Treaty, Protocol 1, Art. 8; and OHADA Treaty Arts. 14-20.
\(^3\) CCJ Statute Art. 22 k); ACCJ Treaty Arts. 32-36; CEMAC Court Convention Art. 17; EAC Treaty Art. 34; COMESA Treaty Art. 30; and UEMOA Treaty, Protocol 1, Art. 12.
\(^6\) Case 6/64 *Costa v. ENEL* [1964] ECR 1141, 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.”
\(^7\) Case 106/77 *Amministrazione delle finanze dello Stato v. Simmenthal* [1978] ECR 629 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.”
\(^8\) ACCJ, Decision No. 3-AI-96.
The Central American Court has been 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.”49 The UEMOA Court for its part, obviously in line with and informed of the CJEU case-law,50 ruled that “it is important to underline that the Union [UEMOA] constitutes in law an organisation 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.”51 The relationship of this wording to the CJEU in Costa v. ENEL is quite patent.

Nevertheless, the various regional courts also make direct reference to CJEU rulings. In a 1998 case before the UEMOA Court, the judge rapporteur was able to maintain:52 “A constant case-law of the Court of Justice of the European Communities – CJEC, 2 December 1971, Zuckerfabrik (aff. 5/71), [1971] ECR 975 – whose texts have strongly inspired the Community law of UEMOA, has recognised the autonomy of the action for damages in relation to the application for annulment. According to the cited principle, it is not necessary to resort to the procedure for annulment as a preliminary to an action for damages based on the illegality of the act of the Community organ which has caused the damage to the petitioning claimant. The two legal regimes, namely the application for annulment and the action for damages are considered as remedies completely independent one from the other, the action for damages not being a subsidiary action to the application for annulment.”

In a similar vein, one may look at the Latin American courts; first the ACCJ, in ruling on the characteristics of the action against a Member State for failure to act, observed that:53 “According to Article 23 [of the Treaty creating the ACCJ], the action for failure to act has a declaratory character. This action is a cornerstone in the construction, development and effectiveness of the Community legal order, since its operation allows the control of the behaviour of the States…. Mayrás, AG of the Court of Justice of the European Communities was able to regard the fact that the failure also occurred when ‘a Member State promulgates or keeps in force a law or rule incompatible with the treaty or with Community secondary legislation (Opinion in Case 39/72 Commission v. Italy [1973] ECR 101).’”

The ACCJ is not alone in emulating its sister court in Luxembourg: the CCJ has also been guided by the fundamental case-law of the CJEU:54 “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 requirements above the norms of Community law is a fermenting agent for dislocation, contrary to the principle of membership to which the

49 CCJ, 27 novembre 2001, Nicaragua v. Honduras – Asunto del Tratado de Delimitación Maritima entre la República de Honduras y la República de Colombia.
51 UEMOA Court, 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.
53 ACCJ, Decision No. 3-AI-96.
54 CCJ, 27 novembre 2001, Nicaragua v. Honduras – Asunto del Tratado de Delimitación Maritima entre la República de Honduras y la República de Colombia.
Member States submitted themselves freely and with sovereign power. 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 provisions 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 has equally confirmed this on many occasions in the cases 1-IP-87, 2-IP-88 and 2-IP-90.

Conclusion

This paper has aimed to show that there does exist a judicial dimension to EU external relations policy. In many ways, it might seem rather far-fetched to designate a CJEU as a “diplomat.” However, this is not so surprising as it might first appear.

Petiteville\(^{55}\) has defined “soft diplomacy” as a diplomacy that resorts to economic, financial, legal and institutional means in order to export values, norms and rules as well as to achieve long-term cultural influence. He sees the EU’s soft diplomacy as a way of “proposing” values, norms and rules rather than “imposing” them as a sort of “soft imperialism” whereby the recipient countries would be tied into a type of learning process. Given these definitions, then, while it is strongly arguable that the EU exercised its “soft imperialism” towards the accession countries in Central and Eastern Europe,\(^{56}\) it has nevertheless projected itself beyond its continental and near abroad, in a soft diplomatic way, thereby providing — according to Petiteville\(^{57}\) — a deliberative contribution to the worldwide debate over which values, norms and rules are necessary to bind the international community together in the globalised world order. The promotion of the EU’s own model of co-operation, partnership and regional integration,\(^{58}\) one relatively untainted by the stigma of colonialism attaching to its Member States,\(^{59}\) 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 noted\(^{60}\) 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 constitutionalisation 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.


\(^{57}\) Petiteville (2003), at 134.


\(^{59}\) Bretherton & Vogel (2004), at 34.