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The Free Movement of Goods

With Margaret McCown

In the previous chapter, we showed how transnational activity, the adjudication of the European Community (EC) law, and EC lawmaking had developed symbiotically to determine much of what is important about European integration. We also provided evidence in support of our contention that, under the Court's tutelage, *negative integration* (the removal of barriers to transnational exchange) provoked, and helped to organize, *positive integration* (the development of common European policies to regulate transnational exchange). Here, we provide a more detailed sectoral account of how the adjudication of one class of trading disputes gradually, but authoritatively, undermined the intergovernmental aspects of the EC, while enhancing the polity's supranational, or federal, character.

It should come as no surprise that traders influenced, disproportionately in comparison to other private actors, the early development of the legal system. The Treaty prioritized the construction of a common market for goods, through rules that prohibited tariffs, quotas, discriminatory taxation, and other charges, as well as less obvious protectionist policies. Just as important, supremacy, direct effect, and related doctrines, once accepted by national courts, made it possible for private actors to activate the legal system in order to enhance the effectiveness of these same rules. Traders and producers had both the incentive and the resources to litigate; and trade litigation quickly generated much of the context for legal integration.

In this chapter, we assess the impact of adjudicating the free movement of goods provisions of the Treaty of Rome on integration and supranational governance. Although findings for the domain as a whole are reported, our focus is on the problem of non-tariff barriers, as governed by Arts. 28–30 (EC). No other part of the Treaty of Rome has been more implicated in the ongoing attempt to define the relationship between the scope and authority

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of European law, on the one hand, and the regulatory autonomy of the Member States, on the other. From its first preliminary ruling on Art. 28, *Dassonville* (ECJ 8/74, 1974), the Court began to convert these provisions into an expansive “economic constitution” (Poiares Maduro 1998). In the Court’s reading of the Treaty, traders possess broad-based, judicially-enforceable rights. Further, private parties enjoy distinct advantages, relative to Member States, in any legal conflict in which a national law or administrative practice could be alleged to hinder trade. By 1980, it was clear to all of the key actors in the domain that no aspect of national regulatory policy fell beyond the reach of judicial scrutiny. As important, in the course of its review activities, the Court had gradually outlined a blueprint for completing the common market, which the Commission would champion and the Member States would later ratify in diverse ways, not least as part of the Single European Act (SEA, 1986).

The chapter proceeds as follows. First, we examine the treaty rules on intra-EC trade, derive hypotheses about how the domain could be expected to evolve, and contrast our argument with alternatives. Second, we track the emergence of the basic doctrinal framework governing the domain, analyze the aggregate data on adjudication in the sector, and trace the impact of the Court’s case law on the decisionmaking of other actors, including the Commission and Member State governments. Third, we discuss the mutation of the framework in the 1990s, an event heavily conditioned by the endogenous development of the law itself. We conclude with an assessment of our findings in light of the pertinent scholarly debates about the legal system’s impact on the greater course of market-building and political integration.

I Theoretical Issues

From the theoretical materials developed in the first two chapters, we derived a set of general expectations about how trading rights would likely evolve, given the constitutionalization of the treaty system.¹ One set of expectations concerned logics of litigating. Traders would use Art. 28 instrumentally, to remove national barriers to intra-EC trade, targeting—disproportionately—measures that hinder access to larger markets relative

¹ See also Stone Sweet and Brunell (1998a) and Stone Sweet and Caporaso (1998a).

to smaller ones. As negative integration proceeded (i.e. to the extent that the legal system sides with traders against national authorities), further litigation would be stimulated. A second set of expectations concerned the kinds of outcomes the legal system would be likely to generate. Given a steady supply of preliminary references, it would be the Court's case law, and not the preferences or decisionmaking of Member State governments, that would determine how the domain evolved. On the basis of assumptions about litigants' and judges' interests, we expected the Court to produce rulings that would (a) facilitate expansion of intra-EC trade; (b) undermine national control over such activity; and (c) press the EC's legislative bodies to extend the scope of the polity's regulatory capacities. A third set of expectations concerns precedent. As discussed in more detail below, we expected the Court to develop coherent argumentation frameworks that would enable it to govern effectively, and we expected these doctrinal structures to help to determine the paths along which trading rules would evolve. These expectations, of course, are heavily conditioned by the institutional setting in which free movement of goods adjudication takes place. The Court is a trustee of the Treaty, not an agent of national governments.

THE NORMATIVE STRUCTURE

Title I of the Treaty of Rome (a) establishes the EC as a customs union (Arts. 23–24); (b) lays down procedures for legislating a Common Customs Tariff (Art. 26); (c) prohibits the Member States from levying duties or direct charges on goods traded across borders within the EC (Art. 25); and (d) prohibits the Member States from adopting import quotas or other non-tariff barriers to imports and exports (Arts. 28–30). The European Court of Justice (ECJ), in *Craig and de Burca's* (1998: 544–5) words, has taken a “strident approach” to Art. 25, which they find “unsurprising and entirely warranted” given the importance of the Customs Union to the Common Market. Indeed, the Court (*Bresciani*, ECJ 87/75, 1975) has interpreted Art. 25 as capturing within its ambit “any pecuniary charge, whatever its designation and mode of application, which is . . . imposed on goods imported from another Member State by reason of the fact that they cross a frontier” (paragraph 9). The Treaty does not, the Court would stress here and elsewhere, provide for exceptions or a defense.²

² Under certain conditions, states may levy fees for services like health inspections, but only where such charges fund services required by EC secondary legislation.

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Non-tariff barriers inherently pose greater challenges for those seeking to prohibit them. Compared with customs duties or border fees, they impede trade in less visible, more indirect ways, and they often can be justified as serving public policy purposes other than protectionism. The Rome Treaty seeks to ban protectionist policies while preserving the autonomy of the Member States to pursue legitimate public policy purposes. Art. 28 states that: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member-states.” The phrase, “measures having equivalent effect”—hereafter MEEs—refers to non-tariff barriers. Art. 29 lays down similar rules for the case of exports. Art. 30 permits a Member State to derogate from Art. 28, on grounds of public morality, public policy, public security, health, and cultural heritage, though derogations may “not . . . constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

These provisions can, of course, be interpreted in different ways. How might actors—traders, litigators, judges, national legislators, and administrators—identify a national law or practice (an MEE) whose impact on trade is “equivalent” to an import quota? Could or must such “effects” be quantified, and what degree of equivalence is necessary for an MEE to be captured by Art. 28? What types of regulation, otherwise prohibited by Art. 28, could not be justified with reference to Art. 30? What would not count as a legitimate “public policy” exception, and how strictly must a defendant Member State be held to justify proposed derogations?

The basic rationale for delegating to the Court in this domain should be obvious. From the point of view of the Member States, the commitment problem associated with building a common market—a paradigmatic prisoners’ dilemma situation—does not disappear with the creation of binding norms. On the contrary, the situation is immediately recast as a problem of governance: in the absence of authoritative mechanisms for interpreting, monitoring, and enforcing the rules, the dilemma is likely to persist. It follows that, in so far as the Member States perceive the problem, the demand for supranational governance will be a function of the strength of their underlying preferences for achieving a single market. Further, in the guise of Arts. 28–30, the Member States negotiated relatively open-ended (or incomplete) commitment rules. Normative indeterminacy supplements the demand for governance, and begs for insulating organizations from controls that might be easily activated by the contracting parties. In the absence of effective supranational governance, national authorities would be able to escape performing their obligations, say, through generating

creative interpretations of Art. 30; and they might be tempted to do so as politically important domestic industries are increasingly exposed to competition from imports.

Although we have just invoked well-known, even mundane, functional logics, three points on the relevance of delegation theory to the market-building project deserve reemphasis (Chapter 1). First, because generic rationales for delegation (e.g. from “principals” to “agents” or “trustees”) can appropriately inform *any* existing theory of regional integration, such logics cannot, in and of themselves, help us to discriminate *between* such theories. Second, notwithstanding the point just made, the size of the strategic “zone of discretion” in which delegated governance operates can help us to predict how effective supranational governance will, in fact, be. In our case, this is so only because we have elaborated a causal theory that relies on the agency of supranational organizations to account for some of the dynamics of integration. The third point, an empirical one, cannot be overemphasized: the Member States did not design the system of governance that entered into force on January 1, 1970.

The Treaty of Rome committed the Member States to eliminating national barriers to intra-EC trade by the end of 1969. They enlisted the help of the Commission. Ex-Art. 33 provides that:

The Commission shall issue directives establishing the procedure and timetable in accordance with which the Member States shall abolish, as between themselves, any measures in existence when this Treaty enters into force which have an effect equivalent to quotas.

The Member States meant Art. 28 and ex-Art. 33 directives to be binding, as a form of “international law-plus” that the Court could ultimately be asked to enforce. Judicial enforcement proceedings against a national government could be brought either by the Commission (through Art. 226), or by another government (through Art. 227). Trade liberalization at the national level, and reregulation of economic activities at the European level, were meant to go hand-in-hand. The Commission would propose legislation to governments sitting in the Council of Ministers; and the Council of Ministers would adopt this legislation under qualified majority voting (QMV), beginning in 1966.

The Member States did not provide for the supremacy or direct effect of Art. 28, or for any other provision of the Treaty of Rome; and they did not provide for the direct effect of directives.³ Yet by 1970, the Court—in

³ See Chapter 2.

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collaboration with national judges—had authoritatively revised the Treaty, significantly expanding the legal system's capacity to respond to the demands of market actors and to control political outcomes. With constitutionalization, governments lost whatever pretense they might have had to being national gatekeepers to the Treaty of Rome. Individuals could now activate the EC's legal system on their own, against their own governments, through national judges. Constitutionalization thus increased the size of the legal system's zone of discretion, through enhancing the judiciaries autonomy vis-à-vis the Member States. It is an error to cast the Court as an "agent" of the governments, in a piece written by governments, from the standpoint of principal-agent theory. The Court must be modeled as a "trustee" of the Treaty, with fiduciary powers. When it comes to interpreting and enforcing the Treaty, the Court, not national governments, holds the relevant political property rights. Governments can seek to curb the Court, or to overturn its rulings on the Treaty, but only through revising the Treaty.

Constitutionalization and the Court's fiduciary status are necessary causal elements of our theory, and they undergird all of the hypotheses developed in this book. We have predicted that the system of governance built by judges (through constitutionalization) rather than the system built by States (through intergovernmental bargaining) would provoke and sustain the market-building project. In the free movement of goods domain, we have proposed that the Court's case law would become the focal point of institutional evolution, and that the legal system would operate to expand market opportunities for private, transnational actors, and to reduce the scope of national regulatory authority. These broad expectations are derived from a theory of integration that stipulates the underlying causal dynamics of an expansive system of supranational governance. Put simply, the more traders can activate the legal system, and the greater is the zone of discretion enjoyed by the Court, the more likely it is that the feedback loops (or mechanisms of spillover) theorized in Chapter 2 would emerge and become entrenched.

Positive and negative integration

Those who sought to build a European common market had assumed that negative and positive integration would reinforce one another. To take a first scenario: the more the EC's legislative bodies succeed in producing Euro-wide market regulations, the less costly it is for national governments

to eliminate their own protectionist laws and administrative practices. Conversely, national governments are more likely to maintain their own idiosyncratic market rules in the absence of harmonization at the European level. In either case, the key issue is the extent to which each Member State trusts that the others would abandon protectionist policies. Positive integration provides such assurance, and therefore facilitates negative integration. This scenario is the one imagined, more or less, by the Member States when they negotiated the Treaty. The Commission would propose legislation to harmonize market rules under Art. 94,⁴ and the Council would adopt it.

In Chapter 2, a rather different scenario was proposed. Negative integration through adjudication, in so far as it is effective, raises the costs of maintaining national systems of governing markets, and puts pressure on governments to Europeanize market regulation. Market actors have every reason to use litigation strategies to extend the reach of Art. 28 into national regimes, in order to undermine national hindrances to trade. Governments could seek to reassert regulatory control over markets, but only through legislative action, in EC fora. Put differently, as negative integration proceeds, it gradually but inevitably reduces the capacities of national authorities to manage the negative externalities produced by growing economic interdependence. At the same time, negative integration, by definition, expands opportunities for traders; and more trade means more legal challenges to national regulatory authority. Some costs of negative integration through adjudication are even more direct. When governments lose in court, they also lose reputation with their EC partners and with the growing numbers of domestic actors seeking to expand European markets; at the same time, national judges have the power to punish national governments, including providing compensation to traders for damages. This second scenario relies, in the first place, on traders litigating their disputes with national governments in national courts. They are far more likely to do so the more that the first scenario does not bear fruit.

This second—judicial—route proved to be the more important, precisely because it could not be blocked by recalcitrant governments.

⁴ Art. 94 (ex-Art. 100):

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

ALTERNATIVE VIEWS

Various strains of integration theory deserve at least summary discussion, to the extent that alternative propositions can be derived from them. A first strain is the strong intergovernmentalism developed by Moravcsik and Garrett. Strong intergovernmentalists (Moravcsik 1991) argue that integration is a product of national interests, which is given agency through heads of government, and the relative bargaining power of the Member States in the EC, as conditioned by the EC's decision rules; private, "transnational actors" are of no relevance, and the EC's organizations play only a secondary role. For Garrett (1992) the decisionmaking of EC organizations follows more or less directly from the preferences of the Member States, and particularly those of the dominant Member States, such as France and Germany. The proposition has the virtue of being testable, although Garrett offered little in the way of supporting evidence.⁵

In a follow-up piece, Garrett (Garrett 1995: 178–9) proposed that the Court seeks to enhance its own legitimacy by pursuing two, sometimes contradictory, goals: (a) to curry the favor of powerful states, and (b) to ensure Member State compliance with its decisions. The ECJ, he argued, will sometimes censure "powerful governments," but only in "unimportant sectors" of the economy, while "accepting protectionist behavior" in more important sectors, since such governments are unlikely to comply with adverse decisions. Apparently, no stable predictions are derivable when it comes to "less powerful governments," since the Court will at times be concerned with noncompliance (the ECJ defers to the Member State), and will at times seek the goodwill of "Northern" governments that desire "trade liberalization" (the ECJ attacks protectionism). The Member States, for their part, continuously balance the short-term costs of complying with adverse decisions against the long-run benefits of trade liberalization through adjudication.

This analysis is flawed for two reasons. First, Garrett leaves out litigants and national judges entirely, actors that are crucial to both process and outcome; the omission is left undefended. The vast majority of Art. 234 references in this area are provoked by claims, brought forward by traders in national courts, that a specific national rule or practice is inconsistent with obligations announced in Art. 28. If the Court responds to a reference by

⁵ Moravcsik, who initially had little to say on the topic, later admitted (1995) that his framework could not explain the construction of the legal system. He then treats the Court, constitutionalization, and the legal system as anomalies that somehow do not weaken his theory.

suggesting or insisting that the national judge refuse to apply the national measure in question (the Court renders an adverse decision from the point of view of the Member State), the choice—to comply or not to comply—rests with the national judge of reference, not the government. If the judge follows the ECJ's preliminary ruling, the government could still seek to enforce the censured measure in subsequent trading situations. This, apparently, is what Garrett means by a decision of noncompliance.⁶ At this point, the government would face an intractable problem, namely, how to enforce an invalid rule. Traders adversely affected by any such enforcement could either refuse to accept the legality of the measure, or attack it in court, where effective remedies—including compensation for losses—are available. In either case, the ultimate site of decisionmaking would be the judiciary, not the government.⁷ In other words, Garrett assumes what cannot be assumed: that a Member State government can make a decision of noncompliance stick without the support of the legal system. Second, given the ECJ's broad fiduciary powers, there would appear to be no valid basis for the assumption that the ECJ fears offending a powerful Member State, or even a consortium of powerful Member States, when it enforces Art. 28. In any event, we predict exactly the opposite: the preferences of defendant Member States will have no systematic effect on outcomes produced by the Court. Instead, in our view, the Court will work to enhance the effectiveness of EC law and to expand the scope of supranational governance, which will benefit the interests of traders, not to comfort the positions of Member States, powerful or not.

The weak intergovernmentalism of Moravcsik (1998) does not generate testable propositions about the kinds of outcomes that the legal system—or supranational organizations, more generally—will produce (see Chapter 1). Instead, Moravcsik stipulates some underlying functional need of the Member States for supranational governance, and then interprets outcomes produced by the EC's organizations in light of these needs—and a prior act of delegation—thereby “explaining” outcomes. Since the Member States established the authority of the Commission and the Court through purposive acts of delegation, supranational governance operates, presumptively, to fulfill the Member States' grand designs. By our reading, Moravcsik only makes one claim, a negative one concerning “unintended consequences,”

⁶ Garrett does not define noncompliance or discuss the consequences of a refusal to comply with a decision of the Court, as applied by a national judge.

⁷ It may be useful to recall the obvious: governments, parliaments, and administrators are dependent on judges to enforce their rules.

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that is testable. He insists (1998: 482–90), that while governments set the agenda for the EC's organizations, the EC's organizations have *never* operated to “alter the terms under which governments negotiate new bargains.” Moravcsik (1998: ch. 5) repeats these arguments in his analysis of the process leading up to the SEA, which we will take up shortly. If he is right, then our theory must be abandoned.

PRECEDENT

A final set of issues concerns the course of judicial lawmaking, that is, how the EC's trading institutions are likely to evolve through practices associated with precedent.

In Chapter 1, it was argued (*a*) that legal norms are fundamentally indeterminate and (*b*) that adjudication functions to reduce normative indeterminacy through the propagation and successive refinement of argumentation frameworks, or doctrinal structures. Such structures are judicially-curated as precedents. They emerge cumulatively, through analogical reasoning, under the meta-norm that similar disputes should be resolved similarly. Argumentation frameworks are institutions that enable judges to structure their (decentralized and noisy) political environments, to enhance the effectiveness of their decisions, and to legitimize accreted judicial rulemaking with reference to pre-existing normative materials. Such frameworks also help lawyers refine litigation strategies, thereby organizing the “market for litigation” (Shapiro and Stone Sweet 2002: ch. 2). One purpose of the chapter is to assess the extent to which the free movement of goods domain comes to be governed by judge-made institutions. If it does, then a second issue is raised: the extent to which doctrine helps to determine the path along which the law, and thus market integration, develops. We expect, at the very least, litigating and judging, at any given moment, to be meaningfully structured by how prior trading disputes had been sequenced and decided.

Chapter 1 also argued that the Treaty of Rome constituted a paradigmatic example of an “incomplete,” or “relational,” contract; that the size of the zone of the discretion in which the Court operates would favor judicial modes of governance; and that certain parts of the Treaty, if reconstructed as rights provisions, would lead the Court to develop balancing, proportionality, and “least-means” tests. Defending rights through least-means tests places a heavy burden on public authorities to defend their activities. Where a least-means proportionality standard is in place, government may

be allowed to restrict the rights of individuals, but *only* to the extent necessary to achieve some separate, lawful, and socially beneficial good. Based on research on other legal systems, Shapiro and Stone Sweet (2002: 371–2) and Stone Sweet (2000: 97–9; 141–3; 203–4) have claimed that balancing typically, even inevitably, leads to the elaboration of least-means tests. Just as inevitably, judges who enforce such standards behave as relatively pure policymakers, in that they use their discretion to evaluate and control the law-making of others.

Articles 28–30 of the Rome Treaty create the conditions not only for sustained conflict between traders and national regulatory regimes, but for the development of balancing standards to resolve such disputes. If such standards stabilize as least-means tests, then the ECJ—given a steady caseload—will become the primary source of EC trade rules. The Court will also, necessarily, generate a normative discourse on the scope of national regulatory autonomy. The emergence of strict proportionality tests would empower traders and the Commission, while placing Member State governments on the defensive. In response the Member States could seek to curb the Court, or to renegotiate trading rules. But given the Court's trustee status, and the fact that traders have access to national courts, it is far more likely that governments will be induced to master the intricacies of the doctrines governing the sector. That is, if governments are rational actors, they will learn to pursue their pertinent “national interests” in doctrinally defensible ways. In so far as they do, governments will participate in reinforcing the centrality of legal argumentation and judicial process to the evolution of the EC's trade institutions.

Our view of precedent and judicial governance contrasts sharply with the models of many other political scientists, in particular those who have worked on the EC's legal system. Speaking directly to Arts. 28 and 30 of the Treaty of Rome, Garrett (1995: 178–80) asserts, for example, that “in most cases pertaining to the free movement of goods . . . there is no coherent legal basis to inform Court behavior. The reason for this [legal incoherence] is the coexistence of contradictory Arts. in the Rome Treaty.” In a subsequent Article, Garrett, Keleman, and Schultz (1998) argued that the ECJ at times follows its own precedents, in order to legitimize its authority over the Member States, and at times defers to powerful governments, for fear of being punished. These analyses proceed from the assumption that the EC law “game” is played only by the governments of the Member States, on one side, and the ECJ, on the other. Litigants and national judges are nowhere to be found.

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In response, we suggest that Arts. 28 and 30 have a reciprocal, rather than a “contradictory” relationship: each provision helps to define the scope of the other. Traders will rely on Art. 28 in their disputes with national authorities, while national authorities will defend themselves with reference to Art. 30. We expect the Court to elaborate a comprehensive argumentation framework, incorporating both sets of provisions, in order to allow it to decide such cases in principled, rather than strictly arbitrary, ways. Through use, the framework will gradually reduce normative uncertainty and organize the politics of market-building in the EC. To the extent that the Court engages in precedent-based rulemaking, the domain will exhibit enhanced “coherence” (see Bengoetxea 2003) by which we mean the development of an internal and self-reinforcing structure to litigation and adjudication. Although we now repeat ourselves, we do not expect the Court to face any recurrent situation in which it would be more concerned with Member State noncompliance than it would be in enhancing the effectiveness of the legal system and trader’s rights through principled, precedent-based decisionmaking.

DATA AND METHODS

In order to help us evaluate these propositions, we gathered the following data for the free movement of goods domain as a whole: (a) preliminary reference activity; (b) type of national regulation being challenged, in preliminary references, as a potential violation of Art. 28; (c) the dispositive outcome announced in the ECJ’s preliminary rulings, where such decisions pertain to violations of Art. 28; (d) the citation practices of the ECJ for the domain as a whole; and (e) the outcomes of infringement proceedings, under Art. 226, brought against Member States by the Commission, for alleged violations of Art. 28. For each of these data-sets, the information is comprehensive through at least mid-1998. We present our findings at various points below, in the context of our discussion of the impact of specific doctrinal outcomes.

II Judicial Governance and Market-Building

On the eve of the entry into force of free movement of goods provisions, the system of governance designed by the Member States to achieve the common

market was in deep trouble. Member States had made no systematic effort on their own to remove non-tariff barriers, and the Commission's legislative agenda on behalf of regulatory harmonization faced a fearsome hurdle. In January 1966, the French had succeeded—the “Luxembourg Compromise”—in blocking the move to QMV in the Council of Ministers. The compromise allowed any government to demand, after asserting that “very important interests [were] at stake,” that legislation be approved under unanimity rather than QMV. The kaleidoscope of disparate national regulations that producers and traders of goods confronted, including myriad “national measures having effects equivalent to quotas,” remained in place. As important, the rapid building of uniform, or “harmonized,” EC regulations looked unlikely, given that any government could veto the Commission's proposals in the Council.

In late December 1969 the Commission issued Directive 70/50 to jump-start matters. Recall that ex-Art. 33 charges the Commission with issuing directives “establishing the procedure and timetable” for the removal of MEEs by the Member States. But with Directive 70/50, the Commission had pushed far beyond its remit, giving Art. 28 an expansive reading. First, it listed nineteen types of rules or practices that Member States were to rescind, including discriminatory policies on pricing, access to markets, advertising, packaging, and names of origin. Pushing further, it announced what we will refer to as a “discrimination test”: measures that treated domestic goods differently than imported goods—say, by limiting the availability or the marketing of imports, or by giving “to domestic products a preference” in the domestic market—were prohibited under Art. 28. Second, the Commission raised the very sensitive question of the legality of measures that States applied to domestic and imported goods equally, but were nonetheless protectionist. The Directive proposed that such “indistinctly applicable measures” [IAMs] ought to be captured by Art. 28 if they failed a test of proportionality. Where the “restrictive effects of such measures . . . are out of proportion to their [public policy] purpose,” and where “the same objective can be attained by other means which are less of a hindrance to trade,” IAMs constitutes an illegal MEE. With Directive 70/50, the Commission had exceeded its authority. The Member States (through ex-Art. 33) had not delegated to the Commission the task of defining the legal concept of the MEE, nor had they ever meant for Art. 28 to apply to IAMs.⁸

⁸ Indeed, in ECJ 249/81 (1982), Ireland argued that this part of the Directive was *ultra vires*, and the Advocate General agreed. The Court chose not to respond to the argument.

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Note, however, that the Commission, while being an agent of the Council of Ministers in the harmonization process, is a trustee of the Treaty under ex-Art. 33.

We now turn to the case law of the Court, which immediately superseded Directive 70/50, rendering it all but obsolete.⁹

THE EMERGENCE AND CONSOLIDATION OF THE “DASSONVILLE FRAMEWORK”

The basic doctrinal structure governing free movement of goods developed quickly, in a series of cases decided in the 1975–9 period. The crucial elements of the framework are the following: First, trader’s rights are conceived broadly and expansively, while the prerogatives of national governments are conceived restrictively. Second, there exist no clear limits to the reach of judicial authority into national regulatory regimes. Third, through the enforcement of a least-means, proportionality test, the framework makes judges the ultimate masters of trade law. Thus, the structure encourages traders to use the courts as a means of negative integration, while denying that national authorities possess secure political property rights when it comes to the regulation of market activities. Perhaps most importantly, since the framework authoritatively organized the relationship between Arts. 28 and Arts. 30, it also *per force* organizes a discursive politics on the nature of European constitutionalism and the limits of national sovereignty (see Póiares-Maduro 1998).

Dassonville: hindrance to trade, direct or indirect

The *Dassonville* case (ECJ 8/74, 1974) provided the Court with its first important opportunity to consider the meaning of free movement of goods provisions.

In 1970, Mr. Dassonville imported a dozen bottles of Johnnie Walker Scotch Whiskey into Belgium, after having purchased it from a French supplier. When Dassonville put the whiskey on the market, he was prosecuted by Belgian authorities for having violated customs rules. The rules prohibited

⁹ There exist no good a priori reasons to think that Directive 70/50, absent the support of the Court, could have been sustained as an authoritative interpretation of what is or is not prohibited as a non-tariff barrier to intra-EC trade. Given the constitutionalization of the Treaty system (i.e. supremacy, direct effect, and the fact that Arts. 28–30 trump secondary legislation), we have better reason to think that the Court, not the legislator, will be the key source of institutional innovation.

the importation from an EC country, in this case France, of spirits that originated in a third country, in this case Britain, unless French customs rules were substantially similar to those in place in Belgium. Mr. Dassonville was also sued by a Belgian importer who possessed, under Belgian law, an exclusive right to market Johnnie Walker. In his defense, Dassonville claimed that Art. 28 meant that (a) goods entering France legally must be allowed to enter Belgium freely and (b) exclusive rights to import and market goods were invalid. The Belgian court appeared to agree and requested guidance from the ECJ.

Dismissing the objections of the United Kingdom and Belgium, whose counsel argued that such rules were not prohibited by Art. 28, the Court found for Dassonville. Much more important, the Court declared the following:

All trading rules enacted by the Member States, which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

Thus, with no supporting argument, the Court had repudiated the two rival understandings of Art. 28 then current. In its official brief to the Court, the United Kingdom had argued that only measures that actually result in a “quantitative reduction in the movement of goods” might be caught by Art. 28. The UK’s position, which would have placed the burden on the trader-plaintiff to show that a given national measure had caused direct and deleterious effects on trade, had wide support among the Member States and legal scholars at the time (see Oliver 1996: 90–2). With Directive 70/50, the Commission had sought to destroy this interpretation. The Court replaced the Commission’s discrimination model with its own, even more rigorous, “hindrance to trade test” (Gormley 1985: 22). If put to a vote, the ECJ’s interpretation of Art. 28—more expansively integrationist than any in circulation at the time—would certainly not have been accepted by the Member State governments.

The Court had, after all, placed no limits to the reach of Art. 28: all national laws or administrative practices that negatively impact the activities of traders, including those that do so only “indirectly or potentially,” are presumptively prohibited. This Court had thus raised a delicate political issue, which proved inseparable from how the law would come to develop. The wholesale removal of national regulations would strip bare legal regimes serving otherwise legitimate public interests, such as the protection of public health, the environment, and the consumer. Further, where the

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Council was unable to produce harmonized legislation in a timely fashion, this lack of protection might not only endure, but could weaken public and political support for integration down the road. In response, the ECJ announced, in *Dassonville* and subsequent decisions, that the Member States could, within reason, continue to regulate the production and sale of goods in the public's interest, pending harmonization by the EC's legislator. The Court stressed that: (a) the condition of "reasonableness"¹⁰ would be controlled strictly; (b) such regulations—as with national measures justified under Art. 30 grounds—could not "constitute a disguised restriction on trade between member states"; and (c) the European judiciary would review the legality of these exceptions to Art. 30, on a case-by-case basis.

Thus, not only did the *Dassonville* decision define the scope of the Art. 28 prohibition of MEEs as broadly as possible, it laid the foundations for balancing, and therefore for judicial dominance over trade policy within the EC.

De Peijper: least-means proportionality

The ECJ's ruling in *Dassonville* showed traders that litigation of Art. 28 in the national courts could be an effective means of subverting national laws that hurt them, and of shaping the evolution of EC institutions in their favor. At the time, the legal establishment (in Brussels, Luxembourg, and the academy) still clung to the idea that the appropriate way to review breaches of Treaty law by the Member States was through infringement proceedings brought by the Commission (Art. 226 EC). The Court, however, had made it clear that the rights of traders must be defended by national judges, and that national judges must do so in particular ways. Most important, *Dassonville* requires national judges to assess the reasonableness of national measures that might affect trade. In *De Peijper*, the Court (ECJ 104/75, 1976) demonstrated that such a requirement entails the judicial review of the decisionmaking of national lawmakers, in micro-detail if necessary.

The case concerned criminal charges brought by Dutch prosecutors against an importer of the pharmaceutical, Valium. Mr. De Peijper had distributed the drug to a hospital and pharmacy, after having purchased it from an English wholesaler and repackaged it under his own company's name. He was accused of violating a law that prohibited the marketing of medicinal products without the prior consent of the Public Health

¹⁰ Reasonableness as a criterion for legality is common in European administrative and constitutional law. The rule normally implies proportionality: a law or administrative act is unreasonable if it produces effects that are out of proportion to its purpose.

Inspector, in the absence of certain documents, to be verified by the Inspector, certifying the origin and composition of imported medicines. In his defense, Mr. De Peijper pleaded Art. 28. He could do so since the files and reports required by the Public Health Inspector could be completed only by designated “experts” who, in practice, were pharmacists employed by a company that was also the official importer of Valium into the Netherlands. Since Mr. De Peijper’s company sold Valium at a lower cost than the official importer, he did not believe he could obtain the latter’s help in completing the required documents. The national court of referral asked the ECJ if the measures in question, as applied to parallel imports, constituted an MEE under Art. 28 and, if so, whether the measure could be justified on Art. 30 grounds, namely, under the heading of “public health.” Once the oral proceedings before the ECJ had been completed, the Commission instituted infringement proceedings against the Netherlands, under Art. 226.

The Advocate General sided with the importer, noting that Valium circulated lawfully in other Member States, under various licenses and other public controls, which could in principle be used by national authorities to trace origin. The Dutch and British governments defended the measures in question, first as nondiscriminatory, then on Art. 30 grounds. But they also argued, joined by the Danish government, that the measures simply implemented existing EC directives, and thus were presumptively valid under EC law. These directives prohibited the marketing of “medicinal products” in the absence of “a prior authorization issued by the competent authority in the Member State”; and they obliged distributors of imported medicines to show to this authority documents, to be completed with the aid of designated “experts,” certifying the product’s “composition and the method of preparation.” In response, the Advocate General argued that the case implicated only the relationship between Arts. 28 and 30, and that EC secondary legislation could not expand the scope of “the residuary powers left to the Member States by Art. 30.”

A final issue concerned the judicial function of the preliminary reference procedure, relative to infringement proceedings. In his report, the Advocate General stated that:

Although it is not within the scope of the Court’s jurisdiction under Art. 234 to give a ruling on the compatibility of the provisions of a specific national law with the Treaty, it acknowledges . . . that it has jurisdiction to provide the national court with all the factors of interpretation under Community law which may enable it to adjudicate upon this compatibility.

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"There is no doubt," the Advocate General continued, "that the normal way of testing the compatibility of national laws [with EC law] is by means of . . . Art. 226," rather than through a reference from a national court. Yet, he argued, "if the Court wishes to give a helpful answer to the national court," it would be "impossible for it . . . to avoid examining this problem of compatibility." Further, given his expressed view on how the case ought to be decided, "the question then arises how Netherlands law should be adjusted in order to encourage free trade to the greatest possible extent while complying with the well-known requirements of public health." The Advocate General suggested that the Court could avoid the question for now, leaving it to be resolved through the Commission's infringement proceedings.

The Court ruled that the Dutch measures fell within the purview of Art. 28, taking care to restate the *Dassonville* formula. It then proceeded to balancing, generating an explicit least-means test:

National rules or practices do not fall within the exception specified in Art. 30 if the health and life of humans can be as effectively protected by measures which do not restrict intra-Community trade so much.

The ECJ then insisted that the national court apply such a least-means formula to resolve the case.

The Court could have ended the matter there. Instead, it chose to evaluate the proportionality of the Dutch measures on its own, showing how a Member State might secure the public's interest in ways that would hinder trade less than the Dutch rules at hand. Among other solutions, the Court suggested that national authorities "adopt a more active policy" of helping importers acquire necessary information, rather than "waiting passively for the desired evidence to be produced for them," or making traders dependent upon a competitor. More broadly, a Member State could hardly claim to be acting to protect public health, the Court declared, if its policies discouraged the distribution of lower cost medicines. Finally, the Court ruled that the various EC directives harmonizing regulation of pharmaceuticals had no effect on the scope of Arts. 28 and 30.

De Peijper illustrates some crucial aspects of the dynamics of judicial balancing under least-means proportionality tests. Courts do not enforce such tests without reenacting the decisionmaking processes of those whom they are being asked to control. That is, "they . . . put themselves in the latter's shoes, and walk through these processes step-by-step" (Stone Sweet 2000: 204). Inevitably, judges speak to how governmental officials should have

behaved, if the latter had wished to exercise their authority lawfully. In doing so, judges lay down prospective rules meant to guide future decision-making. Lawfulness, balancing courts are telling policymakers, entails reasoning through the legal norms as judges do, as balancers of rights with respect to an opposed public interest. Not surprisingly, ongoing enforcement of least-means tests tends to generalize judicial techniques of governance, inducing other public officials, if they hope to defend their interests adequately, to engage in the style of argumentation developed in the pertinent case law.

The *De Peijper* ruling supplemented *Dassonville* in ways that quickly locked in these dynamics with respect to European market integration. The Court served notice to the Member States that national regulations bearing on trade could only be justified under the most restrictive of conditions. It demonstrated to potential litigators and the Commission that the preliminary reference procedure comprised an effective means of reviewing the conformity of national with EC law, parallel to, but not restricted by, the infringement procedure. And the ECJ ordered national judges to engage in least-means testing, while promising to instruct them exactly how to do so, where necessary.

Cassis de Dijon: mutual recognition and strict scrutiny

A third seminal ECJ decision, *Cassis de Dijon* (ECJ 120/78, 1979), completed the construction of a comprehensive framework for adjudicating trade disputes under Art. 28. With Directive 70/50, the Commission had sought to bring within the ambit of Art. 28 those national measures—IAMs—that did not, on their face, discriminate between domestic and imported goods, but which nonetheless restricted market access to imports, or otherwise disadvantaged them relative to domestic goods. In *Cassis de Dijon*, the Court extended the *Dassonville* principles and least-means testing to such “equally applicable” measures. The Court interpreted Art. 28 as prohibiting a Member State from applying national regulations to any imported good that has been lawfully produced under the production or marketing rules of another Member State. Put very differently, the Court had decided that traders should not be asked to bear the costs of the Member States’ failure to produce harmonized EC market rules.

In 1976, the German federal agency that regulates the marketing of spirits denied a request to import the French liquor, *Cassis de Dijon*, a black currant syrup typically mixed with wine as an aperitif. It did so because the

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syrup's alcohol content fell below a minimum that would, under German law, allow it to be sold on the German market as a liquor. The national judge, in effect, asked the ECJ if Art. 28 covered national laws that fixed different "mandatory requirements" for the marketing of products relative to those in place in other Member States. In its defense, the German agency claimed that mandatory requirements—when they are applied indistinctly to domestic and imported goods—do not constitute MEEs under the Treaty; it referenced Commission Directive 70/50 in support of the contention. In the absence of harmonization through EC directives, counsel for the German agency asserted, "each Member State retains full legislative jurisdiction over the technical characteristics upon which the marketing of beverages and foodstuffs is made conditional." As a second line of defense, the agency dutifully trotted out arguments to the effect that its rules on alcohol content served various public interests, covered under various headings of Art. 30. The Advocate General rebutted each of these arguments in his report, stating, notably, that the Court had rejected the more "limited interpretation" of Directive 70/50 being relied on by the Germans.

The Court agreed with the agency that, where harmonized rules were not in place, "it is for the Member States to regulate all matters relating to the production and marketing of . . . alcoholic beverages . . . on their own territory." However, it also ruled that "disparities between the national laws" that hinder trade in such products would be "accepted only in so far as [such laws] may be recognized as necessary . . . to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defense of the consumer." After rehearsing and dismissing each of the justifications given by the German agency, the Court then declared that it could not divine: "[any] valid reason why, provided that they have been lawfully produced or marketed in one of the member states, alcoholic beverages should not be introduced into any other member states."

With these *dicta*, the Court floated a new principle: that of the "mutual recognition," on the part of each Member State, of the national production and marketing standards ("so called mandatory requirements") in place in the other Member States.

The Court's judgment extended the logic of *Dassonville*, while innovating in several important ways. With *Cassis de Dijon*, the Court extended Art. 28's coverage to IAMS: henceforth, no aspect of national regulatory policy touching on the market for goods could be considered, a priori, to be exempt from judicial scrutiny. The ruling required national judges to attend

to the effects, on traders, of “disparities” between national legal regimes, thus making them supervisors of the politics of harmonization. At the same time, the Court made available to the Member States a new set of justifications for derogating from Art. 28, although these are valid only in the absence of harmonization.¹¹ In subsequent cases, the Court imposed a least-means proportionality test to scrutinize such claims, which it taught to national courts by way of example.

OUTCOMES

The Court’s case law on Art. 28 combined with the doctrines of supremacy and direct effect to give traders rights that were enforceable in national courts. The argumentation framework produced gave very wide scope to Art. 28, placed a heavy burden on Member State governments to justify claimed exceptions to Art. 28, and directed national judges to enforce trader’s rights where governments could neither prove reasonableness nor necessity. This structure encouraged traders to use the courts as makers of trade law. Although important, the production of favorable doctrines does not conclude the story. The more the legal system actually removes barriers to markets, the more subsequent litigation will be stimulated. That is, positive outcomes will attract more litigation, negative outcomes will deter it. Further, the more effective the legal system is at enforcing Art. 28, the more pressure adjudication puts on the EC’s legislative organs to harmonize market rules. The data we have collected allow us to examine the various relationships between litigation, doctrine, and outcomes on a number of dimensions. These aspects include the dynamic impact of this doctrinal structure on the greater integration process, culminating in the Single European Act.

We begin with Art. 234 reference activity for the free movement of goods domain as a whole. Figure 3.1 depicts the annual number of preliminary references in the domain as a whole, and for Art. 28, through mid-1998. References have steadily increased since *Dassonville*, and spike upward after *Cassis*.

¹¹ In *Cassis*, the Court generated four “mandatory requirements” (fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defense of the consumer), which were later supplemented by two other headings: the improvement of working conditions (ECJ 155/80, 1981), and the protection of the environment (especially ECJ 302/86, 1988, discussed at length in Chapter 5). Although the Court treats the source of the mandatory requirements as Art. 28, they are nonetheless subject to exactly same judicial standards of scrutiny as are justifications claimed by the Member States under Art. 30 (see Oliver 1996: 181).

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Figure 3.1. Annual Number of Preliminary References—Free Movement of Goods

Source: Alec Stone Sweet and Thomas L. Brunell *Data Set on Preliminary References in European Law, 1958–98*, Robert Schuman Centre for Advanced Studies, European University Institute (San Domenico di Fiesole, Italy: 1999). See Stone Sweet and Brunell (2000).

Table 2.4 (see Chapter 2) shows that one country—Germany—dominates reference activity in the sector, far beyond expected rates. Further, only two countries of the original EC-6 or the first EC-12, France and Germany, show positive values in the “percentage difference” cell; that is, only French and German judges have generated a disproportionate number of references in this legal domain. Of the original EC-12 (i.e. excluding references from Austria, Finland, and Sweden), the legal systems of France, Germany, Italy, and the United Kingdom have produced 73 percent (591/805) of all references in the domain. Thus, we find strong support for our hypothesis: trader-litigators, in fact, do target large markets, relative to smaller ones. The finding seems unsurprising. Traders have a far greater interest in opening larger markets relative to smaller ones; and higher levels of cross-border trade, strongly correlated with larger markets, will generate relatively more trading disputes than would smaller markets (see Stone Sweet and Brunell 1998a). In contrast, however, Garrett (1992, 1995) claimed that the ECJ and the legal system only worked effectively against the smaller and less powerful Member States. Yet if the ECJ is much more likely to vindicate trader’s rights against smaller countries, compared with larger ones, why would

traders be devoting far greater resources to bringing cases before the courts of the larger states?

Analysis of the dispositive outcomes produced by the Court provides a more direct test of such claims. We examined all of the ECJ rulings pursuant to Art. 234 references that expressly invoked Art. 28; $n = 254$. For each ruling, we coded for whether the Court either (a) declared the type of national rule or practice at issue to be a violation of Art. 28 or (b) found it not to be contrary to Art. 28. The ECJ ruled in favor of the traders in exactly half of all decisions in which such a determination was clearly made (108/216). Traders have a higher success rate in France, Germany, and Italy—well over 50 percent—than they do in Belgium, the Netherlands, and the United Kingdom; and they enjoy the best success rate (60 percent) in Germany.

These results are supported by Kilroy (1996), who produced the first relatively systematic empirical study of legal outcomes in the free movement of goods area. Her sample included both preliminary rulings and decisions pursuant to infringement proceedings brought by the Commission under Art. 226. Kilroy found that in eighty-one decisions, two-thirds of her pool, the Court struck down national rules as treaty violations; and that in forty-one cases, one-third of her pool, the Court upheld national rules as permissible under the EC's trading rules. She also assessed the relationship between *observations*—the briefs filed by the Commission and the Member States in pending cases—and the ECJ's rulings. She found that in 98 of 114 cases in which the Commission intervened, the Court sided with the Commission. The Commission's position therefore "predicted" the Court's decision 86 percent of the time. Member State briefs to the Court—revealed state preferences on how the Court should decide cases—failed to presage, or influence, the Court's rulings; and German interventions were found to be particularly ineffectual in generating outcomes. Following Garrett's logic, Kilroy (1996: 23) found it "surprising that Germany has a relatively lower impact on the Court." It is clear that the Court and the Commission work to make EC law effective and to enhance transnational activity, not to codify or give legal comfort to the preferences of dominant Member States. Similarly-designed studies of adjudicating EU social provisions and environmental protection confirm these results (Cichowski 1998, 2001, 2002; Chapters 5 and 6 of this book).

The evidence refutes Garrett's various hypotheses to the effect that the Court defers to the preferences of the larger Member State in its case law. Indeed, when it comes to interpreting Art. 28, there is no evidence that

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governments constrain the Court in any important, let alone systematic, way. The data also tell us a great deal about why litigating EC law has been so attractive to private actors.

We also examined the types of national rules and practices that have come under attack in preliminary references, as a supplementary means of assessing some of the arguments related to spillover discussed in earlier chapters. We expected to find that traders would begin by targeting the most obvious and direct barriers to trade; to the extent that the legal system succeeded in eliminating these barriers, traders would find themselves confronting new layers of national regulation, which they would attack in court. In this way, the shadow of the law would gradually cover the whole of national regulatory regimes (see Chapter 2). Our findings support these claims. In the 1970s, the vast majority of references attacked national measures that required special certification and licensing requirements, border inspections, and customs valuations for imports. After *Cassis*, a host of IAMs, such as those that impose purity or content requirements, came onto the Court's agenda. By the end of the 1980s, traders were attacking an increasingly broad range of national rules, such as those related more to the marketing—rather than the cross-border trading or production—of goods: minimum pricing, labeling and packaging requirements, Sunday trading prohibitions, requirements concerning distribution and warehousing, and advertising. The absence of any clear limit to the reach of *Dassonville-Cassis* made these dynamics—which progressively extended the reach of Art. 28 to more and more indirect hindrances to trade—possible.

Precedent

The founding cases in this legal domain—*Dassonville*, *Cassis*, and *De Peijper*—produced a set of doctrinal principles that governed it until its partial mutation in the 1990s (discussed below). We have analyzed citations patterns, that is, how judges have actually built precedent across all the free movement of goods decisions. Over a third of the Court's decisions on MEEs under Art. 28 cite at least one of these three judgments. These rulings continue to be the main building blocks for doctrinal evolution, even as the Court builds increasingly sophisticated argumentation frameworks. Of rulings that combine clusters of statements found in past ECJ decisions, half cite at least one of the founding trio.

As the adjudication of Art. 28 proceeded, litigants and judges refined doctrine, in order to deal with particular problems. Litigants learned to build arguments from rulings involving situations that most closely resembled

those in which they found themselves. The Court, in turn, treated these arguments, and its own previous case law, as sectorally based. For example, intellectual property rights decisions tend to draw on previous cases dealing with trademarks and patent questions, rather than advertising or labeling requirements, even where the legal question at issue deals with rather general balancing rules that are otherwise applied similarly in all free movement of goods disputes. At the same time, a precedent-based discourse on the various justified exceptions to Art. 28 developed. These frameworks vary subtly across the Art. 30 headings and the mandatory requirements of *Cassis de Dijon*.

The Court confronted the “incompleteness” of the Art. 28–30 normative structure by building explicit sets of rules for identifying legitimate national derogations to free movement principles and for evaluating proposed derogations. Early in the ECJ’s case law on IAMs, *Dassonville*, *Cassis de Dijon*, and an Art. 226 case brought by the Commission pursuant to *Cassis*—the famous German “Beer Purity” case (ECJ 178/84 *Commission v. Germany*, 1987)—comprised a framework for dealing with the public health derogation. This framework established a balancing standard—an “in the absence of harm” variation on the proportionality test—to evaluate national measures governing the labeling of food products. This framework is applied in subsequent rulings (e.g. ECJ 269/89 *Bonfait*, 1990; ECJ 298/87 *Smanor*, 1988) that probe the boundary between Art. 28 and the public health derogation. This framework constitutes the essential structure of the ECJ’s explicit commitment to strictly review IAMs that impose labeling and contents requirements on food. Subsequent cases are gradually incorporated, creating a more precise framework for argumentation in specific situations. Thus, a cluster of cases emerges as stable doctrine governing the litigating of national regulations on food additives and preservatives (e.g. ECJ 42/90 *Höfner*, 1990; ECJ 13/91 *Debus*, 1992).

We could go on. The essential point should by now be clear. Far from being incoherent and unstructured as Garrett (1995) or Garrett, Keleman, and Schulz (1998) imply, the rule system produced by the Court is richly differentiated; it has, moreover, evolved speedily in response to the needs of those who use the system.

FROM NEGATIVE TO POSITIVE INTEGRATION

In adjudicating trading disputes under Art. 28, the Court exercises lawmaking and constitution-building powers. Given the nature of least-means

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balancing, the ECJ and national judges inevitably came to play a powerful lawmaking role. By providing detailed reasons for why a given measure does or does not infringe upon the treaty-based rights of traders, the Court gives guidance on how positive integration ought to proceed. The menu of policy options available to the EC legislator, at any given moment in time, may contain those types of measures that the Court had deemed acceptable under Art. 28, but not those that it has censored. As important, the doctrinal structure developed by the Court heavily implicates the legal system in the process through which the relationship between national sovereignty and supranational governance is determined. As we have seen, the *Dassonville* framework, as completed by *Cassis*, reconstituted the rules of the game that governed interactions between national governments, the Commission, and market actors. How important these changes were, to the course of European integration, is a crucial question to which we now turn.

We begin with the Court's legislative role. There is compelling evidence that the ECJ possessed, right from the beginning, a sophisticated understanding of both its quasi-legislative powers and the strategic context in which these powers would operate. Recall that the Court's aggressively integrationist reading of Art. 28 was predicated, or justified, on the grounds that traders should not be required to bear the costs of intergovernmental inaction at the EC level. In the absence of harmonization, the logic of *Cassis de Dijon* goes, the legal system determines if and what kinds of regulation are acceptable, for the EC as a whole, under Art. 28. The ECJ insisted that it would do so through controlling the reasonableness and proportionality of the actions of individual Member States. Given this balancing structure, it is unsurprising that the ECJ and the national courts would perform a powerful lawmaking role, not least by providing templates of what is or is not lawful government action. In its Art. 28 case law, the Court routinely generated such templates, which could have become harmonized, European law in one of two ways. National regimes could adapt themselves to the Court's case law, in order to remain competitive and to insulate themselves from litigation. Or, more efficiently, the Commission could propose legislation of the kind that had passed review by the Court, enabling the Member States to reassert some modicum of control over the process, and providing the latter with legal shelter.

Both routes were facilitated by how the Court actually decided cases. In a very important piece of research, Poyares-Maduro (1998) examined how the ECJ balances (a) trading rights against (b) derogations from Article 28 claimed by Member State governments, in that part of the domain governed

by *Cassis* (i.e. the review of the conformity, with Art. 28, of IAMS). The data show that the judges engage, systematically, in what he calls (1988: 72–8) “majoritarian activism.” When the national measure in question is more unlike than like those equivalent measures in place in a majority of Member States, the ECJ strikes it down as a violation of Article 28. (We found that the Court began, in the early-1980s, to ask the Commission to provide such information on a regular basis). Poiares-Maduro found no exceptions to this rule. On the other hand, he found that the Court tends to uphold national measures in situations in which no dominant type of regulation exists, although there are important exceptions. In this way, the Court generates a “judicial harmonization” process. Majoritarian activism undermines the logic of minimum common denominator outcomes asserted by intergovernmentalists. At the same time, the Court would have little to fear in the way of reprisals, since a majority of Member States would likely be on its side on any given case.

No systematic research on the relationship between the Court’s Art. 28 case law and legislative harmonization in the EU has been undertaken. It is, however, routinely noted that the Court replaced the Council of Ministers as a force for positive integration prior to the Single European Act (Oliver 1996: ch. 6; Craig and De Burca 1998: ch. 14), and a smaller literature (Empel 1992; Berlin 1992) focuses on how the Court’s case law required or provoked governments to act legislatively. In any case, dozens of EU directives adopted prior to the Single European Act codified, as secondary legislation, the key holdings of specific rulings of the Court. Much more attention has been paid to the constitutional impact of *Cassis de Dijon*, from which the Commission developed a new strategy for achieving market integration.

The *Dassonville*–*Cassis* framework deserves to be considered as a constitutional innovation in that it implies a mode of integration neither foreseen nor anticipated by the Member States. In the Treaty of Rome, intergovernmental control over course of positive integration was seemingly assured by the dominance of the Council of Ministers over the legislative process, control that was upgraded by the Luxembourg Compromise. With Commission Directive 70/50, the Member State’s governments had been told that Art. 28 would cover national measures that discriminated, on their face, between domestic and imported goods, although even this interpretation was controversial among at least some governments. In *Cassis*, the Court extended the *Dassonville* principles to the whole of domestic law and administrative practice (that is, to IAMS), and generated a new principle capable of being legally enforced: the mutual recognition of national standards. In doing so,

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the Court recast the relationship between negative and positive integration. Prior to *Cassis de Dijon*, the responsibility and authority to reduce the negative effects of divergent national regulatory regimes on EC production and trade rested with the EC legislator, acting through Art. 94. *Cassis de Dijon* obliterated the separation between Art. 28 and ex-Art. 94, extending the reach of the former into the purview of the latter.

Floating the doctrine of mutual recognition placed the relationship between negative and positive integration in the shadow of the law. The legal system had shown that the market could, at least in theory, be completed through adjudication. At the same time, mutual recognition created a powerful incentive to harmonize the most important market rules. It was readily apparent to governments, the Commission, and business that, if mutual recognition were actually introduced, a race to the bottom could follow: investment, production, and jobs might move to the states with lowest regulatory costs of production.

Following the Court's ruling in that case, the Commission took the unusual step of issuing a "Communication," in the form of a letter sent to the Member States, the Council, and the Parliament (reproduced in Oliver 1996: 429–31). The letter asserted that the Court had effectively established mutual recognition as a constitutional principle, which the Commission went on to interpret in the broadest possible manner. The Court had shown how states might retain their own national rules, capable of being applied within the domestic market, while prohibiting states from applying these same rules to goods originating elsewhere. Reliance on mutual recognition could obviate the need for extensive harmonization. Indeed, the Commission announced, it would henceforth focus its harmonization efforts on IAMs, particularly those "barriers to trade . . . which are admissible under the criteria set by the Court." Almost immediately, the large producer groups and associations of European business proclaimed their support for the initiative, and the new strategy—mutual recognition, minimal harmonization, concern for the transaction costs of producers and traders within Europe—came to dominate the discourse on how best to achieve market integration.

Concurrently, the Commission (contrary to the analysis of Alter and Meunier-Aitshalia 1994: 548) began to use Art. 226 more aggressively—for the first time—in order to increase pressure on governments. Markus Gehring and Alec Stone Sweet have collected the data on infringement proceedings brought, withdrawn, and decided by the Court. Prior to *Cassis*, the Court produced only two Art. 226 rulings on Art. 28. From the date *Cassis*

was rendered to the date the Single Act was signed, the ECJ ruled on forty-six enforcement actions concerning Art. 28 brought by the Commission. Member States lost 90 percent of these cases. During this same period, the Commission filed an additional thirty-six more Art. 28 suits against Member States that did not go to the Court, because Member States agreed to settle. In the crucial 1980–4 period, free movement of goods cases comprised more than one-in-three of all Art. 226 rulings, and nearly 30 percent of all such rulings concerned Art. 28.

The literature on the sources of the Single European Act—which bundled together mutual recognition, a return to qualified majority voting, and the establishment of a binding timetable for harmonizing in the most important regulatory areas—has sufficiently demonstrated the extent to which transnational business elites and the Community’s supranational organizations were ahead of governments in the process of “relaunching” Europe (Alter and Meunier-Aitsahalia 1994; Dehousse 1988, 1994; Egan 2001; Fligstein and Mara-Drita, 1996; Sandholtz and Zysman 1989; Stone Sweet and Caporaso 1998; Weiler 1991; but Moravcsik 1991, 1995, 1998, disagrees). Governments acted, of course, in the form of a Treaty that codified integrative solutions to their own collective action problems, including the renunciation of the Luxembourg compromise. But these solutions had emerged from the activities of the EC’s organizations and transnational actors, against the backdrop of pent-up demand for more, not less, supranational governance. Of course, the process was not only to do with transnational activity, law, courts, and trusteeship. It was propelled forward by a growing sense of crisis, brought on by globalization, the failure of go-it-alone policies to sustain economic growth, and an accumulation of legal precedents that empowered traders and the Commission in legal disputes with national administrations.

We expected that the adjudication of trading disputes would, among other things, serve to expand the domain of supranational governance, to reduce the EC’s intergovernmentalism, and to reconstruct the contexts in which intergovernmental bargaining takes place. We believe that the Court’s free movement case law on integration and the European polity did each of these things. Intergovernmentalists, however, would presumably tell this story differently, highlighting the putatively proactive role of governments. In his most recent account of the SEA, Moravcsik (1998: ch. 2) denies all of this, declaring that the EC’s organizations “generally failed to influence the distribution of gains” that could have had an effect on the preferences of governments to negotiate.

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With respect to the impact of the Court and the legal system, what evidence does Moravcsik (1998: especially 353–5) marshal to support this view? None, in our view. First, he does not discuss the sources and consequences of litigating Art. 28 and related provisions, and thus is not in the position to address if or how adjudication “influence[d] the distribution of gains.” During the crucial 1979–84 period, levels of Arts. 226 and 234 litigation under Art. 28 rose sharply; rulings of noncompliance proliferated; and national regulatory frameworks were placed in a creeping “shadow of the law.” Second, Moravcsik (based on an error made by Alter and Meunier-Aitshalia 1994¹²) wrongly claims that *Cassis de Dijon* was actually a “retreat from previous ECJ jurisprudence,” but he does not explain or defend the assertion. In fact, *Cassis de Dijon* extends *Dassonville* to IAMs, a deeply controversial area that governments had not contemplated being covered by the treaty until the Commission’s 1970 directive. Third, he argues that mutual recognition “was not a new innovation,” but had been floated as early as the late 1960s. Yet, if by Moravcsik’s own admission, the governments knew of this proposal, they did not adopt it. Instead, they pursued an intergovernmental politics that failed miserably. In the end, they adapted to the Court’s case law, for obvious, “rational” reasons, partly due to the fact that the Court had constructed Art. 28 in ways that redistributed resources away from the Member States and towards transnational actors and supranational authority.

Last, Moravcsik argues that (a) governments fulfilled their own “demand” for mutual recognition and majority voting and (b) “*Cassis*, at most, accelerated the single market program,” but “was not a necessary condition.” Since he nowhere specifies the conditions necessary for the SEA, it is not obvious how one might assess or respond to this claim. We have argued, in effect, that (a) the Member States’ “demand” for an accelerated market-building project was heavily conditioned by two (inseparable) factors: the course of market integration through the mid-1980s, and (b) outcomes produced by the legal system. Moravcsik does not show otherwise. As Egan (2001: 59–60) stresses, larger, more open markets do not develop without altering “the alignment of interests” within affected industries, “which will, in turn, affect policy preferences and corporate strategies.” She then goes on to show that the Court’s evolving case law shaped the strategies of large corporations, the Commission, and ultimately governments. In fact, the Court’s steady and expansively integrationist interpretation of Art. 28

¹² Alter and Meunier-Aitshalia (1994) emphatically claim that, beyond the *dicta* on mutual recognition, the Court’s ruling does not innovate on the basic *Dassonville* framework. The error is critical, and it undermines their analysis of the ruling’s impact.

undermined national regulatory sovereignty, enhanced the role of transnational actors and national judges to participate in market integration, and empowered the Commission, in both legislative and judicial processes. Clearly, the *Cassis de Dijon* jurisprudence raised the cost of intergovernmental inaction, and made the benefits of intergovernmental cooperation more attractive. The “distribution of gains,” by any reasonable measure, had indeed been altered.

A broader point deserves emphasis. To take imperfect commitment and delegation in the EU seriously requires us to abandon an exclusive focus on governments, and to examine the dynamics of trusteeship empirically. In this story, the Member States did *not* design the EU’s trading institutions, nor did they design the mode of governance that best served to enforce them. The Court did. When *Cassis* was rendered, the Legal Service of the Council of Ministers actually produced a finding that rejected the ruling’s main principles, asserting the viability of the Commission’s (pre-*Dassonville*, Directive 70/50) discrimination test!¹³ Here, as before, governments adapted themselves to rules that had emerged earlier, through the actions of the EC’s organizations, while remaining several steps behind what the Court and the Commission were in fact doing. A simple counterfactual might provide the best test: in a world without direct effect and supremacy, in a world in which the Member States actually controlled the evolution of Europe’s trading institutions, how far would market integration have gone after the Luxembourg compromise?¹⁴

III Mutation of the Framework

The *Dassonville* framework remained remarkably stable until 1993, when, in *Keck* (ECJ 167/1991), the Court removed national regulation of certain “selling arrangements” from the corpus of IAMs covered by Art. 28. We view the *Keck* decision as an adjustment dictated largely by the evolution of adjudication in the domain, that is, with factors endogenous to the adjudication of Art. 28. The aggressively interventionist approach taken by the Court in *Cassis de Dijon* ultimately generated four sets of interrelated problems.

¹³ Which some, and perhaps all, governments opposed at that time.

¹⁴ Scholars disagree on the question of whether the EC’s legal system, on its own, would have been able to impose mutual recognition as authoritative law in the EC. We have reason to think that it could, given the Court’s subsequent decisionmaking, while Alter and Meunier-Aishalia (1994) disagree. Whether the Court could have, on its own, “completed” the common market, is quite a different matter.

First, as noted above, in the 1980s firms that were *not* primarily involved in intra-EC trade began to make use of Art. 28 to attack national regulations they did not like. This led to a great deal of doctrinal soul-searching about the absence of limits to the reach of *Cassis de Dijon* (Mortlemans 1991; Rawlings 1993; Steiner 1992), worries that we have good reason to think were shared by the Court (Advocate General Van Gerven in *Torfaen*, ECJ 145/88). Indeed, in the end, the Court adopted the solution proposed in a beautifully argued article (White 1989) produced by a lawyer in the legal affairs department of Commission.

Second, by the early-1990s, the Court's docket had become overloaded. With *Keck*, the ECJ was, in effect telling litigators, "litigators have pushed us far enough; it's time to back them off."

Third, the Court was responding to signals from their most important interlocutors: the national courts. Many national judges had all but refused to subject IAMs to least-means proportionality testing and, partly in consequences, the ECJ had produced a handful of obviously inconsistent decisions. Stone Sweet examined, for the *Cassis* through *Keck* period, every national decision on IAMs reported by courts in three EC Member States (France, Netherlands), UK. Most judges, at least implicitly, used a discrimination test, not the "actual or potential, direct or indirect" hindrance to trade test announced by the European Court in *Dassonville*. In all three Member States, national judges often showed themselves unwilling to find for litigants not directly involved in moving goods across borders (Jarvis 1998; Rawlings 1993). *Keck* formally reduced the political exposure of judges, by restricting the range of national policies subject to supervision through proportionality balancing.

Fourth, the marginal returns to market integration of an aggressive approach to IAMs had, by the time *Keck* was decided, fallen virtually to zero (see also Shapiro 1999, Weiler 1999). In our view, the approach was a victim of the Court's more general successes. After the Single Act, the legislative process opened up (Chapter 2), and harmonization proceeded steadily, thereby withdrawing, prospectively, whole classes of cases from the Court's docket. The court's role in market regulation has necessarily become lower profile since.

Keck and its Aftermath

In *Keck*, the Court announced that the legal system would (a) continue to monitor and enforce Art. 28 rules against one class of IAMs—mandatory

requirements related to the characteristics of products¹⁵—but would (b) greatly reduce or abandon altogether the review of national measures that restrict “selling arrangements,” conceived as the circumstances (the time, place, and manner) of selling goods.

The dispute involved the prosecution of a retailer for selling goods at a loss in order to attract customers, a practice forbidden by a long-standing French law most recently renewed in 1986. In defense, the retailer alleged that the law fell foul of Art. 28, since its effect was to reduce the quantity of imported goods sold and, therefore, imported. Bearing in mind Poiares-Maduro’s “majoritarian activism” thesis, it is worth mention that the ECJ stated in its decision that a majority of the Member States had enacted similar rules. The Court then limited the scope of its Art. 28 jurisprudence on IAMs:

It is not the purpose of national legislation [prohibiting] resale at a loss to regulate trade in goods between Member States.

Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States . . . But the question remains whether such a possibility is sufficient to characterize the legislation in question as [an MEE].

In view of the increasing tendency of traders to invoke Art. [28] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom, even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case law on this matter.

[The Court restates its holding in *Cassis de Dijon*.]

However, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between the Member States in the meaning of the *Dassonville* judgment . . . provided that those provisions apply to all affected [concerns] operating within national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States . . .

Accordingly, the reply to be given to the national court is that Art. [28] of the Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss.

With *Keck*, the Court took a first step to limit explicitly the reach of Art. 28. The ruling, however, did not delineate the scope of “selling arrangements,” beyond the statement that these included the national

¹⁵ That is, of the kind dealt with in *Cassis de Dijon*.

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statue under review. Instead, the Court indicated what remained within the purview of Art. 28. IAMs that “lay down requirements to be met by [traded] goods—such as those relating to designation, form, size, weight, composition, presentation, labeling, and packaging—constitute measures of equivalent effect prohibited by Art. 30.” Clarification would have to await further adjudication.

Nearly a decade’s time allows us to examine *Keck*’s impact on the evolution of a new argumentation framework for this part of the domain. A review of rulings in which the decision has been applied demonstrates the importance of the Courts’ pre-*Keck* jurisprudence to its interpretation of “selling arrangements.” This influence flows in two directions: where pre-*Keck* argumentation frameworks were relatively clear, these continue to shape and define the legal issues. Where the jurisprudence was, before 1993, relatively ambiguous, the application of *Keck* has, at best, incrementally improved coherence, although problems may always remain.

Generally, the case law does not “reverse,” but reclassifies, the Court’s pre-*Keck* jurisprudence. A few months after *Keck*, for example, the Court decided *Huenermund* (ECJ 292/92, 1993), a dispute involving a challenge to a German law that limited the promotion of para-pharmaceutical products. The ECJ held the German measure to be a “selling arrangement,” and thus beyond the reach of Art. 28. Prior to *Keck*, the Court had curated a long line of decisions upholding, as permissible derogations to Art. 28, national measures governing the sale of such quasi-pharmaceuticals (e.g. ECJ 227/82, ECJ 266/87, ECJ 60/89, ECJ 369/88, ECJ 347/89). These types of cases are now covered by the *Keck* doctrine. In such areas, dispositive outcomes will be patterned as before, although the formal process for reaching those outcomes will have changed. What has already changed is not purely a matter of rhetoric. On the contrary, from the point of view of the Court and the national judge, *Keck* eliminated a form of review that had been mandatory, intrusive, and politically delicate: of the proportionality of national measures having little to do with trade, *per se*.

Applying *Keck* to well-established derogations thus removed whole classes of regulation from the coverage of Art. 28, while maintaining a semblance of continuity with prior practice. In these areas, the old case law constrains the range of permissible arguments available to litigants and judges. In *Belgapom* (ECJ 63/94), for instance, the Court found that legally mandated minimum prices at retail fell under “selling arrangements.” A decade before it had bluntly declared that similar measures “[did] not constitute quantitative restrictions on imports,” under Art. 28 (ECJ 80/85),

so the ruling hardly constituted a break with previous interpretations. Previous interpretation had, however, drawn a distinction between regulations governing prices which it decided were caught by Art. 28, such as price freezes on agricultural goods (as in ECJ 5/79 and ECJ 16/79), and those which, like minimum set retail prices, are not. The ruling in *Belgapom* reinforced and clarified the distinction.

A review of the case law on derogations to Art. 28 (Art. 30 and mandatory requirements under *Cassis*) shows the Court working assiduously to reclassify permissible derogations, where possible, as “selling arrangements.” *Keck* thus enables the Court to do what White and other legal academics had advocated. It provides a clarifying explanation of the scope of Art. 28, and a more uniform taxonomy of IAMs.

Where the *Cassis-Dassonville* framework had broken down, *Keck* had perhaps more potential to push the law in new directions. One important group of such disputes concerns national laws establishing opening hours for retailers, including Sunday openings. The Court’s rulings in these cases generated heavy criticism for being unclear (reviewed in Rawlings 1993). In post-*Keck* rulings that include *Punto Casa* (ECJ 69/93) and *Tankstation* (ECJ 401/92), the Court could simply announce that such measures comprised “selling arrangements,” and thus were no longer subject to challenge under Art. 28.

On the other hand, some classification problems seem to be intractable, by their very nature; in such cases, *Keck* may not succeed in reducing indeterminacy. The most obvious example concerns the national regulation of product advertising. Restrictions on advertising can affect how goods are labeled and packaged; labeling and packaging were traditionally covered by *Cassis de Dijon*, under Art. 28; but the Member States could defend their packaging requirements under the heading, “consumer protection.” Prior to *Keck*, lawyers prepared arguments from two positions. Simplifying somewhat: (a) one line of cases had it that the Member States possess significant discretion to restrict labeling and packaging, to protect the consumer (e.g. *Oosthoek*, ECJ 286/81; *Buet*, ECJ 382/87); (b) another line of cases had it that the legal system strictly scrutinizes national measures on advertising (*GB INNO BM*, ECJ 362/88; *SARPP*, ECJ 241/89). How the case was classified—labeling or advertising—could determine the outcome. Academic commentators, too, complained that the Court did not use consistent criteria for classifying and then deciding these cases (Jarvis 1998: 58–63).

Post-*Keck*, the Court, notably in *Leclerc-Siplec* (ECJ 412/93), announced that advertisements, which are designed to promote products, are “selling

arrangements.” *Keck* and *Leclerc* have since been used in tandem, to create a specific argumentation framework defining the relationship of advertising to Art. 28 (e.g. *KO*, ECJ 405/98). In *Mars* (ECJ 470/93) and *Familiapress* (ECJ 368/95), however, the problem of distinguishing labeling from promotion resurfaced. Governments continue to defend national measures under the consumer protection heading; when the Court accepts the defense, it does not apply the *Keck/Leclerc* framework. Academic commentators disagree on how successful the Court has been in reducing indeterminacy with respect to labeling and advertising. Weatherill (1996) argues that the case law is both inconsistent and unclear, and proposes various ways to improve the situation. Others claim that the Court is developing different rules for different modes of product promotion. “Where the method of advertising is an intrinsic part of the product itself, as in *Mars*, the *Cassis* rule applies,” Greaves argues (1998: 310), citing the case of *Familiapress*.

In summary, *Keck* showed the Court to be sensitive to the concerns of the national judges and the legal epistemic community. “Contrary to what has previously been held,” the ruling began, but *Keck* did not initiate anything like a doctrinal revolution. Its primary virtue has been to help the Court preserve the *Cassis-Dassonville* framework, by pruning it of its most controversial elements. In areas where *Keck* has failed to reduce indeterminacy, the situation, compared to the pre-*Keck* era, is made no worse.

IV Conclusion

With supremacy and direct effect, the Court of Justice put into place the basic instruments for the judicialization of the trade regime in Europe. The subsequent entry into force of Art. 28 assured the dominance of the legal system over the evolution of trade institutions, given a steady caseload. The Court successfully imposed its vision of the common market for three basic reasons. First, the Member States had failed to make progress on market integration, according to the plans they themselves had designed. Second, the Court’s efforts were broadly supported by transnational business, the Commission, and national judges. And third, the Court maintained a principled, precedent-based discourse on Art. 28.

Through compulsion and persuasion, the Member States adapted to the judicial construction of Art. 28. In the 1970s, the Member States argued that Art. 234 references could not be used as a general instrument for reviewing

the conformity of national law with Art. 28. They lost. Then they lost arguments, almost continuously made, to the effect that the Commission and the Court had exceeded their respective authority, notably by generating unacceptably broad interpretations of Art. 28. In 1970, governments claimed that the Commission, in Directive 70/50, had gone too far; but they would later invoke Directive 70/50 to defend their actions, given that the Court had pushed even further with *Dassonville*. After *Cassis de Dijon* was decided, governments still continued to claim, before the ECJ and through their own Legal Service, that Art. 28 did not mean what the Court said it meant in *Dassonville* and after. Ultimately, against a backdrop of rising levels of trade-oriented litigation, governments developed proficiency in defending their decisionmaking in light of the Court's rulemaking. In doing so, the Member States served to legitimize the Court's Art. 28 jurisprudence.

The Member States neither anticipated nor welcomed the Court's jurisprudence on the free movement of goods; and academic observers were taken by surprise by *Dassonville* and *Cassis de Dijon*. Yet there was nothing unintentional about this case law or its effects. Indeed, the overarching coherence of the Court's activities in this domain is striking. It seems to us that the members of the Court of Justice proved to be far better political economists—with a better and more subtle understanding of the varied purposes of delegation and self-binding, and of the logics of incrementalism—than have many of the social scientists who have sought to explain market integration in Europe.

In the next chapter, we move from negative to positive integration, and examine the judicialization of lawmaking in the social provisions field.

