

‘Re-constituting’ the Internal Market: Towards a Common Law of International Trade?*

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Are the trade philosophies behind the EU internal market and the WTO international market converging or diverging; and are we, or are we not, moving towards a ‘common law of international trade’? Twenty years ago, an interesting—and swiftly famous—answer to this question was given by Joseph H.H. Weiler. Studying the ‘constitution of the common market’, the historical evolution of free movement law is here divided into five periods or generations. The underlying Weiler thesis is thereby as simple as it is beautiful: starting with an early radical philosophy in *Dassonville*, the European Union has gradually and consistently moved away from its original hyper-liberal approach towards an ever more deferential approach; and the transformation of Article 34 TFEU into a discrimination format ultimately leads to a convergence with international law. What are the empirical and normative credentials of this stylised construction of the internal market? This article argues that there are fundamental shortcomings in this standard interpretation of the evolution of the internal market, and that a historical reconstruction arrives at a very different empirical and normative picture. What can this ‘revisionist’ result mean for EU law scholarship in general? If EU constitutionalism wishes to ‘re-constitute’ its object of study properly, it needs to abandon the abstract ways of philosophizing that have become commonplace in the last 25 years. Part and parcel of this methodological renaissance must be a renewed commitment to test (constitutional) theory against (judicial) practice.

I. Introduction

Are the trade philosophies behind the European Union (EU) internal market and the World Trade Organization (WTO) international market converging or

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‡ Of the Board of Editors. I am extremely grateful to the three EU law colleagues and the three WTO law scholars who critically reviewed and kindly commented on this article. This is the second ‘revisionist’ piece that, together with my ‘Judicial Majoritarianism Revisited: “We, the *Other Court*”’, (2018) 43 *European Law Review* 269, hopes to challenge some prevailing views on the Court in the construction of the internal market, and the European Union generally.

diverging; and are we, or are we not, moving towards a 'common law of international trade'? Twenty years ago, an interesting—and swiftly famous—answer to this question was given by Joseph H.H. Weiler.¹ Studying the 'constitution of the common market' by exploring 'the text and context in the evolution of the free movement of goods', the illustrious academic notably discovered 'the slow convergence between the two systems—WTO and EU' and, consequently, postulated the 'emergence of a nascent Common Law of International Trade'.² Since then, this account of the evolution of the internal market has become generally accepted and, thanks to its author's 'authority', continues to influence the way in which many EU and WTO law scholars 'construct' the evolution of the EU internal market today.³

The methodological and substantive ingredients of that standard interpretation are well-known. Telling his story in jurisprudential 'snapshots' through 'cases so well known as to obviate the necessity of any detailed description', the synthetic attempt is made to transform 'these discrete snapshots into a cinematographic whole' so as to construct a 'narrative over time in which the evolutionary nature of the jurisprudence will receive most attention'.⁴ Weiler thereby divides the European Union's free movement law into five 'periods' or 'generations'. A first 'Foundational Period' begins during the 1960s and culminates in *Dassonville*.⁵ A 'Second Generation' starts with *Cassis* in 1979.⁶ The judgment offers a judicial solution that is complemented by legislative developments during a 'Third Generation' in the 1980s. *Keck* opens a 'Fourth Generation' of internal

¹ JHH Weiler (eds), *The EU, The WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford: Oxford University Press, 2000), and especially: 'Cain and Abel: Convergence and Divergence in International Trade Law' as well as 'Epilogue: Towards a Common Law of International Trade'. The latter essay, in particular, built on the earlier 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in P Craig and G de Búrca (eds), *The Evolution of European Law* (Oxford: Oxford University Press, 1999), 349. In 2005, Weiler finally re-published a revised version as 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO', in F Schioppa, *The Principle of Mutual Recognition in the European Integration Process* (Basingstoke: Palgrave, 2005), 25. My 're-construction' of Weiler's argument primarily focuses on his 2000 piece as the best known version of his convergence thesis.

² Weiler, 'Cain and Abel' (n 1), 3; and 'Epilogue' (n 1), 203.

³ For the broad acceptance of this interpretation of the evolution of the EU internal market, see C Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford: Oxford University Press, 2019); as well as M Poiaras Maduro 'Revisiting the Free Movement of Goods in a Comparative Perspective', in Court of Justice of the European Union, *The Court of Justice and the Construction of Europe: Analysis and Perspectives on Sixty Years of Case Law* (The Hague: Asser, 2013), 485. This view has also significantly influenced comparative or international law scholars working on the EU and the WTO, see especially S Gaines et al (eds), *Liberalising Trade in the EU and the WTO: A Legal Comparison* (Cambridge: Cambridge University Press, 2012), esp. 13 and 201; as well as T Cottier, 'The Common Law of International Trade and the Future of the World Trade Organisation' (2015) 18 *Journal of International Economic Law*, 3.

⁴ Weiler, 'Epilogue' (n 1), 203.

⁵ *Procureur du Roi v Dassonville*, Case 8/74, EU:C:1974:82.

⁶ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon'), Case 120/78, EU:C:1979:42.

market case law,⁷ while a ‘Fifth Generation’ envisions the post-*Keck* developments and is thus future-oriented. The underlying Weiler thesis is thereby as simple as it is beautiful: starting out with a radical liberalizing philosophy in *Dassonville*, the Union is seen to have gradually and consistently moved away from its original hyper-liberal stance towards an ever more deferential approach; and the ‘transformation’ of all EU free movement law into a discrimination format will ultimately lead to the full convergence with international trade law, as found in the WTO today.

What are the empirical and normative credentials of this interpretation of the evolution of the internal market? Is there a convergence or a divergence of the legal philosophies behind the European Union and the World Trade Organization, respectively? This article wishes to answer these intriguing questions.⁸ Complementing my microscopic analysis of *Dassonville*,⁹ it aims to offer a macroscopic re-construction of the historical evolution of the EU internal market by critically examining the standard interpretation as offered by Weiler.¹⁰ This is most unequivocally not meant to be a personal criticism of a well-established academic.¹¹ Yet every new interpretation of a classic object can only ever be successful in *re-constructing* its hermeneutic object if it can convincingly *de-construct* traditional interpretations;¹² and this, vitally, involves the cathartic

⁷ *Criminal proceedings against Bernard Keck and Daniel Mithouard*, Joined cases C-267/91 and C-268/91, EU:C:1993:905.

⁸ This article explores these questions exclusively, and thus selectively, through the prism of the free movement of goods. The reason behind this choice is twofold. First, not only has this EU fundamental freedom traditionally been the ‘first’ in terms of its judicial and academic analysis (a status that it has today lost to the free movement of persons); it is still the best freedom for a historical and comparative analysis with the GATT/WTO. Secondly, the Weiler thesis is, of course, itself confined to goods. Importantly, this article as well as Weiler’s original analysis are also limited in the sense that they are solely interested in the ‘substantive’ law aspects of the EU/WTO comparison.

⁹ R Schütze, “Re-Reading” *Dassonville*: Meaning and Understanding in the History of European Law’, (2018) 24 *European Law Journal*, 376.

¹⁰ For my own detailed historical analysis, see: R Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford: Oxford University Press, 2017).

¹¹ This (almost) goes without saying, but it is always worth repeating in a profession where the ‘personal’ and the ‘academic’ are, like a king’s two bodies, intertwined in an often-lifelong union. Weiler himself is, certainly, no stranger to subjecting someone else’s arguments to sever criticisms (eg JHH Weiler and N Lockhart, “Taking Rights Seriously” Seriously: The European Court and its Fundamental Rights Jurisprudence—Parts I and II’, (1995) 32 *Common Market Law Review* 51 and 579), and he has, honourably, encouraged younger academics especially to the slaughtering of ‘holy cows’. Despite the ‘robust’, ‘critical’, perhaps ‘harsh’ and ‘whimsical’ aspects of this article, I hope to have never crossed the—fine—line between the civil and the uncivil. For my intention is, surely, to provoke, but most assuredly not to offend. For those readers interested in the difficult genre of satirical academic commentary, see the highly entertaining P Goodrich, ‘Satirical Legal Studies: From the Legists to the *Lizard*’, (103) 2004 *Michigan Law Review*, 397.

¹² H-G Gadamer, *Truth and Method* (London: Continuum, 2004).

correction of famous errors that hinder—directly or indirectly, actually or potentially—alternative reconstructions of the past, present, or future.¹³

Without further ado, then, let me begin and scrutinize the standard interpretation of the constitutional evolution of the internal market, and especially Weiler’s convergence thesis, in four steps. Section II begins by introducing his (mis)reading and (mis)interpretation of *Dassonville*—the case on which his entire theory depends. Section III explores Weiler’s ‘cinematographic’ interpretation of the constitution of the internal market from the late 1970s to the early 2000s through which a decline in the integrationist logic is famously found. Section IV turns to Weiler’s reading of the relevant GATT/WTO law in an attempt to see whether a rise in the integrationist philosophy of the General Agreement on Tariffs and Trade (GATT) and other GATT-complementing agreements has taken place. Section V closes in on the empirical and normative credentials of the convergence thesis; and in a last step, a *Conclusion* negatively answers the question of whether a ‘common law of international trade’ has emerged and offers three contextual reasons as to why this is the case.

II. The ‘Weiler thesis’ I: *Dassonville* and the ‘Jacobean’ market

Perspectives depend on standpoints. Historical perspectives depend on starting points. For his narrative construction of the EU internal market, Weiler chooses his starting point in *Statistical Levy*—a case decided under the Union’s customs law.¹⁴ It may be recalled that the case involved a very small pecuniary charge imposed for statistical purposes on imports and exports when crossing the Italian border. The Commission had brought the case before the European Court in order to have the latter declare a violation of the EU Treaty provision(s) on customs duties and charges having equivalent effect.¹⁵ In its judgment, the Court famously offered a broad definition of a charge having an equivalent effect (CEE) through the following textual formula:

[A]ny pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods *by reason of the fact that they cross a frontier*, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect . . . even if it is not imposed for the benefit

¹³ In the words of Montesquieu: ‘Nothing pushes back the progress of knowledge like a bad work by a famous author, because before instructing, one must begin by correcting the mistakes.’ See C de Montesquieu, *The Spirit of the Laws* (AM Cohler *et al.* transl., Cambridge: Cambridge University Press, 1989), 639.

¹⁴ *Commission v Italy (Statistical Levy)*, Case 24/68, EU:C:1969:29.

¹⁵ The case was primarily an export case and involved, in particular, ex-Article 16 EEC. The latter stated: ‘Member States shall abolish between themselves customs duties on exports and charges having an equivalent effect by the end of the first stage at the latest.’

of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.¹⁶

The prohibition of charges having an equivalent effect to customs duties was thus of an absolute nature: *any* pecuniary obstacle to trade—whether discriminatory or not—would have to be eliminated. Yet importantly, the Court simultaneously clarified that the scope of this absolute prohibition was limited to *border measures*, that is: measures that affected imports or exports ‘by reason of the fact that they cross a [national] frontier’.¹⁷ These measures were, by definition, distinctly applicable to imports or exports; and regardless of whether or not ‘like’ or ‘competing’ products existed inside the national market, they would consequently constitute obstacles to inter-state trade *per se*.

It is this obstacles-based definition of charges *having an equivalent effect* that, according to Weiler, was subsequently extended to the concept of measures *having an equivalent effect* in *Dassonville*. These measures were prohibited as equivalent to quantitative restrictions (MEEQR) under Article 34 of the Treaty on the Functioning of the European Union (TFEU),¹⁸ and the *Dassonville* Court here defined them as follows:

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions.¹⁹

When comparing the two textual definitions in *Statistical Levy* and *Dassonville*, it is not quite obvious at first—second or third—sight, that one is dealing with ‘twin-like definitions of Charges and Measures having an effect equivalent’.²⁰ And even if this were the ‘canonical’ view,²¹ the textual similarity argument is hard—if not impossible—to defend. For where is the reference to goods crossing a frontier in *Dassonville*; and where is the reference to ‘directly or indirectly, actually or potentially’ in *Statistical Levy*?

Textually, the two definitions of CEE and MEE, offered in the two classic cases, really have very little in common; and, as a historical reconstruction of *Dassonville* has shown, the textual inspiration behind the Court’s famous formula did *not* come from EU customs law but from a very different part of the EU

¹⁶ *Statistical Levy* (n 14), para. 9 (emphasis added).

¹⁷ The original focus on national/external frontiers is important. In the 1990s, the European Court would, subsequently and dramatically, expand the scope of Article 30 TFEU to include regional/internal borders. For a discussion of this shift from an international to a national market model for Article 30, see R Schütze (n 10), 237–41.

¹⁸ The provision states: ‘Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.’

¹⁹ *Dassonville*, Case 8/74 (n 5), para. 5.

²⁰ Weiler, ‘Epilogue’ (n 1), 205.

²¹ *Ibid* 206: ‘This canonical view is implicit in many textbooks—since the issues are rarely addressed explicitly—and I have observed in years of teaching thousands of students that once *Statistical Levy* is (superficially) internalized *Dassonville* seems predictable and even unexceptional.’

Treaty, namely: EU competition law.²² For the Union's competition law regime had been conceived to outlaw activities that would 'affect trade between Member States', and in the memorable formulation established during the first decade of the 1957 Rome Treaty, this was the case for any activity that had an influence 'direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States'.²³

But let us follow Weiler and blindly gloss over all textual differences between *Dassonville* and *Statistical Levy* and assume that the Court was at least inspired by the 'logic' of *Statistical Levy*. For Weiler claims that *Dassonville* was designed to outlaw—leaving the limited exceptions in Article 36 aside—all obstacles to trade so as to create 'a veritable common market-place'.²⁴ The problem with this line of logic is only that the celebrated scholar has, strangely, omitted the paragraph immediately following the *Dassonville* formula. It states:

In the absence of a [Union] system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all [Union] nationals.²⁵

Does this textual coda not suggest that the *Dassonville* Court did *not* consider Article 34 as an absolute prohibition? How can the logic of *Statistical Levy* be the same as that of *Dassonville*, if the latter judgment contains a rule of reason, whereas the former does not? And, importantly, where did this rule of reason textually or teleologically come from? Without even raising this—crucial—question,²⁶ Weiler idly drops any discussion of this key paragraph as a, presumably, unnecessary detail for his 'cinematographic whole'.

²² On this point, see my "Re-Reading" *Dassonville*' (n 9).

²³ *Établissements Consten and Grundig-Verkaufs-GmbH v Commission*, Joined Cases 56 and 58/64, [1966] ECR 299 at 341; as well as *Société Technique Minière v Maschinenbau Ulm*, Case 56/65, [1966] ECR 235, at 249 (emphasis added): 'It is in fact to the extent that the agreement may affect trade between Member States that the interference with competition caused by that agreement is caught by the prohibitions in [Union] law found in Article [101], whilst in the converse case it escapes those prohibitions. For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.' According to Pescatore's 'Vade-mecum' (Brussels: Bruylant, 2007), 300, the case behind the *Dassonville* formula was *Société Technique Minière v Maschinenbau Ulm*; yet it was *Consten & Grundig*—and not its relatively unknown predecessor—that was cited in the Written Observations in *Dassonville*.

²⁴ Weiler, 'Epilogue' (n 1), 206.

²⁵ *Dassonville* (n 5), para. 6.

²⁶ Ironically, during a first reception period of the *Dassonville* judgment, it was the 'rule of reason' paragraph within *Dassonville* that was seen as the very 'essence' of it; and who could be a better 'authority' here than the (then) President of the Court: R Lecourt, *L'Europe des Juges* (Brussels: Bruylant, 1976), 41. For a discussion of the (potential) meaning of the 'forgotten' paragraph, see

But let us, once more, blindly gloss over all textual and logical differences between both cases and assume that they were identical on both counts. For the important point our cinematographer wishes to make is this: while both judgments do share the same text and logic, when placed in their respective *contexts*, they are fundamentally different:

[P]laced in context—the context (*économie*) of the actual text as well as political and economic context—the two cases were and are fundamentally different and the seemingly easy move from the obstacle-oriented construct in *Statistical Levy* to the obstacle-oriented construct in *Dassonville* is nothing less than fateful.²⁷

And with this, Weiler finally announces his great ‘hermeneutic’ discovery:

Though seemingly sharing the same [sic] logic and a similar [sic] rhetoric, *Dassonville* does the very opposite of *Statistical Levy*. Instead of affirming the GATT-oriented distinction between regulation which bars market access and regulation within the market which, however, allows market access to imported products, *Dassonville* conflates the two *and then it applies to both the same prohibition on unjustified obstacles whether or not discriminatory and/or protectionist*.²⁸

The crucial claim here advanced is therefore this: while *Statistical Levy*’s absolute prohibition of any customs duties (or equivalent charges) was in conformity with the international law philosophy behind GATT, the absolute prohibition for Article 34 TFEU in *Dassonville* was not. Why not? Because the Court did not only consider Article 34 TFEU as corresponding to Article XI GATT—itsself an absolute prohibition; but, in the absence of a European equivalent to Article III(4) GATT, it constructed the scope of Article 34 TFEU to also cover *internal* measures. And when the *Dassonville* definition is applied to internal measures the result is ‘a certain Jacobean conception of the common market-place’ in which the Court resolutely rejected the GATT philosophy in favour of a conception of a ‘transnational market-place which is identical to a *national* market-place’.²⁹ With *Dassonville*, so the standard interpretation asserts, the EU legal order radically abandoned the ‘ordinary’ international law model in favour of a ‘new’ integration model.

What is one to make of this *Dassonville* interpretation? In light of the evidence collected elsewhere, Weiler’s reading of *Dassonville* is mistaken in a number of ways. For not only does the self-proclaimed contextualist fail to place *Dassonville* into its historical and normative context(s),³⁰ his cinematographic interpretation

also R Schütze, ‘Third-Country Goods in the EU Internal Market’, in F Amtenbrink *et al.* (eds), *The EU Internal Market and the Future of European Integration* (Cambridge: Cambridge University Press, 2019), 200.

²⁷ Weiler, ‘Epilogue’ (n 1), 206.

²⁸ *Ibid* 212 (emphasis added).

²⁹ *Ibid* 215 (emphasis added).

³⁰ For a ‘re-construction’ of these concrete contexts, see: Schütze, ‘“Re-Reading” *Dassonville*’ (n 9). But consider also the excellent point made by N Bernard, ‘On the Art of Not Mixing one’s Drinks: *Dassonville* and *Cassis de Dijon* Revisited’, in M Maduro and L Azoulai (eds), *The Past and Future*

completely discounts the subsequent judicial practice of the formula. But is *Dassonville* itself not about a distinctly applicable measure—not an internal measure? And even if one sees *Dassonville* as dealing with an indistinctly applicable measure, why did the Court not apply an absolute test but, instead, relied on a relative rule of reason? The only way to convincingly answer these questions is to look at the subsequent post-*Dassonville* jurisprudence; and the latter irrefutably shows that the Court originally confined its *Dassonville* formula, in the absence of Union harmonization, to border measures; whereas a classic discrimination rationale is carefully developed for internal measures.³¹ In this way, the early Court successfully projected both Article XI and Article III (4) GATT into Article 34 TFEU;³² and *Dassonville* is therefore no 'Jacobean' judgment establishing a 'transnational market-place which is identical to a national market-place' (Weiler) but a 'third-country goods' case that ultimately confirms the international law philosophy behind the GATT.

III. The 'Weiler thesis' II: post-*Dassonville* developments

Having interpreted *Dassonville* in light of his 'Jacobean' national market philosophy, Weiler is forced to interpret all subsequent judicial and legislative developments from his chosen 'radical' perspective. He quickly encounters a number of 'paradoxes' and 'anomalies'. Let us introduce these first (Subsection A) before exploring an interpretation of Weiler's narrative with regard to the remaining four generations of case law under Article 34 TFEU (Subsections B and C). A fourth subsection finally contrasts the standard interpretation against the results of my own historical reconstruction of the evolution of the internal market.

of EU Law (Oxford: Hart, 2010), 456 at 457: 'Clearly, if read literally and free of context, the *Dassonville* formula is capable of supporting the wide interpretation that has later been attributed to it, both in textbooks and in case law, an interpretation that underpins Weiler's claim of a deliberate move away from a logic of anti-protectionism and non-discrimination in the law relating to the free movement of goods. However, this is not how we normally read cases, or, for that matter most texts. Meaning is usually regarded as determined by context and just about everything in the context of the *Dassonville* formula would suggest another reading.'

³¹ *Contra* Maduro (n 3), 489: 'In its landmark *Dassonville* judgment of 1974, the ECJ made clear that also indistinctly applicable national measures were prohibited.' However, it might be recalled that the measure in *Dassonville* was a distinctly applicable measure that only applied to foreign (!) designations of origin; and even if Maduro (and Weiler) might respond that the scope of the *Dassonville* formula was meant to be broader in that it was always 'intended' to outlaw all indistinctly applicable (internal) measures hindering trade, how can they prove their 'originalist' argument? If the meaning of a test/rule lies in its result/application, and if all the pre-*Cassis* applications of the *Dassonville* formula show that the Court did not apply the *Dassonville* formula as a substantive test for internal measures, does that not mean that *Dassonville's* original meaning was more limited? Would legal 'realism' not tell us that the proof of the (philosophical) pudding is in its (judicial) eating? For an 'empirical' analysis of all cases between *Dassonville* and *Cassis*, see: R Schütze, 'From *Dassonville* to *Cassis*: The Revolution That Did Not Take Place', in A. Albers-Llorens *et al.* (eds), *Cassis de Dijon: Forty Years On* (Oxford: Hart, forthcoming).

³² *Ibid.*

A. Evaluating the Foundational Period: ‘anomalies’ and ‘paradoxes’

Weiler has achieved much fame in finding ‘anomalies’ and ‘paradoxes’ where very few others could see them.³³ Within the context of his analysis of the internal market in general, and *Dassonville* in particular, five such paradoxes and anomalous consequences are identified:

- i. Weiler claims that there exists an anomaly because the Union subjects national (internal) tax measures to a discrimination test, whereas national market regulation is, after *Dassonville*, subject to an absolute test.
- ii. He sees a second anomaly in ‘the divergence between the Court’s *Dassonville* obstacle jurisprudence on imports and its discrimination-based jurisprudence [under Article 35] on exports’; yet this anomaly is explained away by ‘a more relaxed attitude by the court to restrictions on exports’, and a presumed ‘clearer vision—antedating *Keck* by a generation—of the constitutional implications of *Dassonville*’.³⁴
- iii. A third consequence of the *Dassonville* definition of Article 34 is claimed to be the ‘enormous’ pressure that the Court put on Article 36; and it—apparently—therefore came ‘as no surprise’ that the Court henceforth insisted that Article 36 ‘has to be constructed narrowly’. For ‘[i]n symbolic terms’, this reinforced ‘an ethos that any obstacle to free trade is in some ways improper’.³⁵
- iv. Fourthly, and ‘[i]nstitutionally’, Weiler asserts that *Dassonville* elevated the Court ‘to the centre of substantive policy dilemmas’, where it became ‘the arbiter of delicate social policy choices’, while . . .
- v. . . . *Dassonville* finally also, ‘[c]onstitutionally’, represented ‘a massive expansion in the legislative competence’ of the Union under Articles 114 and 115.³⁶

What are we to make of these ‘anomalies’, ‘paradoxes’, and ‘consequences’? Equipped with some historical knowledge of the jurisprudential and constitutional developments within the 1970s, the following comments can quickly be made.

³³ In the course of his long and distinguished career, Professor Weiler has discovered several dozens of such ‘paradoxes’ in EU (and WTO) law. With regard to the European Union, the most famous example is the ‘apparently paradoxical emergence of two conflicting trends’ within the Union identified in Weiler’s early ‘The Community System: the Dual Character of Supranationalism’, (1981) 1 *Yearbook of European Law*, 267—published nearly forty years ago in the first volume of this Yearbook. For a brief discussion of his argument here, see n 54.

³⁴ Weiler, ‘Epilogue’ (n 1), 217.

³⁵ *Ibid.*

³⁶ *Ibid.*

First, not only is there no divergence in the jurisprudential regime applicable to fiscal and regulatory measures following *Dassonville*, the future divergence that *Cassis* eventually engenders is a constitutional phenomenon not unknown to American constitutional law.³⁷

Secondly, until *Cassis*, there simply is no divergence between Articles 34 and 35. The Court indeed uses the *Dassonville* formula not only for Article 34 but also for Article 35.³⁸ And even if we accepted the—weak—argument that export restrictions encountered a more relaxed judicial attitude, what does that make of *Statistical Levy*—after all, an *export* case? If the *Statistical Levy* definition was made with regard to exports, and if that definition was the inspiration for *Dassonville*, why should the Court not apply its ‘twin-like definition’ for export restrictions under Article 35 too? Something seems to have gone amiss in the Weiler logic here.

Thirdly, how can we identify the dramatic pressure on Article 36 in the post-*Dassonville* period? (The only signal here—one carefully not mentioned by Weiler—is the *Dassonville* rule of reason idea.) So why would it make sense that the presumed hyper-integrationist approach in *Dassonville* should be matched by a narrow construction of Article 36? Should the radical widening of Article 34 not rather induce the Court to open up the justificatory routes so as to allow for the newly ‘integrated’ categories of national measures to be potentially justified? I would vote for the second intuition, and a historical analysis of the case law confirms that intuition.³⁹

Fourthly, where are the cases in which the Court found itself thrust into the centre of policy dilemmas; and even if there were substantive policy dilemmas, where are the Member State protestations and threats? Weiler himself seems puzzled: ‘[h]ow does one explain the relative equanimity of reaction to these significant constitutional, institutional, and substantive consequences?’⁴⁰ One answer, of course, could simply be: there were no significant constitutional, institutional, and substantive consequences engendered by *Dassonville*. But Ockham’s razor is an instrument rarely found in the philosopher’s toolbox.

³⁷ Schütze (n 10), ch. 2.

³⁸ See only: *Procureur de la République de Besançon v Les Sieurs Bouhelier and others*, Case 53/76, EU:C:1977:17, para. 16 (emphasis added): ‘Thus, apart from the exceptions for which provision is made by [Union] law, the Treaty precludes the application to intra-[Union] trade of a national provision which requires export licences or any other similar procedure in respect of exports alone, such as the issue of standards certificates, the requirement of which constitutes a measure having [an] effect equivalent to quantitative restrictions in so far as such certificates are capable of constituting a *direct or indirect, actual or potential obstacle to intra-[Union] trade.*’

³⁹ Once *Cassis* is interpreted as broadening (!) the scope of Article 34 beyond *Dassonville*, the introduction of ‘mandatory requirements’ appears to be a ‘logical’ counter-device, especially if confined to those new non-discriminatory measure that *Cassis* henceforth brings into the scope of Article 34 TFEU. On this point, see Schütze, (n 10), 214–16.

⁴⁰ Weiler, ‘Epilogue’ (n 1), 217.

Finally, where is the evidence that the scope of Article 115 was significantly broadened by the *Dassonville* formula?⁴¹ When reading the Commission's annual reports between 1974 and 1979, is its position not completely focused on the fulfilment of its 1969 (!) Harmonization Programme; and is *Dassonville* here not simply seen as a second-rate judgment?

In sum, once we see *Dassonville* in its proper historical context, all the ferocious anomalies and paradoxes that Weiler identifies turn out to be peaceful windmills that—directly or indirectly, actually or potentially—stem from Weiler's quixotic interpretation of *Dassonville*. None of these 'paradoxes' occurred prior to *Cassis*; yet because Weiler believes in the radical *Dassonville* revolution, he must historically foreshorten all post-*Cassis* problems into his first jurisprudential period; and, as a result, all remaining generations of Article 34 case law are reduced to mundane and moderating responses to the 'messianic' *Dassonville* Court. But can the entire post-1974 case law be so unassuming? Let us look at what Weiler makes of the subsequent four generations of free movement law to answer that question.

B. Generations Two and Three: the (un-)importance of *Cassis de Dijon*

Once *Dassonville* is seen as the starting point of a 'national' market philosophy, *Cassis de Dijon* is, necessarily, reduced to responding to two 'unresolved problems from the Foundational Period'.⁴²

In the first place, *Cassis* is seen as a belated response to the changed sensibilities as to what *social* values could be invoked against free trade in the Union; and it legally did so by adding an unlimited number of mandatory requirements to Article 36.⁴³

This reading, however, quickly encounters three major challenges: one contextual, one textual, and a logical challenge. Contextually, it is hard to understand why the Court had not already integrated the 'new' social sensibilities into *Dassonville*. For the Union had started an important normative re-orientation at its 1972 Paris Summit; and it had here, in particular, expressly recognized the need for a Union consumer and environmental policy.⁴⁴ Textually, Weiler's

⁴¹ When making these strong assertions, could one not politely insist on having them backed up by a footnote? Weiler excuses the absence of footnotes in the original two versions by his intention to offer a provocative 'think-piece'; yet even in the 2005 footnoted 'final' version, there is no official or academic reference to backup this essential point.

⁴² Weiler, 'Epilogue' (n 1), 218.

⁴³ The doctrinal debate whether these mandatory requirements were originally operative at the scope level or not is for Weiler 'no more than formalist sophistry' (ibid 220).

⁴⁴ On the significance of the 1972 Paris Communiqué, especially for the reach of Article 352 TFEU, see R Schütze, 'Organised Change Towards an "Ever Closer Union"' (2003) 22 *Yearbook of European Law*, 79. For a discussion of the 1973 Consumer Policy Programme, see AS Friedeberg, 'The European Communities and Consumer Policy: An Ambitious Programme' (1974) 8 *Journal of World Trade*, 669. For the first EU Environmental Action Programme in 1973, see only 'Declaration of the Council of the European Communities and of the representatives of the

interpretation of *Cassis* is equally hard to square with *Dassonville* itself. For the Court had, as was noted above, already recognized a ‘rule of reason’ that expressly invoked consumer protection; and, logically, then, for Weiler, as for anyone else seeing *Cassis* as a moderating correction to the radical *Dassonville*, *Cassis*’ choice to restrict these mandatory requirements to *indistinctly* applicable measures must be ‘puzzling’.⁴⁵ Here is another ‘paradox’ for the famous Don Quixote of European law!

What about the principle of mutual recognition; or, as Weiler calls it: ‘functional parallelism’?⁴⁶ Weiler boldly claims that the principle is ‘a very conservative and fully justified application of the principle of proportionality’.⁴⁷ The problem with this—extravagant—view is that it assumes that there is only one form of proportionality analysis.⁴⁸ Yet drawing on the excellent work of Reagan, we ought to differentiate between three principal formats of proportionality review: ‘rationality review’, ‘less restrictive alternative analysis’, and ‘balancing review’.⁴⁹ And, as stated elsewhere,⁵⁰ we might further have to distinguish between the structure of each proportionality test and the contextual ‘frame’ in which that test is applied. Within an *international* frame, the principle of proportionality recognizes each(!) State’s substantive standard as its sovereign choice; and the proportionality review consequently solely eliminates arbitrary inconsistencies imposed on foreign goods that are strictly not ‘necessary’ to achieve the host State’s own national standard. Within a *federal* frame, by contrast, the proportionality analysis no longer defers to the specific national standard of the host state as its normative baseline; instead, it develops its own autonomous normative standard to

Governments of the Member States meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment’ (1973) O.J. C112/1.

⁴⁵ Weiler, ‘Epilogue’ (n 1), 222.

⁴⁶ Ibid 219. The name is later changed into ‘parallel functionalism’ (ibid 231), and while I originally thought that this was probably just a slip of the pen; Weiler has repeated this formulation in: ‘Epilogue: Judging the Judges—Apology and Critique’, in M Adams *et al.* (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford: Hart, 2013), 235 at 241: ‘parallel functionalism (aka inaccurately mutual recognition)’. In his 2005 publication (n 1), the principle is called the principle of ‘functional equivalence’—a formulation that comes close to P Oliver’s ‘principle of equivalence’ from two decades earlier, see ‘Measure of Equivalent Effect: A Reappraisal’ in (1982) 19 *CML Rev.* 217 esp. 234.

⁴⁷ Weiler, ‘Epilogue’ (n 1), 221.

⁴⁸ Weiler, seemingly, recognized his misreading when invited to comment on the impressive analysis of ‘Brazil—Measures Affecting Imports of Retreaded Tyres’ by C Brown and J Trachtman (2009) 8 *World Trade Review*, 85. But instead of seriously engaging with the various tests suggested there, he only uses them ‘in order to set up one notable paradox’—oh, no!—in their analysis (Weiler, *Comment* in ibid 137 at 139); and as regards the EU common market, he now comes to claim—referring to his own article on ‘The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods’ that ‘the slippage from LRM to Balancing was achieved *sub silentio*’ (ibid 141).

⁴⁹ DH Regan, ‘Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing, *Da Capo*’ (2001) 99 *Michigan Law Review*, 1853 esp. Appendix 2; and see also, specifically for the EU context, J Snell, ‘True Proportionality and Free Movement of Goods and Services’ (2000) 11 *European Business Law Review*, 50.

⁵⁰ Schütze, (n 10), 218–25.

determine the necessity of a measure by means of an implicit or explicit balancing review.

In light of this *contextualized* understanding of the proportionality principle, what does *Cassis de Dijon* do? *Cassis* abandons the ordinary international law philosophy by means of a dual revolution. It not only overrules the GATT principle that obstacles to trade arising from legislative disparities between States' internal measures do not fall within Article III: 4 GATT;⁵¹ but much more importantly, *Cassis* fundamentally changes the standard against which the proportionality of a national barrier to trade is assessed. While this was, before *Cassis*, the *host-state* standard, after *Cassis* the Court developed its own *European* standard of necessity. Put differently: with *Cassis*, the Court moves from an 'international' proportionality review (the necessity of the measure when viewed against a state's own standard) to a 'federal' proportionality review (the necessity of a national measure when viewed against the principle of mutual recognition). To downgrade this revolutionary principle of mutual recognition as 'a banal doctrinal manifestation of the principle of necessity' (Weiler) misses one of the most important turning points in the history of European law.

This underestimation, if not an unreserved misreading, of the *Cassis* revolution is not just confined to the judicial sphere. For Weiler undervalues *Cassis's* consequences in the political sphere too. For while there is, of course, some truth in characterizing the *judicial* doctrine of mutual recognition as 'an intellectual breakthrough but a colossal market failure',⁵² the *legislative* implementation of the principle is not a disconnected result of the White Paper and the Single European Act in a third evolutionary period of the internal market. *Cassis* here played an active role: it put negative 'pressure' on the high-standard Member States in the Council! After *Cassis*, decision making in the Council indeed took place in the 'shadow of the Court';⁵³ and while this *Cassis* shadow was soon complemented by the 'shadow of the vote', following the Single European Act, the latter is partly a direct or indirect, actual or potential response to *Cassis*. For the celebrated author of the 'equilibrium thesis', this must be troubling because it flatly contradicts the idea that the judicial and the political spheres of the Union are inversely co-related.⁵⁴

⁵¹ In a nutshell: before *Cassis*, the Member States were asked to *extend* their *own* product requirements to imports (and if they did not do so, they had to justify their 'discriminatory' practices); after *Cassis*, on the other hand, they were asked *not* to extend their laws to imports (or had to justify such an extension by means of mandatory requirements).

⁵² Weiler, 'Epilogue' (n 1), 223.

⁵³ I hope to explore this macro-constitutional question in R Schütze, *From International to Federal Union: The Changing Structure of European Law* (in—very slow—preparation).

⁵⁴ This so-called 'equilibrium thesis' ought to rank among the 'greatest'—in a dual sense of the term—academic (mis)readings in the history of European constitutionalism. Weiler here originally argued that the rise of normative supranationalism in the Union, through which the 'formal' status of the European Treaties was transformed from an 'international' to a 'constitutional' one, was balanced by a decline in decisional supranationalism through which the 'substance' of European law would increasingly be controlled by the Member States (see Weiler, (n 33), 273). This cannot be

C. Internal Market Generations Four and Five: *Keck* and beyond

With more than just one blind eye to the significant judicial developments and disagreements during his third period of the case law,⁵⁵ Weiler characterizes the long decade between 1979–93 as 'the adoption at the legislative level of the *Cassis* rationale'.⁵⁶ And for him, this period comes to an abrupt end with *Keck*—a revolutionary case that opens a fourth generation of internal market cases.

This fourth generation is warmly commended as 'a welcome return to normalcy in the Promised Land of the Single Market'.⁵⁷ How so? *Keck* is said to be 'a rethinking of the very merits of the *Dassonville* doctrine almost twenty years after its inception'.⁵⁸ This rethinking is seen in the Court's embrace of a discrimination rationale; and for Weiler, this return to the ordinary international law doctrine behind the GATT is an express confirmation that the Court's doctrines 'are rooted in a socio-political and economic reality which changes with time and which calls for revision even of the most hallowed canons'.⁵⁹

What are these critical changes in the socio-economic environment? Weiler claims that 'one of the most important issues' at the time when *Keck* was decided was the question of the limits of the Union's legislative competences that had,

the place to critically analyse that argument, but what is already interesting to note is that Weiler's '*Dassonville* thesis' seems to contradict his earlier 'equilibrium thesis'. For if the *Dassonville* Court transforms the substance of Article 34 from an 'international' to a 'national' content, how can there be an equilibrium between the supranational form of the provision (its direct effect and supremacy) and the radical abandonment of its 'international' substance? Even if one were to object that this, unjustifiably, assimilates the judicial sphere (negative integration) and the political sphere (positive integration) of the Union as two agents of *decisional* supranationalism, a look at ex-Article 57 EEC hopefully softens that objection. In any case, the critical point I want to make here is that after the Single European Act, the co-existence—if not positive correlation—between the *Cassis* revolution and the rise of qualified majority voting seems to fully discredit the idea that the judicial and the political spheres of the Union were somehow inversely correlated. I will return to this point in the *Conclusion* below.

⁵⁵ This is the period when *Groenveld*, *Oebel*, *Cinéthèque* (to name just a few important cases) as well as the *Sunday Trading Cases* were decided. For Weiler these 'hard' cases simply appear 'at odds with its normal jurisprudence' (Weiler, 'Epilogue' (n 1), 225).

⁵⁶ Weiler, 'Epilogue' (n 1), 224.

⁵⁷ *Ibid.* 216. Weiler celebrates Walter van Gerven as 'the prophet' and 'hero' of 'a new phase in the writing and re-writing of the economic constitution of Europe' (*ibid.*). However, van Gerven actually advised the Court in *Keck* against *Keck*.

⁵⁸ *Ibid.* 226.

⁵⁹ *Ibid.* In the discussion in the text above, I am leaving aside the judicial reasons that Weiler mentions. He here invokes the 'self-preservation' agenda of the Court, and in particular the Court's new 'human rights jurisprudence' (*ibid.* 227). For after *ERT*, the Court had introduced the idea that once a national restriction to the free movement rules needed to be justified it also had to comply with EU fundamental rights. And for Weiler (*ibid.* 227), '[f]rom this perspective, *Dassonville* was a disaster'. 'For even if the Court was to give a clean bill of health to Member State measures, it would find itself in a position which it finds particularly inimical: having to stand as a de facto appeal instance vis-à-vis national courts.' The problem with this argument is, in my view, that it assumes too strong a connection between the Court's free movement case law and its human rights jurisprudence. Because especially with regard to the latter, the Court did find alternative ways, especially at the justification level, to reduce the impact of its free movement jurisprudence through offering some discretion to the Member States when dealing with sensitive human rights issues.

suddenly, been placed into sharp relief by the 1992 Maastricht Treaty on European Union (TEU).⁶⁰ For, because the *Dassonville* definition of Article 34 ‘constitutionally’ translated into the broadest of harmonization competences, the Court apparently wished to limit—through *Keck*—the legislative scope of Article 114. Constitutionally, this is of course not quite correct;⁶¹ and one should therefore be highly sceptical of the hypothesis that a reactive limitation of the Union’s legislative (!) competences was on the *Keck* Court’s mind.⁶²

But be that as it may, Weiler applauds *Keck* as the long-awaited arrival of a non-discrimination principle in Article 34 and he severely criticizes the Court for its moderation. For him, the thematically limited application of the *Keck* discrimination test to selling arrangements ‘is surely inadequate’.⁶³ ‘Market regulation rules—whether selling arrangements or otherwise—that do not bar access should not be caught unless discriminatory in law or in fact.’⁶⁴ The ‘promised land’ for the Union’s internal market is to submit to a ‘universal field’ theory of international trade law consisting of a general non-discrimination rule for internal measures (Article III GATT),⁶⁵ which is complemented by an absolute rule for market access limitations (Article XI GATT).⁶⁶ The virtues of this universal field theory are said to be ‘a greater tolerance of national and local regulatory diversity’ and the removal of the artificial distinction between pecuniary and regulatory

⁶⁰ Ibid 227.

⁶¹ Weiler’s argument assumes that once Article 34 TFEU is limited, the scope of Article 114 TFEU is automatically limited too; but this is not the case because of the two alternatives mentioned in this legislative competence. The first alternative only relates to the removal of obstacles in the internal market (and a more restrictive scope of Article 34 might thus have a limiting effect on the scope of Article 114); yet the second alternative covers distortions of competition (and here a more restrictive definition of Article 34 has no effect on the scope of Article 114). On the relationship between ‘selling arrangements’ and the scope of Article 114 TFEU especially, see: G Davies, ‘Can Selling Arrangements be Harmonised?’ (2005) 30 *European Law Review*, 370.

⁶² Instead of the extent of *positive* integration it seems, on the contrary, that it was the extent of *negative* integration that troubled the Court. The best indication of what the Court may have been thinking is its reference to ‘the increasing tendency of traders to invoke Article [34]’ in para. 14 of the *Keck* judgment—that is, the overuse of the negative integration provisions and thus, decidedly, not the apparently overextended legislative powers of the Union. This might also explain why the Court did not do ‘a *Keck*’ under the other freedoms, where such a radical overuse had not taken place (see only *Alpine Investments*, Case C-384/93, EU:C:1995:126, decided only two years after *Keck*). I am very grateful to one of the external reviewers for pressing these important points.

⁶³ Weiler, ‘Epilogue’ (n 1), 228.

⁶⁴ Ibid.

⁶⁵ Ibid: ‘The General Rule of Free Movement: national provisions which do not affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States, must be justified by a public interest taking precedent over the free movement of goods.’

⁶⁶ Ibid: ‘The Special Rule of Free Movement (Article [34]): national provisions which prevent access to the market of imported goods must also be justified.’ Weiler is, sadly, never clear about what exactly he means by ‘market access’, but the examples given are ‘border measures’ and ‘sales bans’. His ‘Special Rule’ is thus not to be confused with the ECJ’s own ‘market access’ test after *Keck*. On the latter, see nn 74–76.

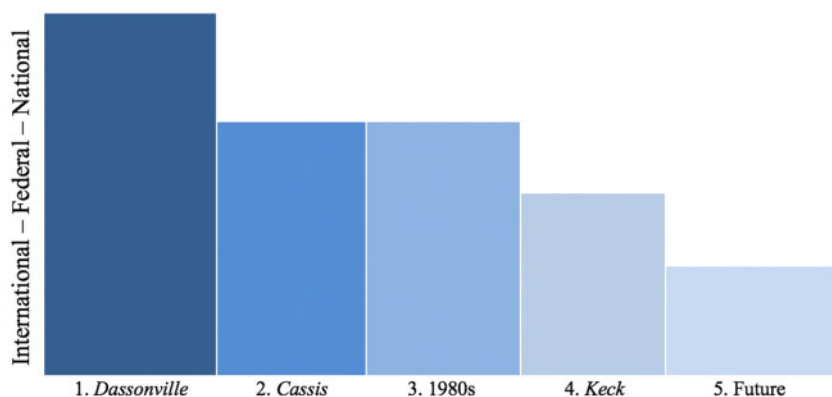


Figure 1. Article 34: Substantive scope (Weiler Interpretation)

internal measures.⁶⁷ And for Weiler, both of these virtues ought to be fully realized in a fifth—and final—period in the evolution of the EU internal market.

An overview of Weiler’s interpretation of the substantive evolution of Article 34 from 1974 into the future can be seen in [Figure 1](#).

D. Evaluating the descriptive side of the ‘standard’ interpretation

Whatever one makes of the normative dimension of the Weiler thesis,⁶⁸ its descriptive and analytical weaknesses are disconcerting. Should not every constitutional theory, at least partially, explain constitutional practice; and can the judicial practice of the Union really be captured in a few ‘discrete snapshots’ of ‘cases so well known as to obviate the necessity of any detailed description’? Novelty can, of course, spring from a number of sources: it can spring from a new ‘fact’—lost and found in a historical archive; or it can be a new interpretation of an old ‘fact’. But a theory without facts is of purely ‘artistic’ use at best, and of no use at worst. For every theory must ultimately be measured by its explicative and predictive value; and on both counts, the Weiler interpretation is surely wrong.

The standard interpretation simply cannot explain large parts of the judicial canvass featuring Article 34 over the past 50 years. For example: where are the prize-fixing cases in which the Court clearly held that *indistinctly* applicable measures would *not* constitute measures having an equivalent effect unless they

⁶⁷ This second virtue could, of course, equally be achieved by ‘levelling up’ the negative integration of fiscal measures instead of ‘levelling down’ the integration intensity for regulatory measures. In favour of this alternative avenue, see: R Schütze, ‘Tax Barriers to Intra-Union Trade: American “Federalism”, European “Internationalism”’ (2016) 35 *Yearbook of European Law*, 382.

⁶⁸ For a discussion of the normative dimension, see Section V below.

discriminated against imports?⁶⁹ Where is the explanation for *Cassis*'s mandatory requirements, which—unlike the *Dassonville* rule of reason—would only apply to *non-discriminatory* measures?⁷⁰ And what about *Dassonville II*?⁷¹ Why is it that the *Groenveld* formula on exports emerges not six months after *Dassonville* but six months after *Cassis*—just a coincidence?⁷² And if the *Sunday Trading Cases* really were just a mechanical application of the *Dassonville* formula, why did the Court not quote it; and why had it taken such a long time for the 'real' meaning of *Dassonville* to come out? All of these unimportant details must have fallen onto the cutting floor when the self-styled contextualist produced his 'cinematographic whole'. Frankly, much of Weiler's essay appears to be written—to borrow Charles Beard's witty dictum on the Harvard philosopher of the day—'without fear and without research'.⁷³

Prospectively, the Weiler interpretation has turned out to be wrong too. No one should be blamed for *not* being a prophet but *false* prophesies must be called out. Indeed, the Court has not followed Weiler's suggestion and introduced a generalized discrimination test for all internal measures. On the contrary, it has, albeit at first for a limited category of measures, introduced a 'national' market philosophy into Article 34. Its market access test today examines whether a national law (greatly) reduces the consumer-usability of goods;⁷⁴ and by reviewing *non-discriminatory* internal measures without considering legislative disparities between the Member States, this test can neither be properly squared with the international philosophy of Article III GATT nor with the federal philosophy of *Cassis*. Instead, it approximates the excessive burden test developed under the US Commerce Clause.⁷⁵ And, so it seems, the *Keck* revolution has not only been 'de-revolutionized'; the contemporary Court has come, whether consciously or not, to apply the *Dassonville* formula in a direct and unmediated manner. To quote just one contemporary illustration here:

The free movement of goods between Member States is a fundamental principle of the Treaty which finds its expression in the prohibition set out in Article 34 TFEU ... Article 34 covers *any national measure capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade*. As it is, it must be noted in that regard that the legislation at issue is capable, in various ways, of hindering—at least indirectly

⁶⁹ For a discussion of these cases, see R Schütze (n 10), 121–3.

⁷⁰ Ibid 212–16.

⁷¹ For a discussion of *Dassonville II* and its relationship to *Dassonville I*, see Schütze (n 9), 400–5.

⁷² On the context and logic of *Groenveld*, see Schütze (n 10), 199–202.

⁷³ The paternity of this wonderfully suggestive phrase is in dispute, see: <https://quoteinvestigator.com/2014/03/17/without-fear/>; but I first met it in the context of Beard's discussion of the work of John Fiske.

⁷⁴ Cf. S Enchelmaier, 'Moped Trailers, Mickelsson & Roos, Gysbrechts: The ECJ's Case Law on Goods Keeps on Moving' (2010) 29 *Yearbook of European Law*, 190. On the 'market access' test more generally, see J Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CML Rev*, 437.

⁷⁵ On the excessive-burden-test under the US Commerce Clause as well as the post-*Keck* developments in EU internal market law, see Schütze (n 10), 61–7 as well as 158–80.

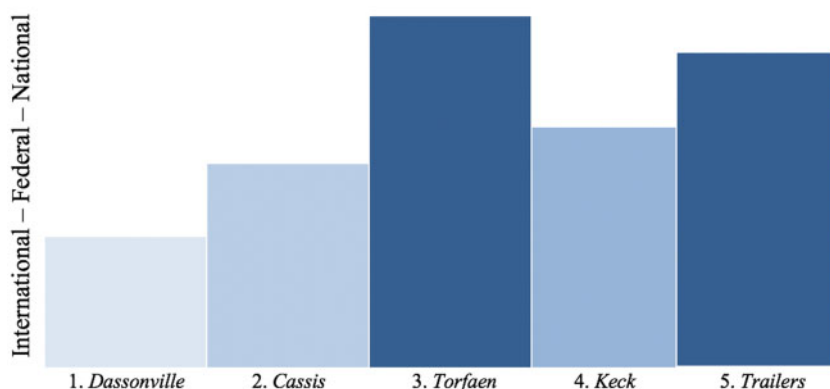


Figure 2. Article 34: Substantive scope (my interpretation)

and potentially—imports of electricity, especially green electricity, from other Member States.⁷⁶

In conclusion, then: not only is the standard *Dassonville–Cassis–Keck* interpretation that Weiler offers full of shortcomings and loopholes, a detailed historical reconstruction of the case law between 1958 and 2016 arrives at the very opposite result (Figure 2).⁷⁷ Instead of a *decreasing* level of negative integration post-*Dassonville*, the constitution of the EU internal market has consistently moved away from its early deferential (international) approach and towards a federal model that even integrates ‘national market’-like elements post-*Keck*.⁷⁸ It is not convergence but divergence that therefore seems the most likely research hypothesis for a comparison between the regional supranationalism of the EU and the universal internationalism of the WTO. To establish this divergence, the next two sections will explore this hypothesis further.

IV. Looking outside in: *Dassonville* and the GATT/WTO

How has international trade law evolved in the last 50 years? Has WTO law, in terms of its substance, become more ‘European’;⁷⁹ and is it true that the WTO

⁷⁶ *Ålands vindkraft AB v Energimyndigheten*, Case C-573/12, EU:C:2014:2037, paras 65–67 (emphasis added, references omitted). On the ‘return of *Dassonville*’, see also I Lianos, ‘In memoriam *Keck*: the reformation of the EU law on the free movement of goods’ (2015) 40 *European Law Review*, 225 at 235 et seq.

⁷⁷ Schütze (n 10).

⁷⁸ The increasing intensity of negative integration post-*Keck* can equally be observed for the other three fundamental freedoms (ibid 284–8); and in this sense, the evolution of the free movement of goods regime is representative for the general evolution of the EU internal market.

⁷⁹ Weiler, ‘Epilogue’ (n 1), 230.

Hormones case, in particular, turned ‘on a *Dassonville*-like complaint that a non-discriminatory obstacle to trade was not justified’?⁸⁰ In order to answer these questions, this section aims to present a preliminary outline of the basic legal structures of the GATT as set out in its Articles III and XI. The distinction between the two GATT provisions follows a simple criterion: ‘border measures’ that distinctly affect imports *as imports* or exports *as exports* fall within Article XI GATT, whereas ‘internal measures’ that apply indistinctly to imports and domestic goods may fall within Article III GATT.⁸¹

Let us zoom into both provisions to see if, and if so where, we find traces of a ‘*Dassonville*-like’ jurisprudence first (Subsections A and B). Thereafter, we shall analyse, in the event that is the case, whether this means that WTO law has itself moved away from an international to a federal or even national market philosophy (Subsection C).

A. ‘Border measures’: interpreting Article XI GATT

Article XI GATT outlaws all ‘prohibitions or restrictions’, such as ‘quotas . . . or other measures’ that are imposed ‘on the importation . . . or the exportation’ of goods.⁸² Textually less elegant than Article 34 TFEU, both provisions nonetheless seem to share the same objective: the abolition of all quantitative restrictions and all other measures with equivalent effects.

How has Article XI been interpreted in the past? The provision has been interpreted in a ‘comprehensive’ way,⁸³ according to which the term restriction is ‘broad’ and refers to ‘a limitation on action, a limiting condition or regulation’.⁸⁴ It thereby captures actual restrictions as well as potential uncertainties for trade;⁸⁵

⁸⁰ Weiler, ‘Cain and Abel’ (n 1), 3; as well as ‘Epilogue’ (n 1) 202 (emphasis added): ‘In the WTO the most notable development in my view is reflected by the *Hormones* case. It represents the most striking attempt under the GATT to reinvok[e] the original philosophy of Article 11 GATT and make a *Dassonville*-type claim that also in the GATT, obstacles to trade, *even if non-discriminatory*, may be prohibited unless a “rational” justification may be invoked.’

⁸¹ See especially Annex I, Ad Article III GATT. The GATT jurisprudence here distinguishes between ‘import bans’, that is: bans that apply to imports *as imports* at the border; and ‘sales bans’ or ‘marketing bans’ that indistinctly apply to imported and domestic products and are thus internal measures.

⁸² Article XI:1 (emphasis added) GATT. The second paragraph adds a number of qualifications and exceptions.

⁸³ ‘Japan—Semi Conductors’ (Panel Report, 1988), L/6309—35S/116, para. 104.

⁸⁴ ‘India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products’ (Panel Report, 1999), WT/DS90/R, para. 5.128; as well as its confirmation in ‘India—Measures Affecting the Automotive Sector’ (Panel Report, 2001), WT/DS146/R, para. 7.270.

⁸⁵ ‘Japan—Measures on Imports of Leather’ (Panel Report, 1984), para. 55; as well as ‘European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds’ (Panel Report, 1989), (L/6627—37S/86), esp. para. 150: ‘[T]he CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. Thus they decided that an import quota constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded imports[.]’

and the scope of the term restriction has also been held to include direct as well as indirect restrictions.⁸⁶ This absolute definition however—crucially—relates to ‘imports’ or ‘exports’; and a national measure will consequently only fall within the scope of Article XI when ‘distinctly applicable’ to imports (or exports).

A good example of this critical conceptual limit to Article XI is offered by *Korea—Beef*.⁸⁷ Korea had established a dual distribution system for beef according to which (small) traders had to choose between selling either domestic or foreign beef. Was this significant restriction of the distribution channels for beef a measure equivalent to a quantitative restriction on inter-state trade? A WTO Panel rejected this finding. Pointing to the fact that the Korean law also applied to the internal sale of domestic beef, the national measure was considered *indistinctly* applicable; and, as a consequence, it had to be analysed under Article III GATT.⁸⁸ For the comprehensive prohibition in Article XI was exclusively reserved for ‘importation measures’ that distinctly applied to imports or exports ‘as such’.⁸⁹ It could thus capture *import* bans for *foreign* goods but not marketing bans that indistinctly applied to all goods;⁹⁰ and while it could potentially cover *import* price provisions, it could not reach generally applicable price-fixing laws.⁹¹

⁸⁶ For the wide definition of ‘made effective through’ in Article XI GATT, see only: ‘Argentina—Measures Affecting the Importation of Goods’ (Appellate Body, 2015), WT/DS438/AB/R, para. 5.218.

⁸⁷ ‘Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef’ (Panel Report, 2001), WT/DS161/R and (Appellate Body Report, 2001), WT/DS161/AB/R.

⁸⁸ ‘Korea—Beef’ (Panel Report, *supra* n.87), paras 698 et seq.

⁸⁹ See especially: ‘Canada—Administration of the Foreign Investment Review Act (FIRA)’ (Panel Report, 1984), L/5504—30S/140, para. 5.14: ‘The Panel shares the view of Canada that the General Agreement distinguishes between measures affecting the ‘importation’ of products, which are regulated in Article XI:1, and those affecting ‘imported products’, which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous.’

In the past, there was an important exception to this rule: (indistinctly applicable) processes-and-production-methods (PPMs) had been held to potentially violate Article XI GATT. The question here is: should a State be entitled to block imports because the exporting State does not comply with the host state’s environmental or labour law provisions? The Appellate Body has held that PPMs that do not affect the physical characteristics of a product cannot be examined under Article III GATT but may be considered under Article XI. This analytical choice has received heavy criticism, see R Howse and D Regan, ‘The product/process distinction—an illusory basis for disciplining “unilateralism” in trade policy’ (2000) 11 *European Journal of International Law*, 249; as well as F Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Oxford: Hart, 2004), esp. 91. For a general overview, see C Conrad, *Processes and Productions Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge: Cambridge University Press, 2011).

⁹⁰ See in particular: ‘European Communities—Measures Affecting Asbestos and Products Containing Asbestos’ (Panel Report, 2000), WT/DS135/R, paras 8.83 et seq.

⁹¹ For a price measure that was examined under Article XI GATT, see ‘European Community Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables’ (Panel Report, 1978) L/4687—25S/68. By contrast, minimum price measures that indistinctly apply to imported and domestic goods have been held to fall outside the scope of Article XI GATT, see ‘Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies’ (Panel Report, 1992), DS17/R—39S/27, para. 5.28: ‘The Panel

technical barriers to trade, arising from legislative *disparities* between Members, by contrast, appeared to fall outside the original scope of Article III: 4.⁹⁶ To nonetheless counteract the increasing abuse of product requirements as neo-protectionist tools during the 1970s, some of the GATT contracting parties concluded—in the year *Cassis de Dijon* was decided—the 1979 Agreement on Technical Barriers to Trade (Standards Code).⁹⁷ The central provision within the Code notably stated:

Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards. They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade.⁹⁸

This expressly extended the non-discrimination principle to technical regulations (and standards), and it even contained *Cassis*-like language according to which state parties were obliged to remove all technical barriers that constituted 'unnecessary obstacles to trade'. After the 1994 WTO reform, both of these normative commitments can today be found in the WTO-related Agreement on Technical Barriers to Trade (TBT Agreement). Article 2.1 TBT here, first, states:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment *no less favourable than that accorded to like products of national origin and to like products originating in any other country*.⁹⁹

In its subsequent jurisprudence, the WTO Appellate Body has analysed this non-discrimination obligation in very careful terms. Unlike its traditional Article III: 4 GATT analysis, it thereby insists that a detrimental effect on the competitive conditions for imports 'is *not* sufficient to demonstrate less favourable treatment under Article 2.1' because a violation of the provision will not occur when 'the detrimental impact on imports stems exclusively from a legitimate regulatory

from domestic sources. Moreover, no [Member] shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.'

⁹⁶ For the argument that the GATT did not cover non-discriminatory product requirements, see KW Dam, *The GATT Law and International Economic Organization* (Chicago: University of Chicago Press, 1970), esp. 194.

⁹⁷ For an early analysis of the Standards Code, see RW Middleton, 'The GATT Standards Code' (1980) 14 *Journal of World Trade*, 201. For the broader historical context, see also GR Winham, *International Trade and the Tokyo Round Negotiation* (Princeton, NJ: Princeton University Press, 1986). For the relationship between the Standards Code and the present TBT Agreement, see S Lester and W Stemberg, 'The GATT Origins of TBT Agreement Articles 2.1 and 2.2' (2014) 17 *Journal of International Economic Law*, 215.

⁹⁸ (Tokyo) Standards Code, Article 2.1.

⁹⁹ Emphasis added.

distinction rather than reflecting discrimination against the group of imported products'.¹⁰⁰ This well-known formulation introduced an 'aims-and-effects'-akin test into Article 2.1 TBT (something that had been rejected under Article III GATT);¹⁰¹ and the best way to make sense of this implicit *additional* criterion is to see it as the consequence of a 'missing' justification clause à la Article XX GATT in the TBT Agreement.¹⁰²

By contrast, Article 2.2 TBT—secondly—attacks technical obstacles arising from legislative disparities among WTO members. It, importantly, covers *non-discriminatory* measures and states:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. *For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.* Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment[.]¹⁰³

The obligations arising from this provision have nevertheless come to be interpreted in a way that is meant to preserve the internal sovereignty of each Member. For not only has WTO jurisprudence confirmed that Article 2.2 TBT also allows for an—unlimited and open—list of legitimate regulatory objectives;¹⁰⁴ more importantly still, the WTO legal order has remained loyal to the ordinary international law philosophy according to which each Member can sovereignly and unilaterally determine 'its' national standard of protection.¹⁰⁵

¹⁰⁰ 'United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products' (Appellate Body Report, 2012), WT/DS381/AB/R, para. 215.

¹⁰¹ That this criterion is specific to the TBT Agreement was confirmed in 'European Communities—Measures Prohibiting the Importation and Marketing of Seal Products' (n 94), esp. paras 5.110–5.127. The European Union here—unsuccessfully—argued that the new criterion should also form part of Article III:4. For an excellent overview of the 'aim and effect' debate within the GATT, see RE Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test' (1998) 32 *International Lawyer*, 619.

¹⁰² For this reading, see the excellent analysis by G Marceau and J Trachtman, 'A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade' (2014) *Journal of World Trade*, 351 esp. at 366.

¹⁰³ Emphasis added.

¹⁰⁴ 'United States—Tuna' (n 100), para. 313: '[T]he use of the words "inter alia" in Article 2.2 suggests that the provision does not set out a closed list of legitimate objectives, but rather lists several examples of legitimate objectives. We consider that those objectives expressly listed provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2.'

¹⁰⁵ Textually, this is already suggested in the Preamble to the TBT Agreement which confirms that each State may take measures in pursuit of legitimate interests '*at the level it considers appropriate*' (Preamble 6). This was judicially confirmed in 'United States—Tuna' (n 100), para. 316: 'We see support for this reading of the term "fulfil a legitimate objective" in the sixth recital of the preamble of the TBT Agreement, which provides relevant context for the interpretation of Article 2.2. It recognizes that a Member shall not be prevented from taking measures necessary to achieve its

Where a Member consequently wishes to maintain a very high-level of consumer protection—as Germany did in, say, *Beer Purity* (in the EU context)—it can do so under WTO law, and especially under the GATT.¹⁰⁶ Of course, the national measure must never be arbitrary or more restrictive on international trade than necessary to achieve the *host* state standard,¹⁰⁷ yet by outlawing such unnecessary obstacles to international trade, WTO jurisprudence only uses an *international* proportionality standard—a standard that is based on, and respectful of, the internal sovereignty of each and every WTO Member.

(ii) *Public health and the Agreement on Sanitary and Phytosanitary Measures*

This respect for the internal sovereignty of each and every WTO Member holds equally true for a second agreement complementing the GATT today: the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). While legally separate from the GATT, the SPS Agreement is specifically designed 'to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary and phytosanitary measures, in particular for the provisions of Article XX(b)'.¹⁰⁸

The core substantive obligation with regard to imports can be found in Article 4 SPS Agreement. It contains an obligation to recognize 'as equivalent' the measures of another Member 'if the exporting Member objectively demonstrates to the importing Member that its measures achieve *the importing Member's*

legitimate objectives "at the levels it considers appropriate", subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the TBT Agreement.

¹⁰⁶ With regard to the GATT's general justification clause in Article XX, see 'European Communities—Measures Affecting Asbestos and Asbestos-Containing Products' (Appellate Body Report, 2001), WT/DS135/AB/R, para. 168 (emphasis added): '[W]e note that it is undisputed that WTO Members have *the right to determine the level of protection of health that they consider appropriate in a given situation*. France has determined, and the Panel accepted, that the chosen level of health protection by France is a "halt" to the spread of asbestos-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection.' For an academic discussion of this point, see AO Sykes, 'The Least Restrictive Means' (2003) 70 *University of Chicago Law Review*, 403 at 411: 'If the stated goal is zero risk from asbestos, then WTO law merely inquires whether the measure in question is necessary to that goal, even if the overall level of health risk is not zero due to the risks from substitutes, and even if some less restrictive alternative policy arguably could achieve a comparable overall level of risk.'

¹⁰⁷ Within the context of Article 2.1. TBT, see 'United States—Certain Country of Origin Labelling (COOL) Requirements' (Appellate Body Report, 2012), WT/DS384/AB/R, esp. para. 349.

¹⁰⁸ Preamble SPS Agreement, Recital 8. It will be recalled that according to Article XX (b) GATT, Member States can justify national measures that are 'necessary to protect human, animal or plant life or health'.

appropriate level of sanitary or phytosanitary protection'.¹⁰⁹ Importantly, then, this is not the principle of mutual recognition. Article 4 generally defers to the *host* state standard of protection; and consequently, therefore, it does not, in substance, undermine a Member's sovereign right to choose 'its' autonomous standard. The Appellate Body has thus, in the past, been 'strongly insistent upon the autonomy of Members in determining their appropriate level of protection'.¹¹⁰ This was notably confirmed by *Hormones*,¹¹¹ where the Appellate Body expressly held that '[t]he right of a Member to determine its own appropriate level of sanitary protection is an important right', and that the SPS Agreement therefore did *not* 'requir[e] Members to change their appropriate level of protection of human, animal or plant life or health'.¹¹²

The structure of the WTO 'common' market has, consequently and unlike the EU internal market, stayed firmly loyal to an international law philosophy. The concept of discrimination here still refers to the different treatment of foreign goods when compared to the importing state's *own* standard.¹¹³ And while the WTO has—more or less at the same time as the EU—integrated technical barriers into its *jurisdictional* scope, the TBT and SPS Agreements do *not* contain a legal principle that recognizes the regulatory standard of each State as—in principle—functionally equivalent.¹¹⁴ There simply is no Union-akin principle of mutual recognition in international trade law.

¹⁰⁹ SPS Agreement, Article 4(1) (emphasis added). Put differently: this is not a 'mutual recognition' of the home state and the host state standards, as the exporting State must unconditionally comply with the *host* state's level of protection to have its exports travel freely.

¹¹⁰ J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (Oxford: Oxford University Press, 2009), 36.

¹¹¹ 'EC Measures Concerning Meat and Meat Products (Hormones)' (Appellate Body Report, 1998), WT/DS26/AB/R.

¹¹² *Ibid.* para. 172 (with reference to Preamble, Recital 6). This was subsequently underlined in 'United States—Continued Suspension of Obligations in the EC–Hormones Dispute' (Hormones II), WT/DS320/AB/R.

¹¹³ On this point, in the context of Article III GATT, see the analysis by M Du, 'Treatment No Less Favorable and the Future of National Treatment Obligation in GATT Article III:4 after EC–Seal Products' (2016) 15 *World Trade Review*, 139 at 163: 'WTO Members are allowed to unilaterally choose their domestic policies but all policies must be applied in an even-handed manner to domestic and imported goods alike, no matter what their final choice is.'

¹¹⁴ Article 2.7 TBT admittedly states that 'Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations'. However, this is 'a goal or aspiration, rather than an obligation' (H Churchman, 'Mutual Recognition Agreements and Equivalence Agreements', in T Epps and M Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Cheltenham: Elgar, 2013), 280 at 285). It may, voluntarily and in the future, be fulfilled by (international) mutual recognition agreements between two consenting contracting parties. This is, however, fundamentally different from the non-consensual—judicial or legislative—principle of mutual recognition in the European Union legal order under which Member States cannot consent in or out at their will.

C. *Dassonville* in the WTO legal order: ‘jurisdictional’ or ‘substantive’?

When viewed against past and present jurisprudence, the proposition that the WTO has adopted a *Dassonville*-like hyper-liberal philosophy according to which any *non-discriminatory* measure restricting trade needs to be justified is clearly untenable. But did we not, still, find spiritual traces of *Dassonville* in WTO law? Rhetorically, various GATT/WTO rulings indeed came close to our famous formula—especially as regards import restrictions under Article XI GATT; and, here, an internationally ‘framed’ *Dassonville* formula really offers a remarkably good textual approximation for the scope of all prohibited *border* measures.¹¹⁵

This, however, is *not* true for *internal* measures. The GATT jurisprudence in the context of Article III continues to make a significant distinction between the ‘jurisdictional’ and the ‘substantive’ dimension within Article III: 4 GATT.¹¹⁶ The first dimension is here expressed via a ‘trade-restrictiveness’ test; the second dimension, by contrast, is manifested in a discrimination test. The relationship between the (jurisdictional) trade-restriction test and the (substantive) discrimination test under Article III is complex;¹¹⁷ and the best way to make sense of both dimensions is to see the former as a necessary *pre-condition* for the latter. For ‘[h]ow can N[atational] T[reatment] function unless one sees a well-defined jurisdictional scope around it?’¹¹⁸

In what manner, then, has WTO jurisprudence interpreted the—jurisdictional—scope of Article III? The jurisdictional scope of the provision has been constructed broadly from the start. A 1958 Panel Report thus held that Article III: 4 GATT captured ‘not only the laws and regulations which directly govern the conditions of sale or purchase but also *any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on*

¹¹⁵ On this point, see text of nn 83–86 above. Similarly, this does, of course, not necessarily mean that both legal orders will always come to the same conclusions. For example, in 1978 a GATT Panel held that the automatic import licensing system that was operated by the (then) European Economic Community would not fall under Article XI (cf. ‘European Community Programme of Minimum Import Prices’ (n 91), para. 4.1). This ruling contrasts with the European Court’s decision, a few years earlier, in *International Fruit Company NV and others v Produktschap voor groenten en fruit*, Joined cases 51 to 54–71, EU:C:1971:128.

¹¹⁶ For the seminal study here, see T Voon, ‘Exploring the Meaning of Trade-Restrictiveness in the WTO’ (2015) 14 *World Trade Review*, 451. The author rightly criticizes the lack of academic analysis of this fundamental doctrinal aspect (ibid 451–3): ‘The notion of “trade-restrictiveness” arises in various forms and contexts throughout the World Trade Organization (WTO) agreements, yet no single definition of trade-restrictiveness exists. Case law and secondary literature provide little guidance in identifying the existence of trade-restrictiveness or in measuring the degree to which a given measure restricts trade . . . The current failure to articulate in the case law the components and characteristics of such a wide-reaching concept, so frequently litigated, converts trade-restrictiveness into a “black box”.’

¹¹⁷ Ibid 455.

¹¹⁸ P Mavroidis, *The Regulation of International Trade* (Cambridge, MA: MIT Press, 2016)—Volume I, 364.

are witnessing, thus, the emergence of a nascent Common Law of International Trade', because 'in the *material* law of disparate international trade regimes we can see *considerable convergence*'.¹²⁶

This convergence is, to briefly recapitulate, said to be the result of two parallel processes. On the one hand, the EU is turning away from 'the early radical approach', set out in *Dassonville*, and towards a 'more mature approach far more respectful of national regulatory autonomy' post-*Keck*.¹²⁷ The WTO, on the other hand, is moving away from a discrimination model towards making 'a *Dassonville*-type claim that also in the GATT, obstacles to trade, even if non-discriminatory, may be prohibited unless a "rational" justification may be invoked'.¹²⁸ Thus, in terms of their *material* or *substantive* obligations 'the slow convergence between the two systems' is, for Weiler, 'quite apparent'.¹²⁹ Part and parcel of his convergence thesis is thereby the predicted arrival of the *Cassis* logic of mutual recognition within the WTO legal order:

It will not be long before a WTO Panel and/or the Appellate Body will pronounce a WTO version of the doctrine of parallel functionalism (or mutual recognition). One can restate the simple reason. *Mutual recognition may seem to some the highlight of [Union] particularism, a result of its very cohesive nature and unsuited to the broader [Union]. But in fact it is but a banal doctrinal manifestation of the principle of necessity which is also a pillar of GATT jurisprudence.*¹³⁰

What are we to make of this 'Cassis'-related prophecy? This final section wishes to address this question first from an 'external' and 'normative' perspective (Subsection A). Thereafter, we shall explore the question from an 'internal' and 'descriptive' perspective, which looks specifically at the European Union, and its law, so as to discover whether the convergence thesis can find some resonance from the narrowest of all possible verification angles (Subsection B).

A. External perspective: regional and universal 'laws' and their context(s)

Are the politico-economic philosophies behind the EU and the WTO increasingly converging? In Section III, it was argued, against the Weiler account, that the overall evolution of the EU internal market has been characterized by a gradual and constant evolution away from the 'ordinary' international cooperation model towards a federal (or even national) integration model.¹³¹ Section IV then, subsequently, established that the WTO legal order has so far rejected a substantive

¹²⁶ Weiler, 'Cain and Abel' (n 1), 3 and 4 (emphasis added).

¹²⁷ Weiler, 'Epilogue' (n 1), 202–3.

¹²⁸ *Ibid* 202.

¹²⁹ *Ibid* 203.

¹³⁰ *Ibid* 231 (emphasis added).

¹³¹ For a brief overview of the evolution of the three other fundamental freedoms, see: Schütze (n 10), Conclusion.

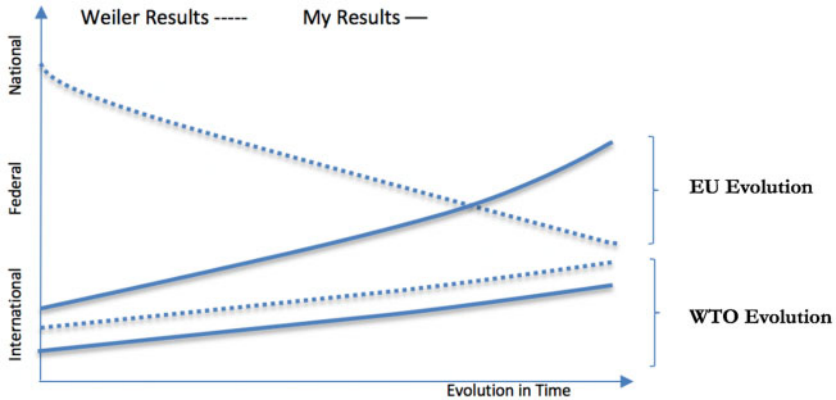


Figure 3. Convergence or divergence of WTO and EU law?

weighing and balancing approach that would legally limit the *internal* sovereignty of each WTO Member.¹³² In terms of their material and substantive obligations, the EU and the WTO free movement regimes are therefore—despite an upwards bent for the WTO during the first decade of its life¹³³—increasingly diverging (Figure 3). What are the reasons for this ever-greater divergence? To search for these reasons, we must, in a first step, begin by comparing the normative contexts for inter-state trade in the EU and the WTO, respectively. Thereafter, we shall look at the relationship between positive and negative integration in a second step.

(i) *Normative frames for interstate trade: contextual differences*

The advantages of interstate trade can be immense,¹³⁴ yet *unregulated* free trade entails the danger of gradually turning States into ‘subjects’ of the global market. For with the exception of—very—few powerful States (such as the G7), smaller

¹³² R Howse, ‘The World Trade Organization 20 Years On: Global Governance by Judiciary’ (2016) 27 *European Journal of International Law*, 9 at 61: ‘[B]eginning with the *EC-Hormones* case, the Appellate Body affirmed the right of a WTO member to determine its own level of protection against a given harm. In principle, a government could seek in its regulation to achieve a risk of zero. The implication of this level of respect for collective preferences is the rejection of the notion of proportionality [in the strict sense] in the evaluation of the relationship between means and ends.’ For the same conclusion, see: D Regan, ‘The Meaning of “necessary” in GATT Article XX and GATS Article XIV: the myth of cost–benefit balancing’ (2007) 6 *World Trade Review*, 347.

¹³³ Since then, the WTO has once more become more deferential to national choices, see Howse (n 132); as well as the earlier and excellent analysis of M Du, ‘The Rise of National Regulatory Autonomy in the GATT/WTO Regime’ (2011) 14 *Journal of International Economic Law*, 639 esp. at 665.

¹³⁴ For a historical retrospective here, see R Schütze, ‘From the “Closed” to the “Open” Commercial State: A Very Brief History of International Economic Law’ (2017) 19 *Journal of the History of International Law*, 495.

states have become increasingly unable to counterbalance—mobile and multinational—companies and global capital that will today hegemonically 'suggest' their corporate preferences to a local legislature.¹³⁵ The difficult choice between attracting global 'capital' and maintaining national 'control' has indeed, in the last three decades of neo-liberal globalization,¹³⁶ led to many unjustifiable 'trade-offs' that were hitherto morally and politically unthinkable.¹³⁷

One way out of this corporate capture has been to try and recreate governmental structures beyond the nation state. This governmental solution was indeed a central plank of the European Union's DNA from the very start.¹³⁸ For the creation of an EU 'common market' was intrinsically linked to, and always seen as co-dependent on, the creation of a common—European—government that could regulate and control that common market. The inclusion of legislative competences, including a supranational competition regime, was indeed an essential sign that the future 'European' approach to transnational market-building was to profoundly differ from the GATT's rejection of any (supranational) *public* regulation of transnational *private* actors.¹³⁹ For even if originally embedded in a 'social-democratic' context,¹⁴⁰ the GATT then and the WTO now constitute—in themselves—purely negative integration projects.

¹³⁵ Let me politely point to Ireland's 'double-Irish' fiscal arrangements here, which were indirectly drafted by and directly designed for US multinational companies. This form of corporate 'capture' of a national legislature goes far beyond the 'golden straitjacket' that the 'Washington consensus' has imposed on global-economy-dependent states. On the latter idea, see T Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (Basingstoke; Macmillan, 2012). On the retreat of the 'state' vis-à-vis the global economy generally, see S Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996).

¹³⁶ One telling illustration of the significant shift in the balance between 'public' and 'private' power is the corporate tax competition that has weakened the financial capacities of the modern welfare state (cf. D Rodrik, *The Globalization Paradox* (Oxford: Oxford University Press, 2012), esp. 193). The Irish corporation tax was, in 1974, around 50%; and, in 2020, it has dropped to 12%.

¹³⁷ Alas, how did it ever come to a situation where the US multinational 'Starbucks' pays less tax in Austria than a Viennese (!) café or sausage stand (*The Independent*, 3 September 2016)?

¹³⁸ To quote a critical passage from the Spaak Report: '[b]y establishing a common market we shall construct an enormous economic space in which the conditions for a common economic policy will be created.' See Bericht der Delegationsleiter ('Spaak Report', in: R Schulze and T Hoeren, *Dokumente zum Europäischen Recht: Band 1: Gründungsverträge* (Berlin: Springer, 1999), 752 at 755–6 (my translation, emphasis added).

¹³⁹ The GATT envisaged no institutional mechanism for positive integration. Nor did it contain a chapter on (international) competition law. For the express rejection of the institutionally deeper and thematically broader 'International Trade Organization' preceding the GATT, see Schütze (n 134), 517–22.

¹⁴⁰ The term 'embedded liberalism' was coined by JG Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organization*, 379. Following Polany's *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, MA: Beacon Press, 2001), Ruggie distinguished between 'embedded'—that is social-democratic—and unembedded *laissez faire* liberalism; and he notably identified the post-1945 period as one in which economic liberalism considered fundamental social and democratic values as part of a much broader 'intersubjective framework of meaning' (ibid 380). For an excellent analysis of this argument, see also A Lang, 'Reconstructing Embedded

Yet if that is the case, should we not, naturally, expect a significant *divergence* between the EU and the WTO ‘common’ markets? For would the presence of a positive integration project within the EU not make a difference as to how ‘deep’ negative integration could *legitimately* cut into the sovereignty of the Member States? Or to put it more concretely: should it matter that when the European Court of Justice decides to remove national laws hindering trade, the latter could—unlike in the WTO context—generally be replaced by supranational legislation re-regulating that trade?

This question is not just confined to comparisons between the ‘regional’ supranational European Union and the ‘universal’ and—essentially—neo-liberal WTO. It also resurfaces when the EU is compared to *other* regional integration projects, like the North American Free Trade Agreement (NAFTA)/United States–Mexico–Canada Agreement (USMCA) or the Association of Southeast Asian Nations (ASEAN). For even assuming that these regional organizations were to enjoy—which is not the case—the same legislative competences as the EU, a ‘universal field’ theory of international trade law encounters enormous social and cultural differences and difficulties. In the words of a distinguished sociologist of international trade:

[R]egional market building is—much like national market building, if not more—a *social* project. This is so for a number of reasons. First, RTAs [Regional Trade Agreements] constitute planned and explicit efforts to create a market space. In that regard, they are imagined and willed by a collective set of actors, often with a model of an ideal RTA in mind. Second, officials actively engage in the crafting of RTAs: regional markets do not “just happen”; on the contrary, thousands of concrete steps (such as the making of laws) are taken to create those markets. . . The relationship between market building and rules can [thereby] vary significantly across markets both in quantitative terms (how many laws) but also in qualitative terms (the target and content of laws). It can also involve remarkably different realms of society and societal organizations. This suggests that *there exists no single blueprint for market building*[.]¹⁴¹

In essence: even if there were similar legal ‘texts’ for two or more regional trade organizations, the social ‘contexts’ within which these regional regimes are situated fundamentally differ. Different market-building philosophies may be rooted in deeper cultural cleavages, and perhaps in the philosophical differences between Anglo-Saxon common law and (European) civil law mentalities.¹⁴² NAFTA

Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime’ (2006) 9 *Journal of International Economic Law*, 81.

¹⁴¹ F Duina, *The Social Construction of Free Trade* (Princeton, NJ: Princeton University Press, 2007), 198–9.

¹⁴² *Ibid* 206–7: ‘A cultural perspective could probably explain some of the most important differences across the EU, Mercosur, and NAFTA that were described in this book. Consider the presence of common-law and civil-law traditions in the different regions. Common law reflects a certain Anglo-Saxon pragmatism: a tendency to shy away from abstraction and to avoid a priori moral or other types of principles, a predilection for accepting reality as [it] is, and a propensity to

minimalism has thus traditionally preferred ‘integration without institutions’,¹⁴³ whereas the EU has always considered integration through (legislative) institutions to be an integral part of its integration project.¹⁴⁴ This link between negative and positive integration can best be seen with regard to the EU principle of mutual recognition to which we must now turn.

(ii) *Positive integration and the principle of mutual recognition*

Should the degree to which positive integration can take place, or has taken place, influence the degree of negative integration established by a court? The *Dassonville* Court had certainly hinted at the idea.¹⁴⁵ But more concretely and perhaps provocatively: would the European Court of Justice ever have decided *Cassis* in the way it did if there had not been, within the Union legal order, the *possibility* of European legislation on the subject matter of the case? Let us carefully listen to the *Cassis* Court on this point once more:

In the absence of common rules relating to the production and marketing of alcohol—a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 (*Official Journal C 309*, p. 2) not yet having received the Council’s approval—it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.¹⁴⁶

The European Court here evocatively lamented the ‘absence of common rules’ and unambiguously pointed the finger at the Member States of the Union for having failed to reach a legislative compromise in the Council. And this judicial lament is the critical point. For did the *absence remarquée*, noted by the Court, not—dialectically—acknowledge and confirm the *presence* of positive legislative powers belonging to the Union? The Union legislator *could* have harmonized the

allow societal institutions to emergence from social life rather than to allow visions of a wished-for world to mould these institutions. The Anglo-Saxon pragmatist would never dream of codifying the world, let alone of devising countless laws to regulate, a priori, the lives of citizens. Civil-law traditions, on the other hand, are certainly a reflection of some form of continental idealism. Such idealism embodies a desire for completeness and perfection, both in understanding reality and in the future evolution of human beings and societies.’

¹⁴³ FM Abbott, ‘Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime’ (1992) 40 *American Journal of Comparative Law*, 917. Glenn refers to the ‘institutional meagreness’ of NAFTA, see HP Glenn, ‘Conflicting Laws in a Common Market? The NAFTA Experience’ (2001) 76 *Chicago-Kent Law Review*, 1789 at 1791.

¹⁴⁴ Nowhere can this link between negative and positive integration better be seen than in the context of the EU’s Common Agricultural Policy. The strong nexus between the creation of a European *market* and the creation of a European *government* was here, from the very beginning, established by Article 38 (4) TFEU. It states (emphasis added): ‘The operation and development of the internal market for agricultural products *must be accompanied by the establishment of a common agricultural policy.*’

¹⁴⁵ *Dassonville* (n 5), para. 6: ‘In the absence of a [Union] system guaranteeing for consumers the authenticity of a product’s designation of origin . . .’. For the idea of a correlation between the scope of the free movement provisions and the absence/existence of a ‘common commercial policy’ in the context of third-country goods, see Schütze (n 10), 188–91.

¹⁴⁶ *Cassis de Dijon*, Case 120/78 (n 6), para. 8 (emphases added).

matter but pending political agreement in the Council, negative integration via *Cassis* provided a second best judicial solution—a solution that could, in the future, ‘nudge’ reluctant Member States into finding a political compromise in the positive integration sphere.¹⁴⁷ After *Cassis*, positive integration thus takes place ‘in the shadow’ of negative integration; but, crucially, without the possibility of positive integration, the *Cassis* revolution might—dialectically—never have taken place. And if this dialectical link between negative and positive integration is accepted, then, the very idea of introducing (judicial) mutual recognition into the WTO legal order should be categorically rejected *in the absence of a positive integration project therein*.

This ‘constitutional’ argument against introducing the *Cassis* logic into the WTO is joined by a social argument. For even assuming that mutual recognition could take place without the institutional possibility of—prior or subsequent—legislative approximation among WTO Members, the nine Member States of the (then) European Economic Community and the 27 Member States of the Union today share(d) a—relatively—homogenous socio-economic context; and this degree of socio-economic homogeneity simply does not exist at the international level. Should there, contrariwise, nonetheless be a *legal* principle of mutual recognition in the absence of a presumptive socio-economic ‘equivalence’? As a *legal principle*, mutual recognition embodies a *legal presumption* of equivalence, and this legal presumption ought only to operate in a social context where we can *presume* that the regulatory standards of all States involved are *in principle* homogenous or similar. The legal principle of mutual recognition is, it seems to follow, context-dependent in that it must only ever operate within a similar *social* context.

One should, therefore, be highly critical of the claim that mutual recognition ‘will inevitably find its way into GATT jurisprudence’.¹⁴⁸ For ‘as long as’ the *social* structure of the world economy remains as heterogeneous and asymmetric as

¹⁴⁷ The fate of the (draft) Regulation in *Cassis* is instructive. While the original proposal mentioned in para. 8 of the judgment was ultimately withdrawn (see Commission, ‘Withdrawal of certain proposal and drafts from the Commission to the Council’ (1993) C 228/04 at 5), soon after *Cassis*, the Commission re-started working on a ‘Proposal for a Council Regulation laying down general rules on the definition, description and presentation of spirituous beverages and of vermouths and other wines of fresh grapes flavoured with plants or other aromatic substances’ that would be formally published in the Official Journal in 1982 (OJ C 189/7). The latter however again remained with the Council for years; and only following the re-introduction of qualified majority voting, by the Single European Act, did the Council finally adopt Regulation 1576/89 laying down general rules on the definition, description, and presentation of spirit drinks ((1989) OJ L 160/1). Based on ex-Articles 43 and 100a EEC, the Regulation provided detailed rules on the definition of ‘whisky’ as well as ‘liqueur’; and it here set the general minimum alcohol content for fruit spirit drinks at 25% (ibid Article 3). This was of course not the lower French but the (higher) German standard in *Cassis*.

¹⁴⁸ Weiler, ‘Epilogue’ (n 1), 230. The dramatic expansion of WTO membership in the past 50 years, on the contrary, suggests that the GATT is not moving towards but rather further away from a presumption of functional equivalence. The GATT originally began with 23 founding members and today has grown to over 160 members.

it is today, a universal field theory of international trade law is—at best—naïvely positivistic and—at worst—hegemonically neo-liberal. For the 'embedded liberalism' characteristic of the original post-1945 trading system has been in shocking decline,¹⁴⁹ and to insist on a presumption of equivalence in the absence of similarly regulated national markets comes close to advocating unregulated international trade and thus unrestrained private and public competition between legal orders. This market 'ideology', for an ideology it is,¹⁵⁰ may resonate with inveterate neo-liberals; yet, it is bound to be contested by those 'social-market' advocates—like myself—who vigorously argue that the construction of every common *market* must go hand in hand with the construction and co-constitution of a common *government* to control that market.¹⁵¹

To claim that '[i]t will not be long before a WTO Panel and/or the Appellate Body will pronounce a WTO version of the doctrine of parallel functionalism' appears, therefore, not just a farfetched prophecy but a socially unjust one too. For to insist on formal equivalence without any *possibility* of substantive equivalence is bound to become a 'majestic' injustice.¹⁵² If mutual recognition, then, is ever to work in the WTO legal order, it 'must be embedded in a process of *governance*' that includes 'essential *harmonization*' and 'a *redistributive* framework'.¹⁵³ This would, however, require serious (and fundamental) changes to the WTO's *institutional* structure—a revolutionary amendment or 're-founding' that seems, *pace* Weiler, not to be on the horizon in the near future. For much international

¹⁴⁹ On the decline of embedded liberalism, see R Howse, 'From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 *American Journal of International Law*, 94, esp. 98–9: 'The very success of the embedded liberalism bargain, along with other phenomena, led to forgetfulness or amnesia concerning the political foundation of the post-war trading regime, its character as a specific and contingent bargain about the interaction between freer trade and the welfare state. . . . This new trade policy elite developed professional working procedures and norms within the GATT, organized the agenda for negotiations, and—with very little to go on from the treaty text itself—created and sustained an effective arbitral mechanism for dispute settlement. As persons with the bent of managers and technical specialists, they tended to understand the trade system in terms of the policy science of economics, not a grand normative political vision. . . . At the hands of this trade policy elite, "embedded liberalism" came to be recast as economics, and economics became ideology, the ideology of free trade.' On the rise of neo-liberalism generally, see: D Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2007); and C Crouch, *The Strange Non-Death of Neo-Liberalism* (Cambridge: Polity, 2011).

¹⁵⁰ In the famous phrase by Keynes: 'Practical men who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist.' For a wonderful analysis of this thought (and much more), see F Block and M Somers, *The Power of Market Fundamentalism: Karl Polanyi's Critique* (Cambridge, MA: Harvard University Press, 2016).

¹⁵¹ For my own preliminary views here, see Schütze (n 10), 300–12. For the relationship between 'socialism' (in a broad sense of the term) and democracy, see especially Polanyi (n 140), esp. 242: 'Socialism is, essentially, the tendency inherent in an industrial civilization to transcend the self-regulating market by consciously subordinating it to a democratic society.'

¹⁵² One may be reminded of the satirical praise offered by Anatole France: 'In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.'

¹⁵³ J Trachtman, 'Embedding Mutual Recognition at the WTO' (2007) 14 *Journal of European Public Policy*, 780 at 781 (emphasis added).

cooperation, and especially in the WTO, appears today ever more ‘grid-locked’.¹⁵⁴ The future of transnational governance will, consequently, have, at first, to rely on the non-universalist-yet-deeper promises of supranational regionalism.¹⁵⁵ Because it is—for the time being—only here that democratic public governance has a realistic prospect of ‘domesticating’ global market forces by subjecting them to democratic control and public accountability.

B. Internal perspective: the European Union and international trade

The EU/WTO convergence thesis is, from an ‘external’ point of view, descriptively incorrect and normatively dubious. However, is there nonetheless some truth in it from the ‘internal’ perspective of the European Union? Or, to put it more clearly and concretely: has the Union perhaps extended *its* internal market principles to *its* international trade with third countries? Surely, the prospect of convergence would here be strongest? And yet: when examining the EU case law of the past 50 years, it quickly emerges that the Union has steadfastly and vigorously refused to project its internal market jurisprudence to its external trade with others.

An early illustration of this divergence—not convergence—is offered in *Polydor*.¹⁵⁶ Some pop records featuring ‘The Bee Gees’ had been imported from Portugal (at the time outside the EU) into Great Britain (at the time inside the EU). The copyright owner had brought proceedings against the parallel importer, with the latter invoking a free trade agreement between the Union and Portugal that included the following provisions:

Quantitative restrictions on imports shall be abolished on 1 January 1973 and *any measures having an effect equivalent to quantitative restrictions on imports* shall be abolished not later than 1 January 1975... The Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, law and order or public security, the protection of life and health of humans, animals or plants, the protection of national treasures of artistic, historic or archaeological value, the protection of industrial and commercial property, or rules relating to gold or silver. Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.¹⁵⁷

The text of the international agreement clearly reproduced Articles 34 and 36 TFEU; and the parallel trader consequently invoked the Court’s ‘European’

¹⁵⁴ D Held *et al.*, *Gridlock: Why Global Cooperation is Failing when We Need It Most* (Cambridge: Polity Press, 2013).

¹⁵⁵ R Schütze (ed.), *Globalisation and Governance: International Problems, European Solutions* (Cambridge: Cambridge University Press, 2018).

¹⁵⁶ *Polydor Limited and RSO Records. v Harlequin Records Shops Limited and Simons Records Limited*, Case 270/80, EU:C:1982:43.

¹⁵⁷ Articles 14 (2) and 23 of the Agreement, see Regulation 2844/72 ((1972) OJ English Special Edition L301/166).

interpretation of these provisions by arguing that the intellectual property right at issue had been exhausted because the Portuguese records had been first marketed with the consent of the copyright holder.¹⁵⁸ Yet the Court unambiguously refused to project its 'internal' jurisprudence into the external realm of international trade:

The provisions of the Agreement on the elimination of restrictions on trade between the [Union] and Portugal are expressed in terms which in several respects are similar to those of the [EU] Treaty on the abolition of restrictions on intra-[Union] trade. . . . However, such similarity of terms is not a sufficient reason for transposing to the provisions of the Agreement the above-mentioned case-law. . . . The considerations which led to that interpretation of Articles [34] and 36 of the Treaty do not apply in the context of the relations between the [Union] and Portugal as defined by the Agreement. It is apparent from an examination of the Agreement that although it makes provision for the unconditional abolition of certain restrictions on trade between the [Union] and Portugal, such as quantitative restrictions and measures having equivalent effect, it does not have the same purpose as the [EU] Treaty, inasmuch as the latter, as has been stated above, seeks to create a single market reproducing as closely as possible the conditions of a domestic market. It follows that in the context of the Agreement restrictions on trade in goods may be considered to be justified on the ground of the protection of industrial and commercial property in a situation in which their justification would not be possible within the [Union]. *In the present case such a distinction is all the more necessary inasmuch as the instruments which the [Union] has at its disposal in order to achieve the uniform application of [Union] law and the progressive abolition of legislative disparities within the common market have no equivalent in the context of the relations between the [Union] and Portugal.*¹⁵⁹

The Union here prioritized *context* over *text*. A 'text' in an EU international agreement that was identical to a textual prohibition in the EU Treaties did *not* demand an identical interpretation whenever the purpose and context behind the two texts were fundamentally different. The hermeneutic frame within which the 'same' prohibition on quantitative restrictions was placed would decisively determine its 'meaning'; and, for the Court, the critical factor in choosing between the 'international' and the 'European' interpretation of 'Article 34' was whether the

¹⁵⁸ In *Polydor*, the Court summed this point up as follows (ibid para. 7): 'According to the well-established case-law of the Court, the exercise of an industrial and commercial property right by the proprietor thereof, including the commercial exploitation of a copyright, in order to prevent the importation into a Member State of a product from another Member State, in which that product has lawfully been placed on the market by the proprietor or with his consent, constitutes a measure having an effect equivalent to a quantitative restriction for the purposes of Article [34] of the Treaty, which is not justified on the ground of the protection of industrial and commercial property within the meaning of Article 36 of the Treaty.'

¹⁵⁹ Ibid paras 14–20.

trade rule was embedded (or not) in an institutional context that allowed for *positive* integration.¹⁶⁰

This *context*-dependent interpretation of the Union's free movement rules can equally be found with regard to technical barriers to trade.¹⁶¹ The Court has here specifically refused to extend the *Cassis* logic to trade with third States; and a good illustration of this crucial divergence between a 'European' and an 'international' trade interpretation of 'Article 34' is *Carbone*.¹⁶² The case concerned Article 398 of the Italian Postal Code that outlawed the production or importation of electrical and radio-electrical appliances that did not meet national product standards. The plaintiff, who had imported 20 non-approved cordless telephones, challenged the Italian product requirement; and in the course of the judicial proceedings, the question arose whether the Italian law violated the Union import regulation.¹⁶³ The Italian government, supported by the Commission, did not think so; nor did the Advocate General in that case. Drawing on the GATT distinction between the 'importation' of goods across a national border and their subsequent 'marketing', the relevant EU Regulation was interpreted as solely designed to implement Article XI GATT. And since the latter only concerned 'border measures' to the exclusion of internal 'marketing' rules, it could not prevent the Union—or in the absence of Union rules: Italy—from imposing its own marketing rules on direct imports from outside the Union.

To quote the Court on this point:

Placing products on the market is a stage subsequent to importation. Just as a product lawfully manufactured within the [Union] may not be placed on the market on that ground alone, the lawful importation of a product does not imply that it will

¹⁶⁰ For a similar difference between intra-Union trade and external international trade in the context of the free movement of capital, see *Skattevekerter*, Case C-101/05, EU:C:2007:804. The case is especially remarkable because under the free movement of capital provisions, 'third-country capital' is theoretically assimilated to intra-EU capital; and yet, the Court held that the absence (!) of Union legislation facilitating the fiscal supervision of third country capital was the reason why 'movement of capital to or from third countries takes place in a different legal context from that which occurs in the [Union]' (ibid para. 36, emphasis added).

¹⁶¹ Historically, when the 1979 (TBT) Standards Code was to be signed, just after *Cassis* was decided, the question arose, 'whether rules on the free movement of goods and the application of standards as developed in the *Cassis de Dijon* case law, are to be applied towards all parties to the Agreement pursuant to its national treatment clause' (J Steenbergen, 'Trade Regulation since the Tokyo Round', in E Volker (ed.), *Protectionism and the European Community* (Dordrecht: Kluwer, 1987), 185 at 188.) The issue was, however, fudged by means of signing the Code as a mixed agreement. For a historical analysis of the Union's view on the Technical Barriers Code, see J Bourgeois, 'The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective' (1982) 19 *CML Rev*, 5.

¹⁶² This case was decided in 2002, see *Prefetto Provincia di Cuneo v Carbone*, C-296/00, EU:C:2002:316.

¹⁶³ The EU Regulation establishing common rules for imports at the time was Regulation 3285/94, (1994) OJ L349/53, whose Article 1(2) stated: 'The products referred to in paragraph 1 shall be freely imported into the [Union] and accordingly ... shall not be subject to any quantitative restrictions.'

automatically be allowed onto the market. A product coming from a third country, in respect of which the requirements laid down by Article [29] of the Treaty are satisfied, is regarded as being in free circulation. It will then be treated, according to Article [28 (2)] of the Treaty, in the same way as products originating in Member States as regards the elimination of customs duties and quantitative restrictions between the Member States. *In so far as there are no [Union] rules harmonising the conditions governing the marketing of the products concerned, the Member State into which they are put into free circulation may prevent their being placed on the market if they do not satisfy the conditions laid down for that purpose under national law.*¹⁶⁴

In essence: since the Union's legislative powers could not extend to 'harmonizing' or governing third-country goods, and in the absence of Union legislation limiting the powers of the Member States, each EU Member State government remained fully entitled to impose its own national regulatory standards or product requirements onto direct imports from outside the Union. The marketing standards adopted by a third country had no role whatsoever to play in this assessment; and, in subsequent cases, the Court indeed unequivocally clarified that there was no principle of mutual recognition for third country goods: 'the principle of mutual recognition established by the case-law . . . cannot apply to trade within the EU in goods originating in third countries and in free circulation where they have not, before being exported to a Member State other than that in which they are in free circulation, been lawfully marketed in the territory of a Member State'.¹⁶⁵

Alas, from the 'inside' perspective of EU law, then, the EU principle of mutual recognition will *not* apply to third country goods; and rightly so: for the Union enjoys no positive legislative powers to regulate third countries, and the extension of the principle of mutual recognition to its international trade would fatally undermine its own socio-constitutional ecosystem. The Union would also lose all its bargaining power to demand international standard setting agreements with third countries if it were to unilaterally extend 'its' federal market principles to States *not* willing to abide by its legislative ground rules. The principle of mutual recognition is, as we saw above, a context-dependent and constitutionally 'bounded' principle. Its jurisdictional scope coincides, unless extended in an association agreement that also extends the legislative powers of the Union, with the legal sphere of the Union's Member States;¹⁶⁶ and the more legislation the Union adopts for its Member States, the greater the divergence in the interpretation of its internal and external trade provisions.

¹⁶⁴ *Carbone* (n 162), paras 31–32 (with reference to *Donckerwolcke*, Case 41/76).

¹⁶⁵ *Commission v Czech Republic*, Case 525/14, EU:C:2016:714, para. 39 (emphasis added).

¹⁶⁶ For a discussion of the extent to which this has (not) happened, see M Cremona, 'The Single Market as a Global Export Brand: Exporting the Single Market' (2010) 21 *European Business Law Review*, 663. For a discussion of the same point in the WTO law context, see L Bartels, 'The Legality of the EC Mutual Recognition Clause under WTO Law' (2005) 8 *Journal of International Economic Law*, 691.

VI. Conclusion

Every interpretation—whether legal or not—must try to explain and ‘construct’ its object. Yet this object is often buried under past interpretations that have come to distort our ‘ways of seeing’.¹⁶⁷ Every new interpretation can therefore only be successful in *re*-constructing its object if it can successfully de-construct traditional interpretations.

This article has tried to deconstruct the traditional *Dassonville–Cassis–Keck* interpretation of the evolution of the EU internal market according to which the Court, since 1974, has become ever more deferential to the Member States.¹⁶⁸

¹⁶⁷ J Berger, *Ways of Seeing* (Harmondsworth: Penguin, 2008); as well as P Berger and T Luckmann, *The Social Construction of Reality* (Harmondsworth: Penguin, 1991).

¹⁶⁸ For a recent revival of this idea, see J Zgliniski, ‘The Rise of Deference: The Margin of Appreciation and Decentralised Judicial Review in EU Free Movement Law’ (2018) 55 *CML Rev*, 1341 which offers a first official glimpse of his remarkable EU PhD thesis that will soon be published as *Europe’s Passive Virtues* with Oxford University Press (2020, forthcoming). Zgliniski takes issue with Barnard’s earlier assessment (C Barnard, ‘Derogations, Justifications and The Four Freedoms: Is State interest really protected?’, in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Oxford: Hart, 2009), 273), according to which the Court’s judicial scrutiny at the justificatory level has become ever more strict over time. Instead, he claims that ‘deference is on the rise’ (J Zgliniski, ‘The Rise of Deference’, 1354). But leaving aside whether substantive deference (in the form of a margin of appreciation) and jurisdictional deference (in the form of decentralized judicial review) can really be aggregated, can one legitimately argue that, through the rise of the margin of appreciation after *Dassonville*, ever more regulatory space has been returned to the Member States?

This conclusion is, in my view, not warranted; and the reason for this lies in a methodological disagreement that I already raised in the context of C Kaupa’s excellent *The Pluralist Character of the European Economic Constitution* (Oxford: Hart, 2016), see Schütze (n. 10), 276, footnote 4. For Zgliniski also accepts the traditional *Dassonville–Cassis–Keck* narrative and the (consequently wrong) idea that the sole ‘doctrinal tool to establish the substantive meaning of the Treaty freedom provisions in relation to the specific situation in question is proportionality balancing’ (Kaupa, *The Pluralist Character of the European Economic Constitution*, 189). This is, however, mistaken. For even if one were to accept the idea that the scope level of Article 34 TFEU is irrelevant, the important point that both authors disregard is that the interpretative ‘frame’ that is chosen for Article 34 will also influence the justification level, and especially the normative pre-commitment with regard to the principle of proportionality. Thus: depending on which normative model is chosen for the EU internal market, the very nature of the proportionality enquiry changes (cf. Schütze (n 10), 218–15).

From this, something potentially important may follow for Zgliniski’s project: For does a change in the substantive standard or baseline of judicial review under Article 36 (or imperative requirements) not directly influence the need for a ‘deference doctrine’ that defers to the host state standard? Is there really much need for such a doctrine if the judicial base line is the host state’s own standard, as under the international model? My personal answer to this is ‘no’, and this ‘no’ could explain why Zgliniski discovers a negative correlation between the occurrence of discrimination—reminiscent of the international model—and the margin of appreciation doctrine (Zgliniski, ‘The Rise of Deference’, 1367).

But more than that: the transformation of Articles 34/36 from an international to a federal interpretation could itself be seen to have triggered the rise in the margin of appreciation doctrine because the Court wished to *compensate* for its ‘activist’ jurisprudence. This new hypothesis suggests that the more ‘aggressively’ the Court pushes an EU fundamental freedom towards a federal (or national) model, the more it employs the margin of appreciation doctrine as a softening counter-device to allow for a degree of ‘host state’ control in a normative context pre-committed to ‘home

The best-known popularization of this orthodox interpretation here famously claims that the *Dassonville* judgment radically 'reject[ed] the GATT philosophy' by embracing 'as its implicit ideal type a transnational market-place which is identical to a *national* market-place'.¹⁶⁹ And from that perspective, the constitutional development of the internal market in the past 50 years is a story of supra-national decline and re-convergence with WTO law. Seen in this light, *Cassis* becomes a corrective—even regressive—judgment that returns and repatriates powers to the Member States; while the *Keck* revolution is celebrated as the ultimate return to the 'promised land' of international law.

What are the merits and demerits of this interpretation? We saw in Sections II and III that there are few, if any, textual or contextual arguments in favour of this stylized construction of the internal market. Indeed, when placed in its historical context, *Dassonville* is not adopting a 'radical' market philosophy;¹⁷⁰ instead, the Court follows an international approach; and once *this* perspective is chosen, all post-*Dassonville* paradoxes that the Weiler account especially generates appear in a different light or disappear altogether! Thus: instead of seeing *Cassis* as a limitation of *Dassonville*, the former becomes the truly revolutionary judgment which radically transforms the interpretative frame around Article 34. And whereas the Weiler interpretation, for example, de-emphasizes vast parts of the judicial canvas following *Cassis*, a better interpretation here finds that it was only within the 1980s that a 'national' neo-liberal market model is born. *Keck* is, when viewed from and against this vantage point, a reaction against the excesses of that *post*-SEA development. And, as we saw above, it is a response that has today been largely neutralized by Article 34's *post*-Lisbon evolution.¹⁷¹

The legal structures of the EU internal market and the WTO international market are not converging. Why not? As Sections IV and V have tried to show, the fundamental reasons for their—increasing—divergence relate to essential institutional and sociological differences. *Institutionally*, the free movement provisions in the EU cannot be compared, as functionally equivalent, to their WTO counterparts because they are 'embedded' within a broader legislative project. The EU Treaties are, unlike the GATT, not just about negative integration but are equally about positive integration; and the dialectical relationship between negative and positive integration could, as was argued above, explain why the

state' or Union control. This 'countervailing device' hypothesis would also predict that the margin of appreciation doctrine is more prevalent in the context of the free movement of goods (as found by Zgliniski, 'The Rise of Deference', 1363), because it has traditionally been the most 'progressive' or 'activist' freedom.

These 'critical' comments are—importantly—not meant to undermine Zgliniski's wonderful project and his important empirical findings as such—on the contrary, EU law needs more of this kind of scholarship! Yet, personally, I would respectfully beg to differ as regards his overall conclusion: in the evolution of the free movement case law in the past 50 years there has, decidedly, not been a general move from judicial 'activism' to judicial 'passivism'. But let the discussion begin.

¹⁶⁹ Weiler, 'Epilogue' (n 1), 215 (emphasis added).

¹⁷⁰ Schütze (n 9).

¹⁷¹ Schütze (n 10), 158 et seq.

ordinary international law by progressively becoming a *normative* supranational legal order, the more its substantive and *decisional* solutions will also differ from that of classic international organizations, like the WTO.¹⁷⁷

Does this all mean there is no appeal in a 'universal field theory' of international trade law? There is, of course, a great appeal here, but only if the 'right' *international* comparators are chosen.¹⁷⁸ To simply identify the same words or text(s) can hardly be enough to solve the 'case selection' problem. For the difficulty with all inter-cultural vocabulary is that lexical congruence often only exists at the surface and that two 'identical' words may quickly turn out to be 'false friends'. The meaning of the word 'art' will thus depend on whether it is found in an English or German text, and even within a German text, its meaning will, critically, depend on the thematic 'context' in which it is found. Similarly, the meaning of a 'trading rule', like 'Article 34', will turn out to mean very different things if placed in an international or a federal context; and this difference occurs, as we saw in Section V, even within the Union context depending on whether it is situated within the internal EU Treaties or an external EU agreement.¹⁷⁹ Text and context are thus dialectically intertwined and any 'universal theory' of international trade law without a common interpretative practice morbidly risks dissolving its object(s) of interpretation.

What can this hermeneutic warning, voiced from the specific context of the internal market, potentially mean for the study of European law more generally? If European integration scholarship were to become serious about 're-reading' and 're-constituting' its object of study, it would need to resolutely abandon the 'arm-chair' ways of philosophizing about European law that have become

¹⁷⁷ For a comparative legal analysis of the 'formal' and 'substantive' solutions (as well as their potential relationships) in the European Union and international law, see Schütze (n 155). The connection between the constitutional and the substantive dimensions of the EU and the WTO legal orders was also seen by Weiler; yet, in line with his substantive convergence thesis, Weiler has, in the past, claimed that EU constitutionalism and public international law are gradually re-converging (JHH Weiler and J Trachtman, 'European Constitutionalism and its Discontents' (1997) 17 *Northwestern Journal of International Law & Business*, 354 esp. 360: '[W]hile constitutionalism has made much of the separation of European [Union] law from public international law, this reformation argues for the convergence of European [Union] law and public international law.').

¹⁷⁸ For a nuanced approach here see J Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016); as well as S Cho and J Kurtz, 'Divergence and Convergence in International Economic Law and Politics' (2018) 29 *European Journal of International Law*, 169 esp. 203.

¹⁷⁹ A 'false friend' relation can, equally, be identified with regard to the idea of 'mutual recognition'. In the EU (federal) context after *Cassis*, mutual recognition means that the *importing* state must (in principle) recognize the *substantive* standard of the *exporting* state. In an international 'Mutual Recognition Agreement', by contrast, the *importing* state only promises to respect the conformity assessment procedures, *formally* undertaken by the exporting state yet based on the *importing* state's substantive standard. For those interested in the mechanisms of the latter, see 'Mutual Recognition Agreement between the European Community and the United States' (1999) OJ L31/3, esp. Articles 2 and 3.

commonplace in the last 25 years.¹⁸⁰ A new generation of European integration scholars must find the courage (and time) to ‘revisit’ and ‘revise’ the orthodox-yet-mistaken theories of the past and replace them with its own re-constructions for the future. Part and parcel of this methodological renaissance must, at the very least, be an honest commitment to combine philosophical *theory* and constitutional *practice*—a commitment, in other words, that takes EU law seriously again. For this, the philosophers of our discipline must allow their halo to drop into the mire of constitutional life. Because it is only there that one can identify the permanent and ‘constituted’ in the transient and changing structure(s) of European law. Within this *reconstituted* EU constitutionalism, political theory must meet historical reality. For a constitutionalism without historical realities—without facts!—is but an abstract formalism that cannot unlock the past, evaluate the present or conceive the future.

¹⁸⁰ For many of the post-1995 EU integration ‘theorists’, respect for an empirical and doctrinal approach to EU law no longer seems à la mode. Their flight into abstraction and speculation has thereby deprived EU theory of much of its predictive and reformist potential; and this has made much contemporary EU theory either ‘useless’ with regard to concrete constitutional questions; or, worse: it has become a handmaiden of political conservatism because it ultimately confirms—rather than challenges—the academic and constitutional status quo. One of the most alarming examples here is the backward-looking discussion of the ‘democratic deficit’ within the European Union. For instead of empirically searching for old or new forms of democracy beyond the state, the prevailing EU studies literature has here come to embrace the anachronism that the ‘nation’ is, and ought to remain, the ‘natural’ locus of democratic decision making. (For a very recent example, see especially: R Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge: Cambridge University Press, 2019).) This position is, in my view, not just blindly ‘apologetic’ vis-à-vis the status quo; it is—I think—dangerously nostalgic and ‘out of touch’ with a reality in which the forces of economic and social globalization have undermined the nation-state’s ‘real’ power on almost all fronts. For a discussion of older and newer models of democracy beyond the State in general, and the European Union in particular, see my ‘Models of Democracy: Some Preliminary Thoughts’ (EUI Working Paper, LAW 2020/08).