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The Challenge of Cooperative Regulatory Relations after Enlargement

FRANCESCA BIGNAMI

INTRODUCTION

This paper conceptualises European governance as a continuous series of collective action games among national regulators. European administration is theorized as a set of mutually beneficial relations among independent regulators, rather than as a hierarchy of supranational institutions, courts, and national administrators. The collective action approach highlights the importance of certain factors in fostering regulatory cooperation and enabling the common market to become an administrative reality: repeated interactions, monitoring and sanctioning by the Commission and the courts, reciprocity norms, and trust. It also suggests that one of the most significant challenges of enlargement will be to establish cooperative regulatory exchanges among old and new regulators. Regulators in the existing member states do not always trust the capacity of Central and Eastern European regulators to administer the *acquis communautaire*. Cooperation and trust among old and new regulators will also prove difficult because, after enlargement, their relations will gradually shift from ones of power to ones of mutually beneficial exchanges among equals. The solution lies in self-awareness of the structure of the collective action game, a more active role for the Commission and the Court in monitoring compliance, and strict adherence to a strategy of reciprocity in retaliating for non-compliance.

Without trust, markets and governments fail.¹ In southern Italy, in order to buy a cow for slaughter, a butcher must go to both the local cattle farmer and the local Mafioso, the cattle farmer for the cow, the Mafioso to make sure the head of cattle is healthy.² The Mafioso sells a substitute for trust, an expensive and ultimately destructive substitute, one that has in fact been the leading cause of the South's economic backwardness, but one that is necessary if the transaction is to occur. In southern Italy, regional bureaucrats are unresponsive to citizen requests and fail to build day care centres, family clinics, and public housing even though they have the tax dollars to do so.³ Why? Because officials and their citizens are not part of networks of civic engagement which breed social trust and therefore are unable to cooperate in addressing the complex socio-economic problems faced by regional governments.

In analytical sociology, trust is a belief which explains cooperation in a variety of relationships, social and economic, where individual incentives, without more, would predict selfish behaviour. In collective action games of different varieties, the two players can either choose to cooperate or defect.⁴ Because of the risk of opportunistic behaviour by the other, both players will choose to defect rather than cooperate and therefore will not obtain the mutually beneficial outcome. Institutions which alter the structure of the game or which facilitate the monitoring and sanctioning of opportunistic behaviour can improve the chances of cooperation.

¹ I would like to thank George Bermann, Gráinne de Búrca, Peter Doralt, Diego Gambetta, Henry Hansmann, Robert Keohane, Xavier Lewis, Milada Vachudova, Joseph Weiler, Stephen Williams, David Zaring, and participants in the Columbia conference for their comments.

² See D Gambetta, *The Sicilian Mafia: The Business of Private Protection* (Cambridge, Harvard University Press, 1993).

³ See RD Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, Princeton University Press, 1993).

⁴ I use the term collective action game to refer to all games in which the parties are better off if they both cooperate and worse off if they both defect. For my purposes, it is not important to distinguish among prisoner's dilemma, chicken, stag hunt, tragedy of the commons, and other games which fit into this category. In these games, there are two players, each of whom can either cooperate (C) or defect (D) and neither of whom knows which strategy the other player will adopt. They are similar in that, for each player, the (C,C) outcome is preferable to the (D,D) outcome. The specific pay off structures, however, differ. For instance, in prisoner's dilemma, chicken, and tragedy of the commons, the individual player will prefer the (D,C) to the (C,C) outcome while in stag hunt, the individual player will prefer (C,C) to (D,C). See K Oye, 'Explaining Cooperation under Anarchy: Hypotheses and Strategies' in K Oye (ed), *Cooperation under Anarchy* (Princeton, Princeton University Press, 1986).

Norms and beliefs, although much more difficult to operationalise and empirically verify, can complement institutions in inducing individuals to cooperate. A player who trusts another player, ie believes that the other will cooperate rather than behave opportunistically, is more willing to take a risk and cooperate herself.

In European governance, the critical relationships are not market transactions among firms or citizen efforts to build day care centres, but rather a continuing series of bargains among government officials.⁵ In large measure, these relations rest upon formal institutions which create incentives for cooperative behaviour. The committee system, notification requirements, the Commission, and the Court of Justice all guarantee the prospect of repeated interactions, reliable information on cooperation or defection, and sanctions for regulators who fail to deliver on promises. For the European common market to operate as an administrative reality, however, reciprocity and trust are equally important. The assertion that individuals can develop norms and beliefs outside of the thick cultural web of a local or national community is a contentious one. Nonetheless, in observing the dense and sustained nature of interactions among European regulators, I conclude that the common market is coming to rely upon trust as much as upon institutional incentives. A regulator from one country (X) believes that a regulator from another country (Y) will cooperate, even though Y is part of a different political and administrative system, because Y has demonstrated through past behaviour that she will cooperate, because she is part of another regulatory network which would disapprove if she were to defect, and because she shows signs of trustworthiness developed in other multinational forums.

⁵ For the theory that state interests and intergovernmental bargaining lie behind European integration, see A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, Cornell University Press, 1989).

Enlargement represents a radical challenge to the system of cooperative regulatory relations and trust at the heart of the common market.⁶ For a number of reasons, regulators in existing member states doubt that Central and Eastern European regulators have the capacity to administer the *acquis communautaire*.⁷ The number of countries, together with the density of European norms, exceeds any previous accession. Ten new sets of regulators, from 10 different political traditions, not two or three, will be asked to join European administrative networks. Unlike their Greek and Iberian predecessors, these countries join at a time of high normative density. The vast majority of harmonisation measures were passed after the Single European Act, each one requiring regulatory cooperation at every twist and turn, from interpretation to enforcement to reassessment and reformulation of the normative framework. Since the fall of Communism, the states of Central and Eastern Europe have had to rebuild their markets and state institutions, and their experience with their administrative systems is still relatively limited.

Developing cooperation and trust among regulators of existing and new member states will be especially difficult due to the shift in power relations that will occur after enlargement. Throughout the enlargement process, the Commission and member state administrations have been able to rely on power to obtain compliance from Central and Eastern European countries.⁸ Existing member states benefit from access to the new markets, but the accession states benefit significantly more through the combination of access to western markets and subsidies. However, once May 2004 comes and goes, the power differential will gradually narrow and mutually beneficial cooperation among equals, rather than power, will be necessary for

⁶ For the importance of trust in building democratic institutions within east European countries, see S Rose-Ackerman, 'Trust and Honesty in Post-Socialist Societies' (2001) 54 *Kyklos* 415 and S Rose-Ackerman, 'Trust, Honesty and Corruption: Reflections on the State-Building Process' (2001) 42 *Archives of European Sociology* 526.

⁷ *Acquis communautaire* or *acquis* refers to the body of EU norms—treaties, secondary instruments, implementing rules, and court decisions—which east European countries have adopted to qualify for enlargement.

⁸ See MA Vachudova, 'The Leverage of Internationalizing Institutions on Democratizing States: Eastern Europe and the European Union' *Robert Schuman Centre for Advanced Studies* (RSCAS Working Paper No 2001/33 European University Institute Fiesole, 2001); A Moravcsik and MA Vachudova, 'National Interests, State Power, and EU Enlargement' (2003) 17 *East European Politics and Societies* 42.

successful administration. This shift will not necessarily be easy, for hierarchical political and social relations are not conducive to developing norms of reciprocity or trust.⁹ One party is at risk of exploiting her power and the other party protects herself, through guile or other devices. In the immediate aftermath of enlargement, as thousands of old and new regulators begin administering the common market as equals, without reciprocity and trust, they may very well choose defection over cooperation, thus, through the downward spiral predicted by game theorists, compromising regulatory cooperation and the reality of a common market for years to come. An old regulator might continue to believe, erroneously, that she can deprive new regulators of certain benefits in a discrete policy area and still obtain cooperation on account of the disproportionate advantages of membership. A new regulator may be readier to perceive defection rather than cooperation due to her experiences during the enlargement process, and defect herself. If this occurs, a common market in the Europe of 25 will not emerge anytime soon.

This paper is divided into three parts. In the first part, I conceptualise European administration as a continuous series of collective action games among government officials in which cooperation is critical. The operative metaphor is a contractual relationship among independent firms rather than a single, vertically integrated, hierarchical firm. A regulator from one country transfers her authority to a regulator from another country, thus allowing goods and services to circulate domestically even though they do not comply with her rules and procedures, in return for a transfer of regulatory authority in kind. The contract establishing the terms of the transfer — the Treaty, the secondary instruments, and the implementing rules— is incomplete and there is a significant risk of opportunism. Regulators belong to different administrative hierarchies and political cultures and therefore face pressures to behave strategically when they

⁹ See generally D Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, Princeton

implement the contract or renegotiate its incomplete terms. Nevertheless, national regulators cooperate rather than defect due to the prospect of repeat plays, monitoring and sanctioning, and trust. European administration is understood as a set of mutually beneficial relations among independent regulators, and not as a hierarchy with supranational institutions and courts at the top and national administrators below.

In the second part, I situate my approach in mainstream theories of European integration. I draw significantly on the institutionalist tradition in international relations scholarship, in which international regimes, including the European Union, are explained as solutions to collective action problems among sovereign nations.¹⁰ Still, the unprecedented level of cooperation among member states has been accompanied by novel practices and institutions to facilitate that cooperation. I explain how these new forms of cooperation challenge some of the premises of classic institutionalist theory and consider the alternative explanation of European integration put forward by neo-functionalists.¹¹ Although my approach shares important similarities with that theory, it differs in that I perceive integration as proceeding through national politics and cooperation among 15, soon-to-be 25, different administrative and political systems, rather than through the construction of a single system.

In the third part, I use the collective action understanding of European governance to analyse the difficulties that enlargement will create for the common market and to suggest possible correctives. As already mentioned, cooperative regulatory relations will be difficult to establish because of lack of confidence in the administrative capacity of Central and Eastern European countries and because of their experience with power relations in the years preceding

University Press, 1993).

¹⁰ R Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, Princeton University Press, 1984); A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, Cornell University Press, 1989).

enlargement. The solution, I argue, is awareness of the structure of the game in both the existing and the new member states, a more active role for the Commission and the Court in monitoring compliance in the member states, and strict adherence to a strategy of reciprocity in retaliating for non-compliance. Moreover, I anticipate that greater centralisation will occur in select areas such as food safety and monetary policy, areas in which the risk of defection imposes such high costs on national regulators that they are willing to relinquish their own enforcement authority in return for greater control over enforcement elsewhere.

THE COLLECTIVE ACTION CONCEPTION OF EUROPEAN GOVERNANCE

The Analogy

The key to understanding European governance is an appreciation that things get done—goods move across borders and into shops, smokestacks get fitted with scrubbers, farmers get rewarded with subsidies for ploughing under their vineyards—under conditions of anarchy, not hierarchy. The anarchy I have in mind is not the Hobbesian one of nations in the international realm, but the gentler one of firms contracting in a market or union members organising in a collective bargaining regime or villagers operating through local associations to prevent erosion and depletion of their land.¹² In other words, unlike nations in the international arena, we have here a background legal regime. However, this regime does not determine the contract, the decision to

¹¹ W Sandholtz and A Stone Sweet, 'Integration, Supranational Governance, and the Institutionalization of the European Polity' in W Sandholtz and A Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford, Oxford University Press, 1998).

¹² O Williamson, *The Economic Institutions of Capitalism* (New York, The Free Press, 1985); M Olson, *The Logic of Collective Action* (New York, Schocken Books, 1971); E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, Cambridge University Press, 1990) 61-69. The term 'anarchy' is drawn from the international relations literature. Even though the process of integration sets the European Union apart from classic international regimes, I use the term to emphasise the continued absence of a sovereign, and hence the enduring relevance of certain tools of international relations theory. As explained below, the game theory used in this chapter was extensively developed in the international relations field to explain cooperation among nations in the absence of a Leviathan. Because the European Union continues to lack many of the fundamental attributes of the state, these concepts still have intellectual purchase in explaining the design and operation of European institutions.

strike, the effort to preserve the land, or the extent of trade among European countries. Goods move from supplier to buyer, workers go on strike, villagers limit their use of land, and goods and services move across borders because institutions, norms, and beliefs curb opportunism and promote cooperation in strategic game situations.

My collective action analysis of European governance is rough. In Duncan Snidal's words, it is at this stage a metaphor or analogy, rather than a model or theory.¹³ Through metaphors and analogies we discern resemblances between entities and suggest ways in which the logic which drives or explains one might also drive or explain the other. The mode of reasoning is primarily inductive, in that the researcher observes certain similarities and speculates as to their significance. Models and theories are far more confident statements about the presence of certain properties in an entity and the causal relationships among those properties. In models or theories, the salient characteristics of a class of phenomena or occurrences are formally identified and their interrelationships and causal effects carefully specified. In particular, a theory is associated with deductive reasoning in that the abstraction of the relevant properties and the specification of the causal arrows permit further implications to be drawn and predictions to be made.

In drawing comparisons between European governance and collective action games, let me provisionally use the analogy of a transaction between two firms for the transfer of an asset such as a machine tool.¹⁴ An official in a national Ministry of Agriculture is like a firm. She

¹³ D Snidal, 'The Game Theory of International Politics' in K Oye (ed), *Cooperation Under Anarchy* (Princeton, Princeton University Press, 1986).

¹⁴ Contractual relations are generally conceived as one variant of the prisoner's dilemma game. I draw heavily from Oliver Williamson's analysis of the governance structures associated with different types of commercial transactions. See O Williamson, *The Economic Institutions of Capitalism* (New York, The Free Press, 1985). For purposes of the analogy, it is important that the asset be mixed or idiosyncratic because, under those circumstances, the problems of bounded rationality, namely the difficulty of negotiating a complete contract and opportunism are at their worst. If the asset is standard and can easily be obtained on a spot market, then the buyer can purchase the goods without having to negotiate a production contract in advance and both the buyer and seller can trade with any number of other buyers and sellers, reducing considerably the opportunism risks.

trades in the legitimate monopoly of force.¹⁵ She transfers her regulatory authority to another country, thus allowing goods and services to circulate domestically even though they do not comply with her rules and procedures, in return for a transfer of regulatory authority in kind. She negotiates the terms under which she will transfer her authority to another regulator, say the health standards for beef, much as a supplier firm negotiates the price, quantity, and specifications of the machine tool with a buyer firm. The resulting written instrument, be it a new treaty provision, directive, or regulation, is incomplete because the regulators cannot agree on more precise terms and because they cannot foresee all future developments. Similarly, the production contract is incomplete because of the transaction costs of drafting and negotiating a comprehensive contract and the difficulty of foreseeing every possible contingency. Should there be disagreement over interpretation or performance once the instrument is signed, both parties have an interest in continuing the relationship by negotiating more specific terms and amicably settling disputes. In European administration, goods and services cannot freely circulate without the consent of national regulators. In the market, since the machine tool is made to certain specifications, the buyer cannot easily obtain it from another seller, nor can the seller easily sell it to another buyer.

With a treaty provision or a directive, as with a contract, there is a risk of opportunism by the parties. In European governance, regulators will not reliably disclose their true conditions (information asymmetry) or self-fulfil all promises.¹⁶ In other words, national officials, like contracting firms, cannot and do not operate on the premise that all behaviour is rule-bound.¹⁷

¹⁵ I follow Max Weber in defining the state as a political organisation with the legitimate monopoly of the organised use of force within a given territory. The ability to set rules, expect routine obedience of rules, and impose sanctions for occasional disobedience, all turn on this essential attribute of the state. Any transfer of rule making, inspection, and prosecution powers implicates the state's legitimate monopoly of force.

¹⁶ O Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38 *Journal of Economic Literature* 595.

¹⁷ O Williamson, *The Economic Institutions of Capitalism* (New York, The Free Press, 1985) 48.. Most of the issues discussed in this section—incomplete contracts, enforcement, and renegotiation—are the bread and butter of

Since they are part of separate governments, administrative hierarchies, and political cultures, regulators face real incentives to defect once they leave Brussels. The demands of pleasing an elected official or advancing in the national bureaucracy can trump good European citizenship. However, if one party alleges that the other did not disclose all relevant information, cheated on a promise, or failed to renegotiate an incomplete term in good faith, there is no clearly recognised legitimate authority to which the dispute can be sent. There is no hierarchy.

Regulators, like firms, may go to court to settle the dispute. In ratifying the Treaty, countries submit to the mandatory jurisdiction of the Court of Justice, thus enabling one member state to take another to court.¹⁸ Yet both in European governance and in the market, going to court has significant costs: litigation is expensive, courts are poorly situated to settle disputes, since their information is limited, they apply general rules that may be ill-suited to the particulars of the transaction, and their involvement can have the effect of putting an end to a mutually beneficial exchange. Regulators and firms therefore rely on informal mechanisms to protect against opportunism, they devise credible commitments and credible threats which supplement litigation, and they set up governance structures which can handle disputes more effectively than courts. Because of the continuous nature of the relationship, one party can punish another party for breaking a promise or failing to renegotiate in good faith by denying that party a benefit in their next exchange. The treaty and European secondary instruments contain a number of credible commitments and credible threats. Independent third parties— the Commission, individual plaintiffs, and courts—are authorised to monitor compliance with the terms of the bargain and apply sanctions,¹⁹ and national regulators may temporarily stop trade with defecting

contract law. For a comprehensive discussion, see S Shavell, *Foundations of the Economic Analysis of Law* (Cambridge, Harvard University Press, 2004).

¹⁸ ECT, art 227.

¹⁹ This includes Commission infringement proceedings under art 228, preliminary references under art 230, the information reporting requirements contained in numerous secondary instruments, and the information gathering function of European agencies such as the European Environmental Agency. For a treatment of arts 228 and 230 as

member states.²⁰ In the market, firms make investments in assets which depend on the completion of the contract—basically a hostage— thereby demonstrating a commitment to the continuation of the relationship. Finally, in European integration, committees of national regulators, generally known as comitology committees, negotiate more precise standards and mediate disputes on the correct application of European norms under the shadow of a qualified majority vote.²¹ Likewise, contracts often stipulate that disputes will be sent to expeditious arbitration bodies or knowledgeable industry experts for resolution.

Sometimes institutions are not necessary to sustain relationships among national regulators or firms.²² A belief called ‘trust’ intervenes. Analytical sociology defines trust as a belief held by one individual (X) that another individual (Y) will do something even though Y might have selfish reasons for not doing it and X will lose if Y acts otherwise.²³ One party cooperates because she trusts that the other party to the transaction will also cooperate. The line between rational calculation and belief as bases for cooperation is blurry. Institutions which create incentives for cooperation— monitoring, sanctions, credible commitments, and governance structures— can shape parties’ expectations, but belief in trustworthiness and the

monitoring and sanctioning mechanisms, see J Tallberg, ‘Paths to Compliance: Enforcement, Management, and the European Union’ (2002) 56 *International Organization* 609.

²⁰ This refers to the safeguard clauses contained in the vast majority of harmonisation measures.

²¹ Importantly, the governance structures established under most European instruments do not entail outright delegations of power to the Commission. Although the Commission has both the power of proposal and, as chairman of comitology committees, the power to call votes, it has neither the information necessary to draft the proposal nor the vote. In drafting proposals, the Commission relies on national experts for technical information and anticipates their positions in committee meetings.

²² The role of beliefs and norms is hotly contested in the institutional economics literature. See M Levi, ‘When Good Defenses Make Good Neighbors’ in C Menard (ed), *Institutions, Contracts, and Organizations: Perspectives from New Institutional Economics* (Colchester, Edward Elgar, 2000). Scholars of network forms of economic organisation have relied most heavily on norms of reciprocity and beliefs of trust and obligation in defining and explaining the network form. See J Podolny and KL Page, ‘Network Forms of Organization’ (1998) 24 *Annual Review of Sociology* 57.

²³ See M Bacharach and D Gambetta, ‘Trust in Signs’ in K Cook (ed), *Trust in Society* (New York, Russell Sage Foundation, 2001).

associated willingness to cooperate is greater than the sum of institutional incentives.²⁴ X might trust Y because Y is from the same club or university, or is part of a network of committed regulators which meets regularly and publishes in the same journals.²⁵ Or X might trust Y because Y displays all the external signs of the underlying dispositions and skills that make her trustworthy, say, the right handshake or the right meeting agenda.²⁶ And the more individuals trust, the more other individuals have an incentive to develop reputations of trustworthiness, since it becomes increasingly likely that a reputation for trustworthiness will be rewarded with trust.²⁷

At the root of the analogy between European governance and collective action games, between government officials regulating the common market and firms engaging in an asset transfer, lie two basic similarities. First, both entail a long term relationship marked by repeated interactions with the corresponding risks of opportunism, namely the failure to fulfil promises, disclose true conditions, or negotiate incomplete terms in good faith. Cooperation among government regulators must be continuous if British beef is going to get to the French butcher shop or Italian wine to the British pub. Second, neither in European governance nor in collective action games is there a commonly recognised legitimate authority, ie hierarchy, able to settle disputes over interpretation, information, and defection. There is not – at least not yet – a Prime Minister for Europe, just as there is no Chief Executive Officer for inter-firm transactions.

²⁴ See M Levi, 'When Good Defenses Make Good Neighbors' in C Menard (ed), *Institutions, Contracts, and Organizations: Perspectives from New Institutional Economics* 142 (Colchester, Edward Elgar, 2000). Levi gives a helpful definition of trust :

Institutions, including but not limited to those producing credible commitments, influence expectations, based on knowledge, that the trusted will not harm the trustor. Trust informs the act of taking a certain kind of risk, of making oneself vulnerable by ' . . . voluntarily placing resources at the disposal of another or transferring control over resources to another' Trust affects the trustor's calculation concerning the probability that she will be better off, or at least not worse off, as a result of taking a risk. Trust is not, however, either the risk-taking behaviour or the calculation about whether to take a risk; it is a belief that informs the decision on how to act.

²⁵ See KS Cook and R Hardin, 'Norms of Cooperativeness and Networks of Trust' in M Hector and K-D Opp (eds), *Social Norms* (New York, Russell Sage Foundation, 2001).

²⁶ See M Bacharach and D Gambetta , 'Trust in Signs' in KS Cook (ed), *Trust in Society* (New York, Russell Sage Foundation, 2001) 154.

Let me pause to underscore the limits of the contract analogy. Firms are assumed to engage in profit maximising behaviour in the context of a functioning market for goods and services. In negotiating mutually beneficial contracts, their preference is profit maximisation. By contrast, the preferences of regulators are vastly more complex. Regulators are supposed to serve as agents for the national interest, but of course national interest is an indeterminate process of elections, political parties, social mobilisation, and interest group representation. In any given case, a regulator's preference might be a reflection of administrative tradition and culture, ministerial directions, national interest group politics, or simply personal predilection. Moreover, even if it were possible to conceptualise regulatory preference as the maximisation of a single national interest, knowing how to do so through the regulatory bargain is not easy. Does a licensing scheme or a tough administrative sanctions regime, a 'reasonableness' or 'proportionality' standard, 10 or five meat packing plant inspections per year, advance the national interest?

Second, in regulatory relations, the difficulty of fully specifying the terms of the bargain *ex ante* is of an entirely different order than in contract. In regulatory relations, not only are certain contingencies difficult to anticipate, but the national response to the event is unpredictable. Take beef safety. Before the mad cow crisis, there was no European standard on testing cows for BSE before slaughter, but now one in every three cows is tested. The European livestock directives were incomplete not only because regulators did not think that Creutzfeld-Jacob Disease could be transmitted to cows and through cows to humans, but also because they did not know what level of risk their national consuming publics would tolerate when confronted with BSE. Was the test to be done on each and every cow, one out of every three cows, or one out of every ten?

²⁷ E Ostrom, 'Toward a Behavioral Theory Linking Trust, Reciprocity, and Reputation' in E Ostrom and J Walker

The last point of clarification relates to the concept of opportunism, as used in the contract literature, or defection, as used more generally in the game theory literature. While in contract, the term opportunism denotes deceitful or selfish behaviour, in European regulatory relations the term carries no such meaning. The possibility of behaving opportunistically is simply a device for conceptualising the journey from Brussels back home to the national capital. A treaty, a directive, or an implementing rule contains multiple commitments to reallocate public resources, favour certain domestic constituencies over others, and subscribe to certain ideals over others. It is not easy for national regulators — part of entirely different political and administrative apparatuses — to honour these commitments. Likewise, the renegotiation of the incomplete terms of the European instrument represents a fresh opportunity for regulators to advance national interest and hence behave strategically through the use of asymmetric information and bargaining tactics.

The Example of Free Movement of Broadcasting Services

In 1998, the British government banned the porn programme ‘Eurotica Rendez-Vous Television.’ The satellite broadcaster, a Danish firm, challenged the British decision in national court and the Commission’s decision upholding the British ban in the Court of First Instance.²⁸ The Danish firm was unsuccessful in both venues. In this section, I use the *Eurotica Rendez-Vous Television* case and the legislative framework for trade in broadcasting services to illustrate the institutions, norms, and beliefs critical to European integration. Only through a combination of iterated games, monitoring, sanctions, credible commitments, alternative governance mechanisms, and trust has a common market in television programming gradually developed and Danish broadcasting reached, at least some of the time, British viewers.

(eds), *Trust & Reciprocity* (New York, Russell Sage Foundation, 2003) 49-54.

²⁸ Case T-69/99 Danish Satellite TV (DSTV) A/S (Eurotica Rendez-Vous Television) v Commission [2000] ECR II-4039.

The story of free movement of porn shows starts not with *Eurotica Rendez-Vous Television* but with the EC Treaty in 1957. Article 49 ECT guarantees free movement of services, including broadcasting services. However, the numerous national rules on matters such as advertising, local and national content requirements, and public decency prevented television shows produced for one market from reaching other markets. Only a handful of cases challenging trade-restrictive national rules were brought before the Court of Justice and in only one was the foreign broadcaster successful.²⁹ Therefore, in 1989, the member states negotiated the Television Without Frontiers Directive, laying down certain common rules on cultural policy, television broadcasting of films, advertising, protection of minors, and hate speech.³⁰ A member state must ensure that national broadcasters respect the directive's common rules and, in return, national programming can circulate freely throughout the other member states. Because the directive contained only a skeletal framework for broadcasting regulation, national regulators agreed, in the text of the directive, to periodically review its application and to negotiate more precise terms where experience showed that national regulatory differences continued to block the free circulation of programming.³¹

Disputes over the meaning of the terms of the Directive are settled through amendments to the basic legislation, interpretive rules, enforcement consultations and, sometimes, in court. Following the periodic review described above, a number of amendments were negotiated in 1997.³² A committee of national broadcasting regulators regularly confers and hammers out

²⁹ See Case 352/85 *Bond van Adverteerders v Netherlands* [1988] ECR 2085; Case 262/81 *Coditel SA v Cine-Vog Films* [1982] ECR 3381; Case 62/79 *SA Compagnie generale pour la diffusion de la television v Cine Vog Films* [1980] ECR 881; Case 52/79 *Procureur du Roi v Debauve* [1980] ECR 833.

³⁰ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23.

³¹ *ibid*, art 26.

³² European Commission, Report on Application of Directive 89/552 (May 1995); Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L202/60.

differences that surface in the Directive's application.³³ A programme which, according to the receiving member state, should have been prohibited by the transmitting state because it breaches the Directive's standards may be banned after regulators in the receiving country consult with regulators in the transmitting country.³⁴ Whether the national act represents a permissible public policy measure, in furtherance of the Directive's rules on public decency, or an illegal discriminatory trade barrier, may be highly contested, not least because the Television Without Frontiers Directive does not lay down standards on pornography and violence harmful to minors.

In other words, the very meaning of the Directive is worked out in enforcement negotiations. The Commission takes part both in negotiations over more precise standards in the committee of national broadcasting regulators and in the interpretation and application of such standards in individual cases, but its authority is not well-defined. As chair of the committee, the Commission representative does not have a vote. In disputes over national programming bans, the Commission is notified of the ban and is required to ensure the compatibility of the ban with terms of the Directive, but the legal effect of the Commission's finding remains unclear.³⁵

Returning to the *Eurotica Rendez-Vous Television* case, the Danish Satellite and Cable Board licensed the broadcaster of the pornography programme.³⁶ The UK Secretary of State for Culture, Media and Sport, however, believed that Eurotica Rendez-Vous Television contravened the Directive's prohibition on pornography harmful to minors, notified the Commission to that effect and, upon receiving no response from the Danish authorities, banned the programme.³⁷

³³ Directive 89/552/EEC as amended by Directive 97/36/EC, above n 32, art 23a.

³⁴ In regulatory schemes without safeguard clauses, however, the Court has found that other regulators may not dispute enforcement of the standard through export or import bans. See Case C-594 *Hedley Lomas* [1996] ECR I-2553.

³⁵ Above, n 32, Directive 97/36/EC, art 2.2a; Case T-69/99 *Danish Satellite TV (DSTV) A/S (Eurotica Rendez-Vous Television) v Commission* [2000] ECR II-4039, para 10 ('[b]y an act referred to as a decision . . . the Commission took the view that the measures adopted by the Member State concerned were not discriminatory . . .').

³⁶ The programme, Eurotica Rendez-Vous Television, was produced in France, subscriptions were sold to viewers by Rendez-Vous, a company with offices in France and Luxembourg, and the channel was broadcast by way of satellite by DSTV, a Danish company.

³⁷ The relevant provision of the Directive reads:

The Commission later found the Secretary's decision to be consistent with the Directive, since the measure did not discriminate against Danish broadcasters and was appropriate for protecting minors under the principle of proportionality.³⁸ The Danish broadcaster (DSTV) challenged the Secretary's Order in UK court and contested the Commission's decision in the Court of First Instance but was unsuccessful in both venues. The UK High Court found that the Secretary of State had exercised his discretion reasonably in determining that Eurotica Rendez-Vous was harmful to minors.³⁹ The Court of First Instance rejected the challenge to the Commission's decision on justiciability grounds. The Court found that the Directive entrusted national governments with licensing and pornography decisions, not national governments in conjunction with the Commission or the Commission alone. Therefore, the Commission's decision did not have a 'direct' effect on DSTV: the decision was 'limited merely to pronouncing ex post facto on the compatibility with Community law of the [UK] Order.'⁴⁰ DSTV was harmed by the British administration's decision to prohibit the programming, not by the Commission's finding of compatibility, which, in the Court's view, simply allowed the national act to stand. DSTV's only remedy therefore lay against the British government in national court.⁴¹

Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence. Directive 89/552/EEC as amended by Directive 97/36/EC, above n32, art. 22. Interestingly, even in a globalised, high-technology world in which activities like satellite broadcasting can move effortlessly between borders and escape the control of government, national authorities have not entirely lost their ability to regulate. In this case, since the programming was encrypted before being beamed via satellite, it could only be viewed with a receiver decoder and a smart card at the consumer's home. Under the Foreign Satellite Service Proscription Order, it became an offence to supply the equipment, advertise, or publish programming times in connection with Eurotica Rendez-Vous Television..

³⁸ See Case T-69/99 Danish Satellite TV (DSTV) A/S (Eurotica Rendez-Vous Television) v Commission [2000] ECR II-4039, para 10.

³⁹ R v Secretary of State for Culture, Media and Sport ex parte Danish Satellite Television A/S and Rendez-Vous Television International SA [1999] EWHC Admin 132 (12 February 1999). The administrative law grounds considered by the court were: necessity, proportionality, Wednesbury reasonableness, the duty to give reasons, and discrimination on the basis of nationality.

⁴⁰ Case T-69/99 Danish Satellite TV (DSTV) A/S (Eurotica Rendez-Vous Television) v Commission [2000] ECR II-4039, para 27.

⁴¹ This is the question of reviewability which is distinct from standing even though they both are jurisdictional issues and fall under art 230. Even if a Community act is found to be reviewable, the party bringing the challenge may not have standing, ie be the correct party to bring the action, because he or she is not individually affected.

Lessons for European Governance

This discussion of the regulatory framework for broadcasting services highlights several aspects of European governance. Most importantly, bargaining among national regulators characterises every phase of the decision whether to allow a television show to circulate freely. Regulators negotiate the Treaty article, the Directive, the standards, and the application of the standards. To translate this into the conceptual language of a national polity, in the European Union regulators negotiate everything from the constitutional article, to the legislation, to the administrative rules, to the enforcement of those rules. It is misleading to frame the decision to ban Eurotica Rendez-Vous Television as routine ‘enforcement’ or ‘implementation’ of the rule contained in the Treaty or the Television Without Frontiers Directive. While concepts such as enforcement and implementation are tied to organisational hierarchy, there is in Europe no prime minister who can tell the Danes to ban Eurotica Rendez-Vous or the Brits to accept it. There is no political superior armed with the formal and informal constitutional tools typically used in ensuring a certain level of commonality in interpreting and applying broadly worded norms. No ‘European’ prime minister can remove recalcitrant administrators, shift budget priorities, deprive uncooperative elected officials of party funds, or damage professional reputations.⁴² Of course, not even in a domestic polity are the law on the books and the law as applied the same, but the distance between the norm and the reality and the process by which the norm becomes a reality are fundamentally different in Europe. Because European governance is about repeated regulatory exchanges, whether British viewers will get to see any Danish porn depends on cooperation between British and Danish regulators in hammering out the thorny issue of what is legitimate trade in services and what is corruption of minors.

⁴² For a comparison of the different constitutional doctrines that shape US federalism and EU governance, see D Halberstam, ‘Comparative Federalism and the Issue of Commandeering,’ in K Nicolaidis and R Howse (eds), *The*

Second, the exchange dynamic characterises everything from formal, inflexible legal instruments to informal understandings as to interpretation. The more formal the terms of the bargain, the higher the stakes, since those terms may be given greater weight by the courts and be extremely difficult to change. Likewise, the more formal and law-like the instrument, the greater the influence of actors other than civil servants—actors such as ministers, parliamentarians, interest groups, and courts—since the significance of the decision, as well as the simple fact that a decision is being made, is more readily apparent. But the core integration process—regulatory cooperation—remains the same.

Third, integration of the European market for broadcasting services depends on strategies of reciprocity, cooperation and trust among regulators. European regulators engage in repeated exchanges, both within the same policy area, as the broadcasting example demonstrates, and across different policy areas. Consequently, they can credibly threaten defection with defection. If one party cheats on a promise, for instance Britain blocks Danish broadcasting because it contains a kiss then Denmark might next block programming from Britain containing a racial slur.’ The British reason, that the programme ‘offended public decency,’ would appear to be a pretext for promoting British over Danish programming, and might be followed by a similarly questionable Danish ban, based on the claim that a racial slur is ‘incitement to hatred on grounds of race.’ The same tit-for-tat logic applies to successive bargaining rounds on, say, what constitutes ‘safe’ programming. Should one party fail to renegotiate an incomplete term in the Directive in good faith, for instance the British regulator on the comitology committee exaggerates the national abhorrence for pornography in setting standards on pornography harmful to minors, then when it comes to setting standards for programmes which can cause incitement to hatred, the Danish regulator might choose to exaggerate the strength of her

domestic neo-Nazi movement. Over time, through repeated exchanges, the credible threat of defection might also be supplemented by beliefs of trust. When repeated dealings allow regulators to demonstrate a commitment to reciprocity, they may begin to cooperate without attention to the next round or threat of retaliation, simply because they believe that other regulators will also do so. This is what analytical sociologists would call trust.

Fourth, the Commission, litigants and courts constitute the essential institutional apparatus, without which regulatory cooperation would advance only slowly or not at all. They play a critical role in providing reliable information on cooperation or defection and eventually in sanctioning defection. National regulators make decisions on implementation and enforcement in part in anticipation of being sued and, once a lawsuit is brought, courts can interpret European instruments to favour European over national interests. Regulators from one country trust regulators from other countries because they know they are subject to the same constraints. Nevertheless, given the complexity of administering the common market, the Commission and the courts can only facilitate, not actually force, cooperation.

The role of the judiciary in this account of integration may, coming from a jurist, sound surprisingly limited. It is therefore important to be clear about the exact reasons for these limits. Because litigation is expensive and jurisdictional rules are restrictive, plaintiffs may have a hard time getting into court and calling their national governments to task for maintaining discriminatory rules. Sometimes plaintiffs simply fail to raise points of European law.⁴³ The authority of the Commission and the Court of Justice is still not foolproof.⁴⁴ National courts do not always make preliminary references or apply European law. National governments do not always comply with decisions of the Commission or rulings of the ECJ. Courts and governments

2001).

⁴³ See Case C-430/93 Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten [1995] ECR I-4705.

may sustain reputational and other costs when they do not follow the case law of the Court of Justice or abide by Commission decisions, but that does not mean that they actually comply. To rephrase the problem in American ‘legalese,’ a frustrated Court of Justice cannot issue a writ of mandamus, ordering the national judge or official to comply or else face imprisonment for contempt of court.

The more circumscribed role for courts in this account of integration is also linked to the regulatory bargains they are charged with enforcing. Courts face two significant institutional hurdles in establishing uniform sets of rights under European law. First, even when the legal instrument is complete, information on cooperation or defection is sometimes knowable only to national regulators. Administrative decision making is notoriously invisible and difficult to police, even for courts operating in the very same national tradition as an administrative agency. It is therefore unrealistic to expect that they will be able to discern whether, say, the British Secretary of State was protecting the legitimate interests of British children or the illegitimate interests of his broadcasting industry. To illustrate the problem of observability and verifiability in contract law, Steven Shavell uses the example of a contract between a photographer and a couple for taking photographs on their wedding day.⁴⁵ Whether the photographer develops a stomach ache on the day of the wedding is certainly relevant to the contract, but unless the condition is very severe, only the photographer will know whether she has a stomach ache. Even if the couple could also know, say from her tone of voice when calling to cancel on the morning of the wedding, it would be difficult to prove in court. Likewise, in European law, whether European standards are being applied impartially to both domestic and foreign producers, or are

⁴⁴ On the difficulties of establishing judicial authority in the Community, see JHH Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403. On the difficulties of establishing the Commission’s authority, see K Van Miert, *Le marché et le pouvoir* (Editions Racine, Paris, 2000).

⁴⁵ S Shavell, *Foundations of the Economic Analysis of Law* (Cambridge, Harvard University Press, 2004) I am thankful to Henry Hansmann for bringing the problem of information in contract enforcement to my attention,

being interpreted in the spirit of the legislation, is difficult for a court to discern. The responsible national administration will know, and other national administrations— given their repeated dealings and familiarity with the regulatory area— might very well know, but proving defection in court can be difficult or even impossible. In *Eurotica Rendez-Vous Television*, the UK court reviewed the administrative record, found that Secretary of State had personally viewed the Danish programming to make the determination under the Directive, and upheld the ban. Yet how sure can a court be that, faced with identical British programming, the Secretary's decision would have been the same?

Moreover, to the extent that the legal instrument is incomplete, courts are reluctant to intervene and force an exchange upon the parties in which one regulator is required to renounce authority to another. The Treaty and European laws contain open-textured language which leaves room for conflicting national regulation. Courts are often reluctant to impose one national approach over another in what would amount to finding an agreement to harmonise when, for that particular good or service, no such agreement had in fact been reached.⁴⁶

On this point, it is helpful to recall that neither the Commission nor the courts in the *Eurotica Rendez Vous Television* case decided the question of what type of pornography is harmful to minors under the Television Without Frontiers Directive, and neither chose to exercise its authority to require the Danes to ban the programming or the British to accept it. The terms of the Directive were ambiguous and the Danish authorities were allowed to exercise their discretion to license *Eurotica Rendez-Vous Television*, and the British to ban it. This deference to administrative interpretations of broadly worded statutes is typical of the

together with the possibility of using rules of evidence to alleviate information problems, addressed in the last section of this chapter.

⁴⁶ For another skeptical view of the courts' ability to achieve market integration, see M Everson 'The Crisis of Indeterminacy: An 'Equitable' Law of Deliberative European Administration?' in C Joerges and R Dehousse (eds), *Good Governance in an 'Integrated' Market* (Oxford, Oxford University Press, 2002). Everson, however, focuses on the doubtful moral authority of the courts in settling regulatory matters.

relationship between courts and administrative agencies. Nowhere in Europe do judges, in reviewing public decision making, decide whether the government made the right decision. They do not ask whether the scientific facts were accurate or the agency's interpretation of the legal standard correct. In the UK, judges examine government decisions for 'reasonableness,' in France for 'manifest error of evaluation,' and in Germany for 'abuse of discretion.' Given the institutional limits of courts, until British and Danish regulators decide otherwise, they will continue to agree to disagree and a common market in programmes like Eurotica Rendez-Vous will not exist.

Another lesson to draw from European regulation of broadcasting services is that, through repeat interactions, players are not only assured of cooperation, but they develop more robust definitions of what is cooperation and what is defection. Over time, the players learn to recognise a wider range of national regulatory activity as either 'cooperation' or 'defection.' This is the equivalent of striking a series of more detailed bargains to fill in the terms of the incomplete contract initially negotiated. One might think of European governance in this regard as a process in which an initially small core of covered activity—both of regulator and regulated—gradually expands through repeated regulatory interactions, and in doing so squeezes out purely national decision making. From the perspective of one of the 15 member states, this is a process in which a large ring is drawn; the activity outside of the circle is proscribed by the European norm, while the activity within the circle is purely discretionary and thus a matter of national choice. As integration progresses, the ring tightens and the zone of national autonomy is squeezed. The more loosely defined the norm, written or unwritten, the smaller the core of covered activity, while the more fine-grained the norm, the larger the core. And even though the norm may become more fine-grained, it does not necessarily result in harmonisation or uniformity; indeed it might require pluralism, since, over time, different national practices come

to be recognised as protecting similar values. Through this process, regulators as well as the national communities in which they operate develop European as opposed to purely national conceptions of interest and value. Nevertheless, as long as regulators remain part of different political, administrative, and cultural elites, at the margin of the expanding core or the narrowing ring, they will continue to behave strategically.

To illustrate once again with the broadcasting example, the British regulator wishes to promote her broadcasting industry while, at the same time, not incur the wrath of angry parents who believe that their children are being corrupted by pornography. The same goes for the Danish regulator. They negotiate the Television Without Frontiers Directive. The Directive says nothing as to what type of programming is likely to be harmful to minors. It seems pretty clear that, for example, documentaries on World War II, on the one hand, or bestiality, on the other, should be covered under the Directive: the British regulator must license documentaries on World War II, regardless of their origin, while the Danish regulator must not license programming with bestiality, regardless of its origin. But what about matters in between? British and Danish parents may have different views as to what type of shows will disturb children, but how different are those views? Perhaps British parents can only know their views once they have actually been exposed to Danish broadcasting since, for longstanding historical reasons, an equivalent British industry never developed. In their dealings with one another, in negotiating, say, encryption requirements for certain types of shows or, in banning certain programming as in the *Eurotica Rendez-Vous Television* case, the British regulator will legitimately resist renouncing her authority over programming which offends her parent population, albeit at the expense of her broadcasters, and vice versa for the Danish regulator. At the same time, the regulator might defect by exaggerating the sensitivity of parents to certain types of shows which happen to be foreign, or by simply scrutinising foreign broadcasts more

rigorously than local ones. In these repeated dealings, as regulators renegotiate the boundaries separating legitimate retention of regulatory authority from illegitimate discrimination against foreign broadcasters, they develop European values concerning the types of influences likely to be harmful to child development.

The lessons learned from the regulation of broadcasting apply to virtually every area of European policy making and administration. Regulatory cooperation and trust are critical to everything from monetary policy, product safety, food safety, telecommunications, the designation of protected labels, licensing of genetically modified organism, pharmaceuticals, sex and race discrimination, and more.⁴⁷ This regulatory dynamic is critical to European instruments and institutions which, when viewed from the traditional perspective of a nation state, would suggest centralised as opposed to fragmented authority. A Council and Parliament directive, a Commission implementing rule, even a Commission decision, is generally the product of consultation among national regulators, not the bureaucratic decision making of a single public administration. The Commission (most visibly in those areas where comitology committees exist), European agencies, and even the European Central Bank operate on the basis of regulatory cooperation rather than administrative hierarchy.⁴⁸ To the extent that these European institutions exercise administrative authority—and it is important to keep in mind that the

⁴⁷ For an especially comprehensive and acute analysis of shared administrative authority, see S Cassese, *Lo spazio giuridico globale* (Gius. Laterza & Figli, Bari, 2003) and S Cassese, 'Il diritto amministrativo europeo presenta caratteri originali?' (2003) 1 *Rivista trimestrale di diritto pubblico* 35. See also G della Cananea 'I procedimenti composti dell'Union europea' (paper presented at conference held at Università di Roma 'La Sapienza' 8 April 2003); C Joerges, 'Law, Science and the Management of Risks to Health at the National, European and International Level—Stories on Baby Dummies, Mad Cows and Hormones in Beef' (2001) 7 *Columbia Journal of European Law* 1; G Majone and M Everson, 'Institutional reform: independent agencies oversight, coordination and procedural control' in O De Shutter et al (eds), *Governance in the European Union* (Brussels, European Commission, 2001) (telecommunications, pharmaceuticals, foodstuffs, and electricity).

⁴⁸ On the decentralised nature of the European Central Bank as compared to the US Federal Reserve, see S G Cecchetti and R O'Sullivan, 'The European Central Bank and the Federal Reserve' (2003) 19 *Oxford Review of Economic Policy* 30. For a comprehensive and illuminating analysis of the 'joint exercise of Community functions' through European agencies, see E Chiti, 'Decentralized Integration as a New Model of Joint Exercise of Community Functions: A Legal Analysis of European Agencies' (2003) *European Public Law Review* (forthcoming, copy on file with author). See also G Majone, 'The Credibility Crisis of Community Regulation' (2000) 38 *Journal of Common Market Studies* 273.

majority of what are called agencies only have information gathering responsibilities—they are significantly constrained. The Commission, the European Medicinals Evaluation Agency and the European Central Bank rely heavily on national administrations, both for information, in the form of technical expertise and self-reporting, and for decision making, in that most measures must be approved by a majority of national regulators on the committees.⁴⁹ Moreover, with the possible exception of competition law and anti-fraud investigations,⁵⁰ no European institution has powers of direct application and enforcement of European law. Thus, regulatory cooperation of the sort which occurs under the Television Without Frontiers Directive is critical in virtually all European policy areas.

RELATIONSHIP OF THE COLLECTIVE ACTION APPROACH TO OTHER THEORIES OF EUROPEAN INTEGRATION

The collective action understanding of European governance draws upon the institutionalist tradition in international relations scholarship, but it also develops new concepts based on my observation of the institutions which have facilitated an unprecedented level of cooperation among EU member states. This is not the place to survey comprehensively the vast literature in both international relations and European integration. But, to give a better idea of what enlargement means for European governance through collective action games, I briefly situate my approach in the canon and, in doing so, relate my assessment of enlargement to the other

⁴⁹ The only European institution which does not fit this mould is the European Office for Harmonization, which operates as an administrative tribunal. The European officials who staff the Alicante headquarters decide, through an adversarial process, whether a given design or logo should be awarded a European trademark, and the parties may appeal the finding to the Court of Justice.

⁵⁰ However, even when Commission officials investigate competition law infringements and claims of embezzlement of Community funds, they must act through local administrative authorities in obtaining search warrants and conducting other enforcement activities. See Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) [2003] OJ L1/1, art 20.6.

contributions in this volume.⁵¹ First, I review the intergovernmental analysis of European integration and explain that the regulatory trust approach uses many of the same game theory tools, but sees a greater role for sector-specific regulators and their incremental development of European norms. I then sketch the neo-functional alternative and show how this paper, while sharing certain similarities, places greater weight on national politics in explaining common market integration.

Intergovernmental Theories of European Integration

In international relations, policy areas like trade, environmental protection and defense are routinely framed as prisoner's dilemma or other types of games, in which states would do better cooperating, yet, because of the structure of the interaction, fail to do so. One of the purposes of international regimes is to alleviate collective action problems by providing states with information on cooperation and defection, making it more likely that defectors will suffer

⁵¹ In this contribution, I conceptualise European governance with the limited purpose of explaining what makes European institutions work and deriving predictions and prescriptions for enlargement. Although terms like 'cooperation,' 'reciprocity,' and 'trust' in everyday usage carry normative overtones, I do not employ them in that sense here. I do not address the question of whether the process of regulatory cooperation is a legitimate one or whether the end result of cooperation, namely the single market and other areas of collective governance, is always a desirable one. My conceptualisation, however, is relevant to normative theories of European administration in that it suggests that the combination of indeterminate legal instruments and the absence of bureaucratic hierarchy give rise to an administrative system defined by regulatory negotiation. Therefore, to the extent that normative assessments are derived from the procedural aspects of transnational regulatory cooperation, as opposed to the substantive learning specific to certain types of regulatory cooperation, this paper shows that such normative assessments are broadly applicable to European governance. For instance, if as Christian Joerges argues, national regulators engage in deliberative supranationalism when they sit on comitology committees, then they also do so when applying European norms at home. See C Joerges, 'Deliberative Supranationalism—Two Defences' (2002) 8 *European Law Journal* 133; C Joerges and J Neyer, 'From Intergovernmental Bargaining to the Deliberative Political Process: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273. And if national regulators engage in experimentalism in developing policy targets and alternative means of achieving those targets through the Open Method of Coordination, so too do they in drafting market-creating harmonisation measures. See C Sabel and J Cohen, 'Sovereignty and Solidarity in the EU' in J Zeitlin and T Trubek (eds), *Work and Welfare in Europe and the US* (Oxford University Press, New York, 2003). This is not to deny that classic instruments like directives and regulations are different from the new instruments of Council guidelines and Commission reports but to say that they fall along a continuum. On OMC, see G de Búrca, 'The Constitutional Challenge of New Governance in the European Union' (2003) 28 *European Law Journal* 814 and J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the EU' (2002) 8 *European Law Journal* 1.

retaliation and that cooperators will benefit from cooperation in kind.⁵² An international secretariat with a full time staff and adequate funds can monitor individual countries and disclose information on their behaviour to other countries, which can then reciprocate either through cooperation or defection. In this vein, some scholars employ a thicker model of the domestic political process and the transnational mobilisation of private actors to argue that a defecting country can expect to face pressure not only from other states, but also from local and foreign interest groups, social movements, foreign lender banks, and so forth.⁵³ In certain, rare cases, an international secretariat is authorised to make definitive determinations as to whether states have defected or cooperated and to decide upon an appropriate sanction. For instance, the World Trade Organization Secretariat conducts periodic reviews of individual countries for compliance with the WTO agreements (the so-called Trade Policy Review Mechanism), while the WTO Dispute Settlement Body decides on defection and the level of retaliation warranted. By facilitating repeat plays among states and providing assurances of monitoring and sanctioning, the international regime guarantees that, in the short run, states will not engage in opportunism and that, in the long run, they will improve common, national interests.

The intergovernmental perspective has particularly influenced one line of thought on the reasons for the establishment of the European Community and on the role that European institutions currently play in making the common market work. The leading proponent of this view in the American academy, Andrew Moravcsik, argues that substantive and institutional dimensions of each of the major agreements in the history of the European Community can be

⁵² R Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, Princeton, 1984); R Axelrod and R Keohane, 'Achieving Cooperation Under Anarchy: Strategies and Institutions' in K Oye (ed), *Cooperation under Anarchy* (Princeton, Princeton University Press, 1986).

⁵³ In the international law literature, see A-M Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 *Columbia Law Review* 1907; HH Koh, 'Transnational Legal Process' (1994) 75 *Nebraska Law Review* 181; LR Helfer and A-M Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273.

explained as the result of state interest.⁵⁴ The member states sought to enhance their collective welfare by agreeing to pool sovereignty in certain policy areas, while at the same time using their relative bargaining positions to alter distributional outcomes. For purposes of this chapter, what is most relevant is Moravcsik's characterisation of the institutional innovations in each bargaining round as the consequence of the long term interests of states. He argues that qualified majority voting and the Commission's power of proposal were introduced in the Treaty of Rome because the founding member states wished to credibly commit themselves in those substantive areas where their interests—or at least those of the most powerful member states—converged. In Moravcsik's view, the same was true for the extension of qualified majority voting in the Single European Act and the Maastricht Treaty as well as the establishment of the European Central Bank.⁵⁵ Following in this tradition, Jonas Tallberg argues for an institutionalist understanding of the current role of European institutions in the day-to-day business of European policy administration. He contends that recent improvements in member state compliance rates can be attributed to the role of the Commission and private plaintiffs in monitoring state behaviour and the courts' role in sanctioning member states for non-compliance.⁵⁶ Most recently, Mark Pollack has drawn on game theory analysis of American political institutions to take a close look at the many ways in which the Commission and the Court of Justice exercise delegated powers.⁵⁷ Pollack analyses the enforcement mechanism operated by the Commission and the Court, together with the Commission's agenda-setting and rule making powers. He

⁵⁴ A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, Cornell University Press, 1989).

⁵⁵ *ibid* at 375, 467. G Majone has argued in favour of transferring powers to the Commission and European agencies based on the credible commitment logic. See G Majone 'The Credibility Crisis of Community Regulation' (2000) 38 *Journal of Common Market Studies* 273, 288. However, in his view, national politicians enter into credible commitments to reassure their citizens that they will pursue the long term interest of the polity rather than to reassure one another that they will cooperate.

⁵⁶ J Tallberg 'Paths to Compliance: Enforcement, Management, and the European Union' (2002) 56 *International Organization* 609.

⁵⁷ MA Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda-Setting in the EU* (Oxford, Oxford University Press, 2003).

convincingly demonstrates that the credible commitment logic as well as the need for quick and efficient decision making have influenced the choice of when to delegate powers to European institutions and how to structure such delegations.

The premise of this chapter – that the member states still retain their authority in fundamental ways and therefore regulatory cooperation is critical to European policy making – is heavily influenced by intergovernmental theories. Nonetheless, my approach differs in that I take the grand bargain for what the international relations theorists say it is, nothing more and nothing less. It is a bargain situated in a regime which is still, in important respects, international, not federal, and therefore the shape of the bargain is constantly subject to re-evaluation and reinterpretation. Strategic behaviour continues well after the ratification of the treaty, the coming into force of the directive, and the opinion of the experts committee. My emphasis on the persistence of strategic behaviour in the ‘low politics’ of common market administration leads me to focus on a distinct set of institutions and practices which permit cooperation under conditions of anarchy.

How, then, do the institutions and practices which enable Danish programming to get to British television screens differ from those which led to the commitment to free movement of services in the Treaty or free circulation of television shows in the Directive? Unlike classic institutionalist theory, in which the actors are unitary states, in common market governance the players are civil servants. Their interactions are so frequent that agreement among them is not only memorialised in treaties or secondary instruments, but is also found in informal opinions and unwritten understandings about interpretation. Regulators negotiate not only the substantive meaning of the basic legal norms, but also the procedures through which they decide those substantive meanings. Directives are amended and working party rules of procedure modified so as to alter the balance of power between national regulators and the Commission. Since civil

servants constantly renegotiate the terms governing a policy area, what was a concession in a previous round can become a preference in the current round. In other words, regulators gradually develop a European conception of interest and value, albeit still under pressure from their home governments, elites, and electorates to defect. Moreover, because of their frequent dealings and the dense, common cultural and institutional context in which they operate, regulators can develop trust. Under the right circumstances, they can stop behaving strategically and cooperate, not because of the fear of retaliation or sanctions, but because one party is trustworthy and the other party trusts.⁵⁸

Neo-Functionalist Theories of European Integration

Intergovernmental explanations represent only one strand in the political science literature on European integration. Rather, beginning with Ernst Haas, scholars have believed it necessary to look beyond myopic national interest to understand the development of the common market and European governance. Initially, the combination of technocratic policy entrepreneurs and producer groups were believed to impel integration. Technocrats would capably manage concrete, pan-European problems, and employer associations and trade unions would reap the benefits, leading in turn to political momentum for more technocratic supranational management, followed by more benefits for producer groups, and in turn by demands for more supranational

⁵⁸ My characterisation has a lot in common with Fritz Scharpf's analysis of European governance when acting in what he calls the supranational and joint decision modes. See F Scharpf 'What Have We Learned? Problem-Solving Capacity of the Multilevel European Polity' *Max Planck Institute for the Study of Societies* (Working Paper MPIfG 01 / 4 July 2001). Scharpf notes that European policy making on issues of negative market integration and harmonisation of product and process standards has been conducted mainly through these institutional modes. He claims that the success of European policy making in these areas can be explained as a function of states operating in a classic prisoner's dilemma game, promoting their shared interest in market creation. By contrast, the absence of European-wide welfare policies is a reflection of divergent state preferences for income redistribution and social protection. Given the collective action game premise of this paper, as in Scharpf's analysis, successful administration undoubtedly rests upon shared state interests. My analysis differs mainly in my focus on the institutional dynamics of European administration. Given the importance of repeat plays, regulatory cooperation, and trust, initial agreement over shared interest does not necessarily predict success and likewise, initial scepticism over shared interest does not necessarily predict failure.

management, and so on, in a continuous feedback loop.⁵⁹ The Schuman Declaration is the classic expression of the early neo-functional view: the incremental successes of supranational expert administration would gradually lead to the decline of self-destructive nationalism and the rise of a federal-style European system.⁶⁰

Although this early form of neo-functionalism was largely abandoned in the 1970's, the last 20 years have witnessed a rising tide of scholarship chronicling the power of economic actors, interest groups, courts, and the Commission in pushing forward collective governance where intergovernmental politics would have predicted stalemate. As in the earlier neo-functional literature, the state is eclipsed by supranational institutions and interest groups. According to Alec Stone Sweet and Wayne Sandholtz, the exponents of one of the most highly theorised examples of this scholarship, the process is as follows. Transnational economic actors and other civil society groups which stand to benefit from market liberalisation and, more recently, market-correcting measures, put pressure on supranational institutions (the Commission, the Court of Justice, and, now, the European Parliament) through their litigation and lobbying activities.⁶¹ Those supranational institutions take the lead in establishing new rules and expanding collective governance into new areas. The increasingly dense fabric of rules serves to constrain national governments and to structure future interactions among transnational interest groups and branches of their national governments, on the one hand, and supranational institutions, on the other hand. The rules generate their own dynamic in favour of more European rules, not necessarily for the reasons that classic neo-functionalism posited, ie the

⁵⁹ See J Monnet, *Mémoires* (Paris, Fayard, 1976); EB Haas, 'International Integration: The European and the Universal Process' (1961) 15 *International Organization* 366.

⁶⁰ R Schuman, 'Paris Declaration of May 9, 1950' < <http://dspace.dial.pipex.com/mbloy/hst/schuman.htm> > (17 February 2004).

⁶¹ See A Stone Sweet et al 'The Institutionalization of European Space' in Stone Sweet, A et al (eds), *The Institutionalization of Europe* (Oxford, Oxford University Press, 2001); W Sandholtz and A Stone Sweet, 'Integration, Supranational Governance, and the Institutionalization of the European Polity' in W Sandholtz and A Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford, Oxford University Press, 1998).

growing benefits to certain producer groups, but because once a rule is chosen, the logic of path dependency drives social actors to choose a set of related rules rather than reassess the initial rule.⁶² Much of the empirical research on the Commission, the Court of Justice and national courts, the Council, the European Parliament, and Brussels-based lobbies does not explicitly or implicitly endorse all elements of modified neo-functionalism. Nonetheless, at the risk of over-generalising, the growing consensus is that supranational institutions, and the interest groups and citizens which mobilise around and through them, matter and that they matter more than national political processes.

Like neo-functionalists, I conceive of integration as an incremental process in which previous successes can generate momentum for more collective European governance, albeit among national regulators rather than supranational officials and interest groups. Also, like neo-functionalists, I find that common European interests and values are generated through the daily operation of national and supranational public bodies, and not only through treaty making and direct bargaining among government ministers and heads of state. At bottom, however, my approach differs from neo-functionalism in that I conceive of integration as proceeding through coordination and cooperation among 15 different administrative and political systems rather than the construction of a single, federalist system. In my view, anarchy rather than hierarchy—15 firms engaging in mutually beneficial exchanges rather than a single integrated firm—is still the better metaphor. The continuing importance of national politics cannot be underestimated.⁶³ It should be clear from all that has been said that by national politics I do not mean prime minister

⁶² JA Caporaso and A Stone Sweet, 'Institutional Logics of European Integration' in A Stone Sweet et al (eds), *The Institutionalization of Europe* (Oxford, Oxford University Press, 2001); P Pierson, 'The Path to European Integration: A Historical-Institutionalist Analysis' in W Sandholtz and A Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford, Oxford University Press, 1998).

⁶³ For the different but consistent view that the democratic legitimacy of the European Union continues to flow from national constitutionalism, see P Lindseth, 'Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford, Oxford University Press, 2001).

and government cabinet. Rather, I mean civil servants facing pressure from their governments, electorates, elites, and courts, civil servants who negotiate with other civil servants under similar pressures. In this view of integration, there are certainly interest groups and citizens who benefit from the collective European policies and vindicate such policies through politicians, administrators, and courts. But those European claims are still made primarily through national institutions. The national political process, not the Brussels complex, is therefore able to exert considerable control over the success or failure of such claims.

The corollary of the continuing importance of national politics in my understanding of European governance is the more limited organisational capacity of the two principal supranational institutions, the Commission and the European Court of Justice. To put it bluntly, the Commission, the European Court of Justice, and national courts are not as powerful as some of the literature would have it. As the broadcasting example illustrates, the member states have yet to give the Commission the resources or the authority of a federal administration, complete with full time policy making experts, rule making powers, local branches, enforcement officers, and the power to impose administrative and/or criminal sanctions. With very few exceptions, national regulators sitting and voting on committees, not the Commission acting independently, are responsible for administrative rule making and interpreting primary legislation. And national regulators, acting in consultation with other national regulators and the Commission, are responsible for day-to-day enforcement.

Similarly, the European Court of Justice is still not a federal supreme court.⁶⁴ National courts do not always refer questions of European law to the ECJ and national governments and courts do not always comply with ECJ rulings. Most critically, as discussed in the previous

⁶⁴ As should be clear from the previous section, however, the monumental importance of the Court of Justice cannot be underestimated. See JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403; KJ Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford,

section, courts can only go so far in constraining government action. Judicial review of government action can be demanding, but judges are not institutionally equipped to make many of the value judgments and scientific determinations necessary to apply national and European law. With their background rules of statutory interpretation, procedural rights, and reasonableness, courts may be deciding more than they would like to believe, but they do not actually make decisions for government administrations. Furthermore, to the extent that national governments do not enforce European policies because they choose to dedicate their administrative resources to national priorities, private plaintiffs and courts will not pick up the slack. For a variety of reasons, an American-style litigation culture, in which private plaintiffs enforce regulatory statutes in the absence of government action, does not exist in Europe. The Commission has repeatedly encouraged private plaintiffs to enforce European rules in national courts, in competition law, consumer protection, and environmental law, but it simply has not happened. It is because of the limits of the Commission and European courts—and the resistance of national governments to improving their organisational capacity—that strategic interaction, cooperation, and trust among national regulators remain critical to European governance.

THE COLLECTIVE ACTION ANALYSIS OF THE CHALLENGES OF ENLARGEMENT

The Problem of Integrating New Regulators into Common Market Exchange Relations

A collective action analysis of European governance suggests that the most significant hurdle to a common market in a Europe of 25 will be the establishment of cooperative relations among regulators from new and old member states. There are two principal challenges. First, existing

regulators do not have faith in the capacity of Central and Eastern European regulators to administer the *acquis communautaire*. This could provoke retaliation or sanctions against the new states even where none is warranted, leading to the downward spiral and the defect-defect equilibrium predicted by game theorists. Second, enlargement will be accompanied by a significant shift in power relations between existing member states and the accession states, which could hamper the initiation of cooperative regulatory exchanges.⁶⁵ After enlargement, old regulators (ie regulators in the existing member states) gradually will lose their leverage over their Central and Eastern European counterparts and instead will have to rely on pure reciprocity in their exchanges with new regulators to achieve cooperation. The transition could be a difficult one, for power relations are not conducive to developing either norms of reciprocity or trust. An existing regulator in any one of the numerous common market areas might continue to believe, incorrectly, that she can deprive her Central or Eastern European counterpart of certain benefits within that area on account of the overall advantages of membership. Conversely, because of certain abuses of power during the enlargement process, a new regulator might be too ready to see the legitimate regulatory concerns of old regulators as pretexts for blocking their markets, and respond with administrative trade barriers of her own. In other words, the lack of trust among member states and candidate countries stemming from the pre-accession period, could hamper cooperative regulatory relations and the creation of an integrated market in post-accession Europe.

University Press, 2002).

⁶⁵ On the power dynamic in the enlargement process, see M A Vachudova 'The Leverage of Internationalizing Institutions on Democratizing States: Eastern Europe and the European Union' *Robert Schuman Centre for Advanced Studies* (Working Paper No 2001/33 European University Institute Fiesole 2001) and A Moravcsik and MA Vachudova 'National Interests, State Power, and EU Enlargement' (2003) 17 *East European Politics and Societies* 42.

Lack of Confidence in the New Regulators

The lack of confidence in the ability of Central and Eastern European regulators to effectively implement European law can be traced to a number of sources, some of which are more legitimate than others. From the perspective of common market administration, this accession is particularly difficult for a number of reasons. In each policy area, 10 new sets of regulators from 10 different political traditions, not two or three as in past accessions, will be asked to join European administrative networks. This represents a new set of languages, legal cultures, political systems, and administrative hierarchies, all of which must be understood, in a very broad sense, by existing regulators, as well as by other new regulators. In collective action games, the ability to recognise whether another player is cooperating or defecting is critical and, in the common market after enlargement, that will require learning 10 new administrative and legal traditions, or from the perspective of the new regulators, 24 new administrative and legal traditions. Understandably, European regulators perceive that this will be difficult and will require time.

Furthermore, the new regulators will be asked to cooperate with their counterparts elsewhere in administering a huge legal apparatus covering everything from automobile safety to environmental protection. Only in the Swedish, Finnish, and Austrian accession were new officials integrated into such an extensive set of policy making networks.⁶⁶ The earlier accessions— those of the United Kingdom, Ireland, and Denmark, Greece, and Portugal and Spain— all occurred at a time when the common market was rudimentary and most public policy was still largely national. Officials from those countries, therefore, were involved in developing many if not most of the norms—some of which are inscribed in secondary legislation and implementing rules, others of which are part of informal practice—which they now administer

day in and day out. Central and Eastern European regulators will be asked to jump in, midstream, and learn the rules, written and unwritten, under which they are to exercise their public authority not as ‘Hungarians’ or as ‘Slovakians’ but as ‘Europeans.’⁶⁷

Moreover, Central and Eastern European civil servants have only recently begun to participate in international policy making efforts and thus have not yet developed trust relationships with other European regulators. During the iron curtain years, they were cut off from the robust regulatory discussion in the Organisation for Economic Co-operation and Development (OECD), the Council of Europe, and the different parts of the UN system. Therefore, to the extent that sub-communities of governmental officials develop social capital through interactions in these international settings, it does not yet fully extend to the new regulators. In 1995, when Sweden, Austria, and Finland joined, existing regulators could trust the new regulators because they had demonstrated their commitment in other networks, had contributed to the same academic and policy making journals, and had attended the same conferences. This cannot be said for the Central and Eastern European regulators. Lastly, the discrepancy in administrative and economic capacity which separates the new from the old member states is more significant than in many of the previous accessions. Since the fall of Communism, the accession states have had to rebuild their market economies, their political institutions, their government administrations, and their court systems. Given that implementation of the existing body of European law requires extensive economic and administrative resources, the new member states can expect difficulties.

The accession countries have undergone an extensive and intensely scrutinised process of reform to qualify for enlargement. The annual Commission reports on their progress and the

⁶⁶ Indeed, even then, under Agreement on the European Economic Area signed in 1991, Swedish, Finnish and Austrian regulators had already been participating in common market administration for a number of years.

⁶⁷ There has already been some collaboration under the Europe Agreements but it will be much more significant once accession occurs.

regular visits of West European experts to verify implementation are a remarkable and distinctive feature of this accession. After almost a decade of supervision and monitoring, the Commission became satisfied that most of the *acquis*, in most of the countries, had been transposed, that is, had become law on the books. It became satisfied that, with a few notable exceptions, basic human rights, democracy, and the rule of law were respected by governing elites in the enlargement countries. Nevertheless, the big question on everyone's mind remains how the law on the books will work on the ground.⁶⁸ As Gunter Verheugen, Commissioner for Enlargement, said in the aftermath of the accession negotiations, the accession countries 'must continue to work 'ceaselessly' to put in place the administrative capacities and ensure that they will be able to implement the *acquis* correctly from 1 May 2004.'⁶⁹ To this end, the Commission has established an 'enhanced monitoring process,' which will continue up to enlargement. Through this program, the Commission will monitor enlargement countries' application of the *acquis*, requiring regular reports from the governments and sending experts to inspect their customs offices, slaughterhouses, dairies, local administrations, and so on.⁷⁰

One sign of the collective nervousness in Brussels is the existence of far-reaching safeguard clauses in the Accession Treaties.⁷¹ The Commission, responding to concerns in the member states and reservations expressed in the Council's working group on accession, proposed a special safeguard clause in October 2002. Safeguard clauses have been included in previous accession treaties, but they were generally limited to economic disruptions caused by the common market. The traditional clause allows new and old member states to block exports

⁶⁸ The Commission's 2002 report on Hungary is indicative in this regard. Hungary is generally considered one of the most advanced in meeting the criteria for membership. Yet even Hungary is not viewed as having the judicial and administrative infrastructure required for full and vigorous enforcement of the *acquis*. See European Commission, 'Regular Report on Hungary's Progress Towards Accession' (2002) 109-10, 137.

⁶⁹ Agence Europe no 8388 (29 January 2003) 14.

⁷⁰ Agence Europe no 8313 (7 & 8 October 2002) 8; Agence Europe no 8376 (11 January 2003) 7.

⁷¹ See Act of Accession, arts 37, 38, 39. I am grateful to Xavier Lewis for bringing the safeguard clauses, as well as a number of other points of European law, to my attention.

and imports temporarily in order to protect producers in vulnerable sectors of their economies and allow them to adjust gradually to the competition of the common market. By contrast, the safeguard clauses that are found in the Accession Treaties cover home and justice affairs as well as the common market, and they authorise member states to take measures not only to protect their economic operators, but in response to any shortcoming in the implementation of the *acquis*. Moreover, the safeguard clauses only apply as against the new member states, meaning that a Central and Eastern European country is not authorised to block trade with an existing member state on the very same grounds of failed implementation. Specifically, the clauses permit member states, with the approval of the Commission, or the Commission on its own initiative, to stop trade with a new member state in the face of evidence that the new member state is delinquent in administering the *acquis*. The clause may be invoked during the first three years after enlargement, one year longer than provided for in earlier drafts.⁷² However, unlike earlier drafts, the final version contains significant restrictions on the measures which may be taken in response to a new member state's implementation lapse: there must be a 'serious breach' or 'imminent risk of such breach' and the measures taken in response must be 'proportional,' may 'not be invoked as a means of arbitrary discrimination or a disguised restriction on trade,' and must 'be maintained for no longer than strictly necessary.'⁷³

Shift in Power Relations

The remarkable structural changes which have been achieved so far in the enlargement countries are largely the consequence of the enormous power differential separating existing and new member states.⁷⁴ This power relationship, known in the political science literature as

⁷² Agence Europe, no 8313 (7 & 8 October 2002) 8; Agence Europe, no 8315 (10 October 2002) 5; Agence Europe no 8317 (12 October 2002) 10; Agence Europe, no 8328 (27 October 2002) 7.

⁷³ Act of Accession, art 38.

⁷⁴ See MA Vachudova, 'The Trump Card of Domestic Politics: Bargaining Over EU Enlargement' (2001) 10 *East European Constitutional Review* 93.

asymmetrical interdependence,⁷⁵ enabled the former effectively to impose extensive domestic reform on the candidate countries, all on the strength of the benefits that the accession states could expect from EU membership. Although existing member states will gain improved access to new markets, enlargement countries stand to gain significantly more through the combination of access to markets and subsidies from the Common Agricultural Policy and the Structural and Cohesion Funds.⁷⁶ However, once May 2004 comes and goes, and the candidate countries accede, the power differential will dramatically narrow, for existing member states will no longer be able to threaten candidate countries with exclusion from the common market. Within each of the many policy areas in which the EU governs, if agreement among existing and new member states is to be reached, it will have to rely more upon the mutually beneficial nature of the particular decision, rather than upon the carrots and sticks that informed the accession process. Policy making in consumer safety, telecommunications markets, environmental protection and other policy areas will resemble a discrete set of collective action games that can only succeed if all the players strictly adhere to reciprocity norms.

The shift from strategies of power to strategies of cooperation will not necessarily be easy. Sociological studies have shown that patterns of behaviour learned in strongly hierarchical communities can be difficult to change. Thus, even though social and political relations can become more egalitarian, citizens following old habits of distrust may face difficulties engaging in collective governance. Robert Putnam's discussion of Italian regional government is instructive on this point.⁷⁷ Before unification in 1865, southern Italy had been under the Bourbons for centuries, with feudal dependence and domination characterising most social and

⁷⁵ See RO Keohane and JS Nye, *Power and Interdependence* (Boston, Little Brown, , 1977); A Moravcsik and MA Vachudova, 'National Interests, State Power, and EU Enlargement' (2003) 17 *East European Politics and Societies* 42.

⁷⁶ *ibid* at 48.

⁷⁷ See RD Putnam, RD (1993) *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, Princeton University Press, 1993).

political relations. By contrast, many parts of northern Italy had been governed as independent city-states, run by oligarchies of powerful merchants and nobility. Even though they fell far short of modern definitions of democracy, they were more egalitarian and participatory in nature than the Bourbon kingdom to the south. According to Putnam, this difference continues to the present day and explains the difference in performance of local government. In the south, kinship, clan and patronage are the operative social networks, whereas the North is rich in civic associationalism, in the form of mutual aid societies, bird-watching societies, trade unions, and so on. In Putnam's account, kinship and patronage networks undermine democratic government precisely because of the distrust they foster. Patronage relations are a particular form of exchange relation—the powerful gives a job to the powerless in return, say, for a vote—but they do not build the social capital necessary for democratic governance. This is because the powerless party, knowing the significant risk that the powerful party will abuse her power, protects herself accordingly, through guile and other devices. One party has significant incentives to exploit, and the other party to shirk. In stark contrast, civic associationalism supports democratic governance because it requires cooperation in achieving collective goals among true equals.

This account of the failure of local democracy in southern Italy serves as a cautionary tale for Europe. The power relations that characterised enlargement were not conducive to learning the norms of reciprocity or to developing the trust that will be critical in the post-enlargement era. Indeed, there is every reason to believe that power was abused on occasion during the accession process, with all of the unfortunate consequences for the socialisation of old and new regulators.⁷⁸ Some candidate countries complain that member states unfairly suspended trade or

⁷⁸ As Elinor Ostrom conceptualises the problem, a player enters a prisoner's dilemma game already subscribing to a particular norm of reciprocity—which might be a norm against reciprocity—based on previous experiences. If, in the past, a player was never rewarded for cooperation with cooperation, or a player was never punished for defection with defection, then she is likely to subscribe to a weak norm of reciprocity and it will be more difficult to achieve

illegitimately blocked market liberalisation under the Europe Agreements.⁷⁹ While the Europe Agreements were intended to gradually remove trade barriers, both tariff and non-tariff, so as to establish a single market in certain areas before full EU membership, in some instances member states invoked safety concerns as a pretext for keeping their markets closed to Central and Eastern European goods, in what for trade lawyers amounts to a ‘disguised restriction on trade.’ There has likewise been grumbling about certain heavy-handed behaviour of Commission officials and Western experts in monitoring implementation of the *acquis*.

Consequences of Regulatory Defection for Post-Enlargement Europe

As argued earlier in this chapter, cooperative regulatory relations are critical to virtually every area of European administration. Without cooperation among national officials in developing and applying European norms, the free trade and policy guarantees contained in the Treaty and harmonisation directives would have little force. Yet a lack of confidence in the ability of new regulators to implement European law, together with habits developed during the enlargement process, could make both old and new regulators too ready to defect in their regulatory exchanges. Civil servants in existing member states may too readily deny access to their markets on health and safety grounds and, in so doing, invoke the safeguard clauses in the Accession Agreements. New regulators, no longer constrained by the fear of being excluded from the common market, and influenced by their experiences under the Europe Agreements, may too readily perceive safeguards as illegitimate protectionism rather than legitimate public policy, and respond with their own form of defection. So, for instance, even though the new safeguard clauses are unavailable to new regulators as a means of blocking imports from existing member

cooperation in strategic game situations. E Ostrom, ‘Toward a Behavioral Theory Linking Trust, Reciprocity, and Reputation’ in E Ostrom and J Walker (eds), *Trust & Reciprocity* (New York, Russell Sage Foundation, 2003) 49-54. This type of experience, by definition, is more likely where there is an imbalance of power.

⁷⁹ See MA Vachudova, *Europe Undivided: Democracy, Leverage and Integration After 1989* (Oxford, Oxford University Press, 2004) (describing trade disputes over steel and livestock).

states, new regulators could very well use administrative practices such as the discriminatory application of licensing standards or selective enforcement procedures to achieve much the same result. If this were to happen, regulatory relations could very quickly deteriorate, as game theorists have shown, into a defect-defect equilibrium, in which the benefits of a common market are not realised by either new or existing member states. Yet, moving the game to a cooperate-cooperate equilibrium could be extremely difficult because it would require one regulator, in the face of retaliation and defection, to take a leap of faith and cooperate, perhaps not one time but many times. In other words, even though there might be high-level commitment among European governments to enlargement, success in each of the hundreds of common market areas depends on whether regulators are able to establish cooperative relations in the immediate aftermath of enlargement. Too many defections at the outset could compromise the establishment of the common market for years to come.

Let me cite enforcement of the Television Without Frontiers Directive to illustrate the dangers of regulatory defection. Among the current member states, Germany is the best known for restricting racist hate speech to protect the personal dignity right guaranteed under Article One of the German Basic Law. Under the Directive, if Germany believes that another member state has failed to guarantee that broadcasting transmitted from its territory is free of hate speech, it may block broadcasts from that member state.⁸⁰ Suppose a nationalist government takes power in one of the new member states and the German broadcasting authorities doubt that its broadcasting authority will clamp down on neo-Nazi programming. They then see that a television documentary on the Holocaust from that country is being shown in Germany. According to the German authorities, it contains incorrect figures on concentration camps and an interview with David Irving, a notorious Holocaust denier. Therefore, even though the

⁸⁰ Above, n 32, Directive 97/36, art 2a.

documentary also provides footage on concentration camps and interviews with Holocaust survivors, they decide to ban it. The question then becomes, was this an instance of defection, in which the German authorities simply assumed that the authority in the new members state would fail to clamp down on pro-Nazi programming, and denied that country the benefits of trade in broadcasting services, or was it an honest disagreement on the value of the documentary, in which case it was cooperation? If the broadcasting authority in the new member state believes it to be defection, that state might retaliate by banning German television programmes on similarly plausible, but untrue, policy grounds. The same downward spiral could occur in any number of areas.

Solutions to the Risk of Defection in Common Market Regulatory Exchanges

Self-Awareness of the Structure of the Game

There are a number of possible antidotes to the risk of European regulatory relations degenerating into a defect-defect equilibrium after enlargement. First is self-awareness in both old and new member states that an enlarged Europe can only be governed through mutually beneficial exchange among equals rather than through power dynamics. Even after May 2004, the old member states will be able to exercise leverage over Central and Eastern European elites because they will still be dependent upon the EU for aid,⁸¹ because access to the common market will be granted only in stages,⁸² and because their right to participate in the Schengen area and monetary union remains to be decided. Eventually, however, if enlargement goes as planned, the accession states will participate in European governance on the same footing as all other

⁸¹ At the conclusion of the accession negotiations in December 2002, the Commission calculated that, in the first three years after enlargement, the net gain to future member states would be EUR 13.66 billion (the difference between credits received from the Community budget in CAP funds, structural funds, and other programs and central and eastern European countries' contributions to the Community budget). Agence Europe, no 8363 (16 & 17 December 2002) 14.

countries, at which point reciprocity will be the only way to administer the common market. Regulators in current member states, therefore, should quickly get into the habit of acting as if they are playing collective action games— games in which reciprocity and trust are vital for the success of the enterprise. Central and Eastern European regulators should also get into the habit of trust, and not let their pre-enlargement experiences colour their dealings within administrative networks post-enlargement.

Monitoring and Sanctioning

Second, the traditional role of the Commission and the courts as honest brokers in detecting defection and sanctioning breaches will be especially important in the first years after accession. It is critical that the institutions which do the monitoring and sanctioning be perceived as independent and impartial. The Commission is charged with reviewing and approving national safeguard measures, whether authorised by specific safeguard clauses, such as the one found in the Television Without Frontiers Directive, or by the general safeguard clauses found in the Accession Treaties. Yet immediately after accession, when the composition of Commission's civil service will still be heavily weighted toward the old member states, the guardian will itself need a guardian. Even the Commission might be perceived by enlargement countries as partial, and hence it will be important to ensure that all of its decisions in safeguard cases are subject to judicial review. As might be recalled, in *Eurotica Rendez-Vous Television*, the Court of First Instance found that it did not have jurisdiction to review the Commission's finding in which the Commission allowed the British ban of foreign programming to stand. This meant that the Danish broadcaster could not contest the Commission's finding in the European court system.⁸³

⁸² This is not unique to the central and eastern European accessions. Free movement of workers between Greece, Spain, and Portugal and the rest of the European Community only came into effect a full 10 years after they first joined.

⁸³ Depending on local law on the reviewability of non-binding administrative acts, the Danish broadcaster might have been able to object to the Commission's decision in the UK judicial proceeding. The objection, however,

Given that it is absolutely critical that the decision to block trade with a new member state be perceived as fair, economic actors should be allowed to challenge Commission decisions in the Court of First Instance, when these decisions directly enable the existing member states to adopt trade-restrictive measures.

To monitor and sanction defection in Europe's system of repeated regulatory exchanges, the Commission and the courts also need good information. When old regulators invoke the safeguard clauses against goods and services from enlargement countries, the honest brokers will need to know whether new regulators broke their promise to administer the *acquis* or whether the old regulators' suspicions were stereotyped and unfounded. Did the new regulator defect by failing to enforce a European standard or did the old regulator defect by hindering free trade? One solution to this problem is the use of rebuttable presumptions to induce national authorities to come forward with information on their administrative decision making, when that information is difficult for other regulators and the Commission to gather independently.

In the American usage, a rebuttable presumption places the burden of production and the burden of persuasion on one of the parties to the litigation. That is, the court will presume certain adverse facts against a party, unless the party produces evidence to the contrary and persuades the court that the evidence on balance does not support the court's adverse presumption. Although the European Court of Justice does not employ the language of rebuttable presumptions, burdens of production, or burdens of persuasion, it relies on this device in its jurisprudence. One might say that the single market is built on the rebuttable presumption that goods and services which circulate in one member state are safe for circulation everywhere. That is, once the Commission or a litigant shows that a measure hinders trade and hence is

would almost certainly have faced the same fate as the challenge to the UK Order. On that claim, the High Court ruled against the broadcaster on the substance (proportionality and discrimination) and refused to refer the question to the Court of Justice on the ground that Community law was clear. See *R v Secretary of State for Culture, Media*

covered by Article 28, the member state must come forward with evidence and arguments showing that there is a legitimate public purpose for imposing the regulatory burden under Article 30 or the jurisprudence on mandatory requirements. The same rebuttable presumption applies when the Commission acts as the honest broker. National administrators are required to report trade-restrictive measures and, once they do so, they must also prove that the measure is justified on legitimate public policy grounds.

Clearly, the decision to place the burden on the country maintaining the public health or safety restriction is related to a belief that the presumption most accurately approximates the state of affairs, on the ground, in the member states. The Court's famous *Cassis de Dijon* decision, which prompted the mutual recognition approach to harmonisation, stands for the proposition that most national regulatory measures hinder intra-European trade without any compensating welfare-enhancing effect.⁸⁴ In the Court's analysis, if one member state believes certain products and services to be safe, then the presumption is that they are safe for consumption everywhere. To some extent, this is based on assumptions as to the protectionist motives of national legislators. More importantly, in *Cassis de Dijon*, the Court recognised that many of the national regulations at issue were adopted at a time when governments and markets were still purely local and therefore the welfare-enhancing potential of trade and the interest of foreign traders were never even considered in the law making process.

Although rebuttable presumptions are often selected on the basis of their shorthand function, they can also be used to elicit information where there is good reason to believe that one party has better access to the relevant evidence than the other.⁸⁵ At this juncture in the

and Sport ex parte Danish Satellite Television A/S and Rendez-Vous Television Internationale SA [1999] EWHC Admin 132 (12 February 1999), aff'd [1999] 3 CMLR 919 (Court of Appeal, Civil Division).

⁸⁴ Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

⁸⁵ RJ Allen, 'Presumptions in Civil Action Reconsidered' (1981) 66 *Iowa Law Review* 843, 854. See also I Ayres and R Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *Yale Law Journal* 87, 97.

common market, the Commission and the Court would do well to move away from the first rationale for presumptions and toward the second one. The question should not be ‘are products which circulate in Europe generally safe or unsafe’ but ‘which party has the best information on the safety of the product?’ Since the Single European Act, the assumption that regulatory measures are imposed for protectionist rather than safety reasons has less currency. National administrators have negotiated over two hundred harmonisation measures in which they have relinquished authority and shown a willingness to define common standards that accommodate both free movement principles and public interest concerns. At the same time, enlargement brings a real need for information on enforcement of regulatory standards. Existing regulators have legitimate reasons to distrust the ability of new regulators to administer the *acquis*. On questions such as whether a Ministry of Agriculture has conducted the appropriate number of veterinary spot checks, or has brought criminal prosecutions against farmers who fail to report suspicious cow deaths, that administration has the best information. Therefore, should a national agriculture regulator ban the import of cattle and adduce some evidence of dangerousness, the presumption in the Commission or the Court should be that the ban is legitimate. The burden would then be on the exporting administration to come forward with the information showing that it took all of the necessary precautions.

In regulatory exchange relations involving enforcement, the question of whether promises have been kept and cooperation has been practiced, is buried in the everyday activity of a foreign administration. A rebuttable presumption against the party claimed to have infringed a consumer safety, environmental protection, or public health standard might shed light on national administrative practices which are largely invisible to outsiders. Especially given old regulators’ unfamiliarity with the relevant Central and Eastern European regulatory systems, the information

on health and safety practices which would be revealed in this manner could assist with regulatory cooperation.

Reciprocity

The last insight that the collective action approach can bring to enlargement is the prescription in favour of only one ‘tit’, not two, for every ‘tat’.⁸⁶ If a member state defects, other member states, on their own accord, and the Commission and Court of Justice, in policing them, should respond only with defection in kind. Punitive, as opposed to purely reciprocal, defection will produce a rapid deterioration of the collective action game, inducing further defection, rather than cooperation in the next round.

In law making and rule making, tempering retaliation is a matter for national regulators and the Commission. Imagine, for instance, that the 25 are negotiating a directive on the liberalisation of local public transport and a member state fails fully to disclose information on local conditions or to make concessions. The ‘tit’ for the ‘tat’ of failing to bargain in good faith might be the voting to override the country’s interest in maintaining a form of transport which accommodates legitimate local needs, but also makes it more difficult for non-national service providers to compete. Tempering retaliation is also a recipe for the Commission, which mediates among member states in proposing and re-proposing legislation and rules, and rewarding or punishing countries in successive versions of the proposals. Whether the decision to ignore the local need is punitive or proportionate can only be discerned by those deeply familiar with the policy issues, the interests of the different countries, and the bargaining history of the measure or set of measures.

⁸⁶ Given that it is difficult to quantify ‘tits’ and ‘tats’ in the world of European governance, this approximates Robert Axelrod’s advice that the best strategy ‘might be to return only nine-tenths of a tit for a tat.’ R Axelrod and RO Keohane, ‘Achieving Cooperation Under Anarchy: Strategies and Institutions’ in K Oye (ed), *Cooperation under Anarchy* (Princeton, Princeton University Press, 1986).

In the realm of enforcement, the Court of Justice and national courts also become involved. Suppose an existing member state invokes an Accession Treaty's safeguard clause in the belief that livestock from a Central or Eastern European state are unhealthy. Suppose further that the Commission reviews the evidence and finds, using the presumption that I recommended above, that the new regulator has not proven the livestock to be healthy. Information on defection or cooperation has been gathered, and there is agreement that defection has occurred. The question then becomes what type of response is warranted. The reciprocity or 'tit-for-tat' principle would suggest banning trade only in the particular item or service which is dangerous and only for as long as it is dangerous. One enforcement lapse, without further evidence, should not constitute grounds for suspecting enforcement lapses in other goods and services and blocking trade in those common market areas as well. Over-reaction can easily cause common market governance to degenerate into a defect-defect equilibrium, with bad faith health and safety arguments being advanced as pretexts for keeping out goods and services in competition with local producers.

The Court's case law from other accessions strongly suggests that the safeguard clauses in the Accession Treaties will be narrowly interpreted and that a strict reciprocity strategy among member state regulators will be required. Because of the primacy of the four fundamental freedoms, the Court interprets derogations in accession treaties narrowly.⁸⁷ A whimsical moment from the Greek Advocate General captures the Court's approach. The case involved the interpretation of a derogation in the Finnish accession agreement in which certain goods were exempted from customs union tariff rates for a transitional period.⁸⁸ The Court, following the Advocate General, significantly narrowed the scope of the provision, finding that it applied only

⁸⁷ See, eg, Case 231/78 *Commission v United Kingdom* [1979] ECR 1447, para 16, Case 77/82 *Peskeloglou v Bundesanstalt für Arbeit* [1983] ECR 1085, para 12, Case 58/83 *Commission v Greece* [1984] ECR 2027, para 9, Case 11/82 *Piraiiki-Patraiki v Commission* [1985] ECR 207, para 26.

⁸⁸Case C-233/97 *KappAhl Oy* [1998] ECR 8069.

to goods imported into Finland directly from third countries and not to those same goods when imported into Finland via another member state. In arguing for this approach, the Advocate General said:

I believe, however, that the risk of deflection of traffic is ultimately to be considered as less serious than the risk of opening the bag of Aeolus and blowing unchecked off course the observance of a fundamental freedom—the free movement of goods—by broadly interpreting Article 99 of the Act of Accession, a provision which, because of its derogating nature, is to be interpreted narrowly. A wide interpretation could act as a Trojan horse, circumventing the fundamental principle of Community law of the free movement of goods, as enshrined in the Treaty.

This preoccupation with the free movement of goods and services in the enlarged common market will significantly limit old regulators' use of the safeguard clause.

The Court also requires that trade-restrictive measures, such as bans imposed under the safeguard clauses, satisfy the principle of proportionality. Under proportionality, a national administrator's protective measure will not be permitted to inhibit trade with the enlargement country any more than is strictly necessary for protecting the enacting state's legitimate public health or safety objective. Where the exchange among regulators can be framed as access to markets in return for protection of common health or other public interest standards, proportionality essentially amounts to the reciprocity principle. Therefore at least in those areas where the Court is institutionally capable of policing, national regulators will most likely be held to a strategy of reciprocity, thus keeping the risk of punitive, and ultimately self-destructive retaliation, low.

Possible Evolution of European Administration

Ultimately, the difficulties of cooperative regulatory relations in a Europe of 25 might be so great that, in certain policy areas, the member states will take the unprecedented step of relinquishing their enforcement authority to a single European administration. To return to the contract analysis in the beginning of the paper, this would be the equivalent of internalising certain transactions within a single firm rather than relying on contractual relationships with multiple firms. In certain policy areas, defection might impose such high costs that credible commitments, credible threats, reciprocity, and trust simply will not suffice. Even if the players establish a cooperate-cooperate equilibrium, the risk of defection is never completely eliminated and may be too great for the players to bear. In other policy areas, the temptation to defect might be so great that a cooperate-cooperate equilibrium is always precarious. In such instances, the authority which currently resides in 15 separate bureaucracies can be expected to migrate—albeit in the face of great resistance—to a single European organisation. National regulators will be willing to relinquish their own enforcement authority in return for greater control over enforcement elsewhere.

To a limited extent, administrative centralisation has already occurred in the fields of monetary policy and food safety. The European Central Bank and, now, the European Food Safety Authority have been given the resources and the permanent staff necessary to develop their own technical expertise. They are not therefore as heavily reliant on self-reporting and national expert opinions as are the Commission services and agencies like the European Medicinal Evaluation Agency and the European Environmental Agency. The particular character of defection in these issue areas explains the institutional choice. In the food safety area, as the BSE crisis demonstrated, the costs of regulatory failure in one country can be overwhelming for other countries due to the political saliency of the problem and the ease with

which the regulatory problem circulates. In monetary policy, likewise, there are significant externalities attached to the use of figures on national economic performance to influence interest rates and the use of inflationary fiscal policies to influence money supply.

With the increased difficulty of cooperative regulatory relations following enlargement, one can expect even greater centralisation in food safety and monetary policy as well as in other areas, such as pharmaceutical regulation. For instance, in food safety, the member states might decide to establish European veterinary inspection offices in each of the member states, staffed with civil servants chosen and trained in Brussels and financed through the European budget. By contrast, areas like customs and the distribution of agricultural and regional development subsidies can be expected to continue operating through coordination among independent regulators. The consequences of, say, a customs officer misclassifying a product for purposes of assessing duties or a local administrator taking bribes in the distribution of subsidies are very different from those of a health ministry official approving a new drug application without adequately assessing its side effects.

CONCLUSION

Debates on the institutional reforms necessary in anticipation of enlargement have focused largely on the problem of gridlock. How will European institutions decide anything with 25 members when it is already difficult with 15? Much attention has been devoted to the allocation of votes among small and large countries and to the dynamics of qualified majority voting. Voting rules are undoubtedly important, but they are not enough, since no matter how many harmonisation directives are passed in Brussels, without a series of cooperative relations among national administrators, a single market will not exist. Establishing such cooperative relations is a far more daunting task than negotiating one-time changes to the European institutional

apparatus. By bringing to light the anarchic world that European regulators inhabit, I mean not only to emphasise the magnitude of the problem, but also to suggest the strategies and institutional mechanisms which can foster cooperative regulatory relations among new and old member states. Sometime in the distant future, they might also serve as the foundation for the less concrete, yet in some respects more powerful, quality of trust.

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