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## THE AUTONOMY OF NATIONAL LEGISLATURES IN THE EUROPEAN UNION AND MERCOSUR

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*Paper Presented at the European Community Studies Association*  
*May 31-June 2, 2001*  
*Madison, Wisconsin*

### **Abstract**

The impact of the common markets, and the European Union (EU) in particular, on the policy-making, administrative, judiciary, and territorial autonomy of nation states is to date fairly well explored. Less explored, by contrast, is the impact of common markets on the legislatures of nation states. This paper proposes that common markets produce supranational law that displaces national legislatures as the traditional legislative bodies of the nation state. The displacement, however, varies in intensity across legislative arenas. An analysis of the legislative output of the EU and Mercosur for the years 1958-1999 and 1991-1999 respectively (a total of over 1,800 relevant laws were coded) reveals an interesting pattern to this displacement. Intense displacement occurs above all in arenas directly and, due to spillover, indirectly related to the trade of physical goods. These include the environment, transportation, and public health. But in other arenas, including labor, capital, and services, states retain significant substantive and institutional integrity. The protectionist tendencies of states in these arenas, along with the geopolitical and commercial nature of common markets, probably explain such limitations. The implications of these findings for state strength in spheres other than legislation are discussed.

## INTRODUCTION

In all cases, whilst the government subsists, the *legislative is the supreme power*: for what can give laws to another, must needs be superior to him.

— John Locke, Second Treatise of Government

Classical and contemporary scholars have described in great detail the multifaceted and intimate relationship between early national capitalist economies and nation states.<sup>1</sup> Despite their varying views on the nature of that relationship, most scholars have seen the nation state as a stable and legitimate form of political organization during that period. The arrival of supranational economies, whether on a global or regional scale, has spurred a heated debate about the continuing stability of nation states. Numerous scholars have argued for an inevitable decline of the nation state; others have posited an opposite, strengthening trend. In most cases, the evidence has concerned only some of the key facets of the relationship between supranational economies and nation states.

This chapter expands our understanding of that relationship by examining the impact of common markets, the European Union (EU) and Mercosur in particular, on the autonomy of national legislatures. The findings paint a complex picture of change. The legal systems of common markets deprive national legislatures of control over numerous areas related to the trade of physical goods and, through time, some areas seemingly unrelated to the objectives of common markets, such as the environment. But, unpredictably, national legislatures retain significant control over numerous aspects of services, labor and capital, despite the centrality of those areas to common markets. Moreover, they retain undisputed control over numerous other areas, such as culture and education. We notice, in addition, that the drivers of these observable trends, which include an internal logic of spillover but also the protectionist tendencies of member states in areas such as banking, are complex and often contradictory. Rather than necessitating the decommissioning of national legislatures, then, the arrival of common markets may be giving rise to an enduring division of labor between the supranational and national levels. In the conclusion, we contemplate whether such a change might entail, at the same time, a parallel strengthening of the national executive branch and other national functions.

## EXISTING ANALYSES OF STATE AUTONOMY IN SUPRANATIONAL ECONOMIES

Scholars have generally formulated polarized conclusions about the impact of supranational economies on the strength of nation states. In most cases, only the most obvious facets of that relationship have come under consideration. When thinking of the *global economy* as the independent variable, scholars have primarily focused on the impact of mainly commercial aspects of that economy --- above all surges in the international trade of goods and investments --- on the ability of states to continue formulating *economic policy* independently --- above all in areas related to exchange measures, the actors participating in exchanges, and domestic issues such as unemployment, inflation, and subsidies.

Those proposing the decline of nation states have accordingly described how the global economy irreversibly assumes control of the following exchange measures: tariffs, exchange rates, and protectionist practices.<sup>2</sup> They have described the increasing freedom with which multinational corporations and international trade organizations act and pursue their objectives at the expense of nation states' regulatory authority.<sup>3</sup> And they have noted how the macroeconomic policies of states have converged<sup>4</sup> along certain conservative lines.<sup>5</sup>

Defenders of the nation state have responded in kind. One such group has argued that national economic borders exist and that indeed much remains in the ambit of national rules for economic exchange.<sup>6</sup> A second group has forcefully argued for the increased role states play in limiting and making possible the activities of supranational and sub-national economic actors.<sup>7</sup> And a third group has argued that genuine domestic policies continue to exist.<sup>8</sup>

Scholars considering the impact of *regional* and especially *common markets* on nation states have also been polarized in their conclusions and selectively focused in their analyses. In their case, however, attention has turned to the impact of supranational structures on the continuing ability of nation states to engage freely in *international policy-making*, in economics as well as other areas. Those espousing a decline in state control have hence argued, from neo-institutionalist and functionalist perspectives, that supranational processes, rules, and institutions have pushed states into undesired agreements in areas such as the environment or social policy.<sup>9</sup> Those arguing otherwise -- rational choice theorists and intergovernmentalists --- have argued that those agreements reflect national preferences.<sup>10</sup>

A small set of scholars of regional and common markets has begun exploring arenas other than international policy-making to assess the impact of those markets on nation states. By and large, these scholars have taken more ambivalent positions about the future of nation states. The works of Burley and Mattli<sup>11</sup> and Guibernau,<sup>12</sup> with their respective focus on judiciary autonomy and regional decentralization, are important examples of *partial institutional* transformations affecting nation states. In the same spirit, Mény et al.<sup>13</sup> observe a partial 'fusion' of national administrative structures in the EU.

Scholarly work is thus gaining some sophistication in its investigation of the future of the nation state in supranational economies. Nonetheless, one can still easily notice that the impact of supranational markets on *national legislatures* has largely gone unexamined.<sup>14</sup> Yet, such bodies have lied at the heart of the nation state for centuries. As Weber himself argued, legislatures have had the fundamental task of regulating the relationships between civic society and public authority, and between elements of civic society.<sup>15</sup> Locke, in his *Second Treatise of Government* thought of the legislature as "*the soul that gives form, life, and unity, to the common-wealth.*"<sup>16</sup> Generations of writers thereafter echoed his sentiments.<sup>17</sup>

Common to all characterization of the legislature has been its freedom from both other branches of government, such as the judiciary or executive, and non-state forces, such as supranational organizations. In the words of Locke, "in all cases, whilst the government subsists, the *legislative is the supreme power*: for what can give laws to another, must needs be superior to him."<sup>18</sup> Such freedom, moreover, has always been interpreted as crucial to modern, democratic states. It has been ensured through two

venues. First, as pluralists and liberal theorists have emphasized, elected representatives have owed their positions to the populace (or some of its segments) rather than members of the executive or judiciary.<sup>19</sup> Second, as statist and institutionalists have argued, the domestic legal structures and institutional arrangements which legislators inhabit have themselves been largely insulated from external factors.<sup>20</sup>

Common markets risk making the historical autonomy of national legislatures a thing of the past. These markets require that the four basic elements of any economy – goods, labor, services, and capital – circulate free from tariff and non-tariff barriers. They also impose a Common External Tariff (CET): a single tariff barrier vis-à-vis the outside world preventing any one participant from having special access to external resources. To realize these objectives, common markets promulgate obligatory laws intended for faithful adoption into national legal systems. These laws, as Mercosur's constitution and the European Court of Justice have made clear, supercede any competing national law:

The Common Market Council will promulgate Decisions, whose adoption will be obligatory for the Member States . . . . The Common Market Group will promulgate Resolutions, whose adoption will be obligatory for the Member States . . . . the Member States agree to undertake any measure necessary to ensure, in their respective countries, the realization of Mercosur norms. (Articles 9, 15 and 38 of the Protocol of Ouro Preto of 1995)

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply . . . the executive force of Community law cannot vary from one state to another in deference to subsequent laws. (Case 6/64, *Costa vs. ENEL*, [1964] ECR 1141)<sup>21</sup>

National legislatures do not participate in any of the steps required for the production of these laws. Sets of appointed national representatives belonging to the executive branches of their governments or outright members of supranational bodies, such as the European Commission, control the process instead.<sup>22</sup> Pushed outside of the deliberative space in which supranational laws are formulated, domestic legislators have had to passively accept the resulting principles, and play an administrative or executive role for transposition and application. That the principles of supranational laws may coincide with national interests (and thus strengthen states in certain ways, as discussed in the conclusion) of course in no way renders the bypassing of the national legislature any less real. The transformation of national legislatures into obsolete or simply executive entities, and their de facto *abdication* of legislative power to representatives of the executive branch working at the supranational level or to outright supranational actors, is bound to happen even when national interests are served.

Yet, loss of autonomy by national legislatures has not been pervasive. Such a situation would only have occurred in cases where common markets produced laws so comprehensive and powerful that they would replace national authority in every arena. We know, from any cursory review of these laws, that this has not happened. But we know little, however, about the changes that have occurred.

## MEASURING THE AUTONOMY OF NATIONAL LEGISLATURES IN COMMON MARKETS

We may state that national legislatures lose most autonomy in those legislative arenas where supranational law has intruded the most. In those arenas, the presence of supranational law has made national legislative actors and institutions irrelevant, except perhaps for executive purposes. Legislative arenas represent distinct spheres of social actions or the world, such as the environment or industrial production, which are subject to regulation. Arenas can be broken down into buckets to gain additional specificity.

We can identify approximately 25 major arenas comprising 106 buckets representing all areas of traditional national legislative activity.<sup>23</sup> Table 1 identifies the arenas and the associated buckets:

**Table 1: Identification of Legislative Arenas and Buckets Historically Controlled by National Legislatures**

LEGISLATIVE ARENAS		LEGISLATIVE BUCKETS					
		A	B	C	D	E	F
1.	<i>Customs</i>	Classification	Tariffs	Non-tariffs	Border inspection procedures		
2.	<i>Agriculture</i>	Definitions	Production procedures	Subsidies	Third-country trade	Trade	
3.	<i>Fisheries</i>	Classification	Catching restrictions	Processing restrictions	Subsidies	Third-country trade	
4.	<i>Labor &amp; Social Policy</i>	Worker rights (incl. Movement)	Pensions	Unemployment	Migration	Children/ disabled	Housing
5.	<i>Services</i>	Classification	Barriers	Internal and client procedures	State guarantees	Public contracts	
6.	<i>Transportation</i>	Air (infrastructure, safety, procedures)	Water (ibid)	Land (ibid)	General		
7.	<i>Competition</i>	Aid	Unfair practices (monopolies dumping, etc.)	Public unfair practices (ibid)	Public enterprises, privatization		
8.	<i>Taxation</i>	Direct (personal, organizational)	Indirect (personal, organizational)				
9.	<i>Monetary Policy</i>	Freedom of intervention	Exchange rates	Accounting methods	Bank operations	Main instruments	
10.	<i>Capital</i>	Tariffs	Formal (non-tariff) barriers	Security	Classification	Modalities ( terms & conditions, etc.)	
11.	<i>External Relations</i>	International representation	Development aid	International agreements			
12.	<i>Energy</i>	Coal (production, aid, prices)	Electricity	Nuclear	Oil & gas	Other sources/general	
13.	<i>Industrial Policy</i>	Classification	Manufacturing standards	Sectoral intervention	Cooperation		
14.	<i>Regional Policy</i>	Regional rights and responsibilities	Subsidies				
15.	<i>Environment</i>	Air (pollution, protection,	Water	Land	Animals	Forests	General
16.	<i>Consumers</i>	Health & safety	Information	Economic protection	Rights		
17.	<i>Public Health</i>	Protective measures	Intervention measures	Rights	Medical standards		
18.	<i>Science, R&amp;D, &amp; Information</i>	Focus	Funding	Standards	Statistics	Registration of Products	
19.	<i>Education</i>	Primary and middle education	Minimum age	Higher education	Special programs	Safety	Standards (incl. professional standards)
20.	<i>Culture</i>	Funding	Program contents	Museums			
21.	<i>Undertakings</i>	Company law	Intellectual property	Economic & commercial law			
22.	<i>Security Policy</i>	Military	Crime & Prosecution				
23.	<i>Justice/Home Affairs</i>	Civil code	Penal code	Court jurisdiction	Legal rights of individuals	Contracts	
24.	<i>Political System</i>	Constitution	Party structure	Administrative Practices & Structure			
25.	<i>Civic Life</i>	Association	Religion	Property rights	Citizenship	People movement	Women's Rights

Legislative intrusion refers to the presence of supranational law in any one of these buckets. Intrusion varies in intensity. It is precisely such variation that we are interested in measuring. Intensity levels may be said to vary across buckets as a function of coverage and depth. *Coverage* concerns the volume of affected persons, activities, or processes which, out of the total potential volume in a given bucket, is being targeted by supranational laws: 'of all parties, activities, or processes belonging to this bucket, what proportion is being targeted by common market law?'

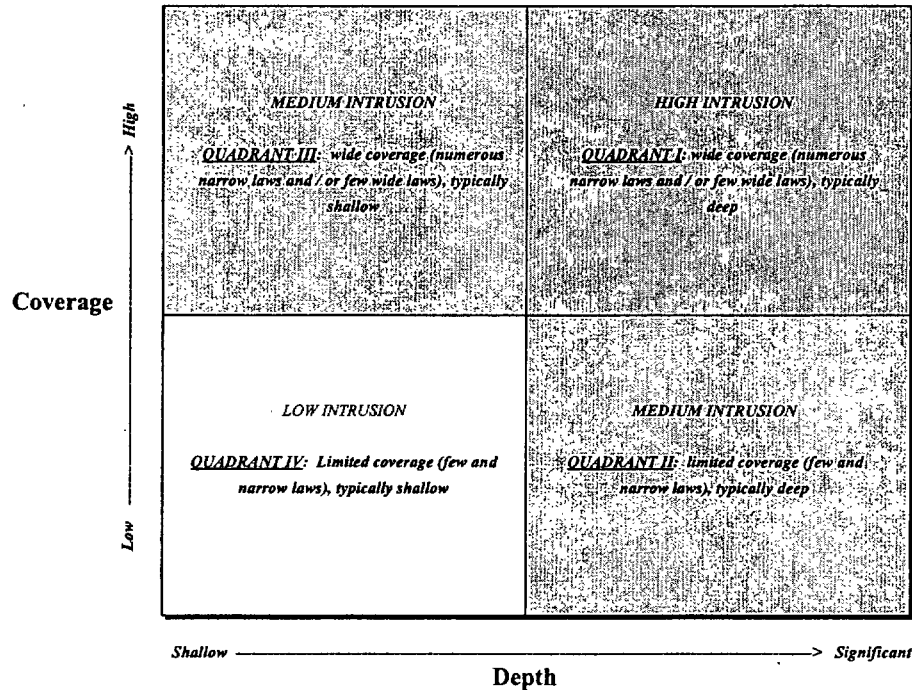
To arrive at an understanding of the coverage of a bucket, each law affecting a given bucket can be measured in terms of its specific breadth: specific, broad, or comprehensive. Specific laws target very few of all the potential targets; broad laws target a sizeable amount of potential targets, though they are short of covering the majority; comprehensive laws target the majority if not all of a bucket. Together, the total number of laws targeting a bucket and the breadth of each law provide us with a good, though surely approximative, understanding of the coverage of supranational law of any given bucket.<sup>24</sup> We can then state that overall high coverage of a topic occurs where 50% of possible targets seem addressed, while overall low coverage occurs when less than 50% of all targets seem to be addressed by common market law. We will then need to turn to depth to understand fully the intensity level with which said laws reach into each bucket.

*Depth* refers to the level of control being exerted in any given bucket. Again, we need to turn first to individual laws for measurement. Shallow laws are those that mandate that nation states accept other member states' definitions of the essence of objects, activities, or agents in any given area, or introduce very small changes in those definitions. Deep laws are those that, by contrast, define the nature of objects, activities, or agents in any given area. Such laws may define, for instance, the nature of beer, research standards in the pharmaceutical industry, or the educational requirements of an architect. Three approximate levels are used to evaluate the depth of individual laws: prevalently recognition-related, partly recognition-related and partly ontological, and prevalently ontological. A comprehensive review of the nature, within any given bucket, of all laws' requirements (mainly recognition-related or ontological) provides us with an indication, again certainly approximative, of the typical degree of depth with which a particular bucket is targeted. We will of course need to keep in mind the breadth of each law when conducting such an exercise to weigh its relative importance in a bucket.<sup>25</sup>

We will thus notice four types of possible intrusion in any given bucket. Heaviest intrusion will occur where high coverage (a large number of narrow laws or a low number of broad or comprehensive laws) and significant depth are observable. Medium intrusion will occur either as a result of low, i.e. selective, coverage but significant depth or high coverage but shallow depth. These two variations of 'medium' will of course indicate very different types of intrusion. Low or no intrusion will be where coverage and depth are low, and nation states retain most, if not all, of their legislative capacity.<sup>26</sup> Secondary works interpreting the legal texts will serve to substantiate the findings of the analysis.

Figure 1 summarizes the different types of intrusion:

Figure 1: Possible Intrusion Levels for a Given Bucket



The resulting analysis can be augmented by a study of the chronological order of intrusion. A sense of the timing of the targeting of different buckets may provide us with hints about future trends and, at a more fundamental level, of the overall logic driving supranational law.

#### HYPOTHESES ON LEGISLATIVE INTRUSION

With insights from existing works in the literature on supranational economies and the nation state, we can posit a priori hypotheses about the nature (intensity and chronological order) of legislative intrusion in common markets. Recall that the literature claims a full, partial, or non-existent decline of national authority either within the realm of economics or beyond as well. We can formulate four hypotheses: a 'strong and pervasive impact' hypothesis, a 'moderate but economics-focused impact' hypothesis, a 'moderate but diversified impact' hypothesis, and a 'weak impact' hypothesis.

According to the first hypothesis, we should witness an irreversible and thorough takeover of the activities of national legislatures on the part of common markets. All areas most intimately related to free trade and a common external tariff are probably targeted first, but intrusion soon expands to all remaining legislative buckets as the initial objectives of the project require, for their fulfillment, the realization of other objectives. The hypothesis states:

*Hypothesis 1: Common markets begin with wide and deep legislative activity in strictly economic buckets related to the trade of goods, services, labor, and capital but, after*



*some time, expand their activities into other apparently unrelated buckets. The national legislature experiences a gradual, continuous decline in most buckets and arenas.*

We can articulate a second, more moderate, hypothesis that begins with the assumption that common markets are by nature economic projects. As such, their legislative requirements may be expected to concern primarily legislative buckets directly related to economic activity: trade, industrial production, movement of goods, and others. We should thus witness the heavy targeting of economic buckets over time, though this may decrease in intensity over time as the work nears completion. The hypothesis states:

*Hypothesis 2: Common markets begin and essentially end with wide and deep legislative activity that is strictly related to buckets concerned with the trade of goods, services, labor, and capital. The national legislature experiences a gradual and continuous decline in those buckets only.*

The third, also moderate, hypothesis recognizes certain limits to intrusion but does not assume that economic buckets alone are targeted, or targeted first. Only certain legislative buckets are targeted, but the nature and chronological order of such targeting are unclear and impossible to predict a priori. A variety of plausible causes could be driving such a pattern, such as nation states' reactions, supranational leadership, the pressure from interest groups, international events, economic and political crises, poor planning, or misguided beliefs. The hypothesis states:

*Hypothesis 3: Common markets produce deep and wide legislation not necessarily related to the principles of free trade of goods, capital, labor, and services. Intrusion, both low or high, is in fact observable in several buckets but it is impossible, a priori, to identify those buckets. There seems to be no chronological order to intrusion.*

The 'weak impact' hypothesis predicts little or no legislative intrusion. There would be, accordingly, little chronological order to notice. The hypothesis states:

*Hypothesis 4: Common markets produce little, if any, legislative output that intrudes with national legislatures. Common market law is primarily recognition-based and addresses only a very few areas of legislative activity. The national legislature remains essentially in control. There will be no observable order of legislative intrusion.*

The next section turns to the European Union and Mercosur to investigate empirically these hypotheses.

#### EMPIRICAL FINDINGS: THE EUROPEAN UNION AND MERCOSUR

The European Union and Mercosur are the two most successful common markets in existence. They are, at the same time, remarkably different in terms of geographic location, length of existence, number of participants, and levels of development. As such, they represent excellent case studies for the unveiling of any general feature of common market law and for generating conclusions about the autonomy of legislatures in common markets.

The European common market began with the formation of the European Coal and Steel Community (ECSC) among France, Germany, Italy, Belgium, Luxembourg, and the Netherlands in 1951. In 1957, the same states signed the two Treaties of Rome — the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) — giving formal birth to the European Community. As Denmark, Ireland, and the United Kingdom (1973), Greece (1981), Portugal and Spain (in 1986), Sweden, Austria, and Finland (1995) joined in different stages, additional treaties, acts, and charters specified gradually clearer common objectives and accelerated the process of unification. In the most important treaty since inception — the 1992 Treaty on European Union (or Maastricht Treaty) — the European Community renamed itself as the European Union.<sup>27</sup>

The EU has depended on *directives* and *regulations* as the main tools for attaining its objectives. Directives, generally espousing important and wide-reaching principles, have required transposition and application (Article 189 (3) of the EEC Treaty). Regulations, typically more subject-specific in their scope, have merely required application.<sup>28</sup> The Commission, a supranational institution composed of 20 appointed commissioners, has been the primary formulator and overseer of the implementation of EU directives. The European Court of Justice, also a supranational institution composed of 15 appointed judges, has been the primary interpreter and enforcer of EU law.<sup>29</sup> The Council of Ministers, an intergovernmental institution composed of national ministers, has had the role of approving legislative proposals. The European Parliament, also an intergovernmental institution of directly elected members, has increasingly played a role in the approval process of legislative proposals.

Mercosur resembles the EU in its reliance on foundational treaties and protocols for its design and objectives, and institutions and laws to attain those objectives. The Treaty of Asuncion of March 26, 1991 gave birth to Mercosur, with Brazil, Argentina, Uruguay and Paraguay as its members. It envisioned that by December 31, 1994 a free trade area for labor, services, goods and capital would be established. After this period, a common external tariff would be specified. The linear and automatic tariff reduction for intra-area trade of physical goods did occur more or less according to schedule and was partly responsible for an increase in intra-area trade from US\$3.5 billion in 1990 to US\$10 billion in 1994. The protocol of Ouro Preto of January 1, 1995 set out to define Mercosur's institutional structure.

Mercosur has only intergovernmental institutions operating on a consensual basis. The Common Market Council (CMC), composed of the ministers of foreign affairs and finance and the heads of state, is in charge of overall leadership and direction and enacts *decisions*. Like EU directives, these tend to be more abstract and principled than other common market legislation and are to be transposed into national law (Article 40, Protocol of Ouro Preto). The Common Market Group (CMG) is composed of four permanent members and the ministries of foreign affairs, the economy, and national central bankers. As the main executive body, its function is to ensure that the larger principles of the CMC's decisions are practically achieved. To do so, the CMG enacts *resolutions*, intended for incorporation into national law as well.<sup>30</sup> Mercosur's Trade Commission (MTC) aids the CMG in the areas of the trade of goods and customs operations. The Joint Parliamentary Commission is composed of representatives from

national legislatures and its task is to ensure proper acceptance of Mercosur law into national legal systems.

For the purposes of this study, 1,850 individual laws were coded along the two critical dimensions --- breadth and depth --- for the period between 1958-1999, with Mercosur beginning in 1991. The EU accounts for 1,302 directives and regulations, while Mercosur accounts for 540 decisions and resolutions.<sup>31</sup> The only laws not coded were repetitions, amendments, and laws in areas already deemed to be under high intrusion. Laws affecting more than one bucket were coded as such.

*The Targets and Intensity of Supranational Intrusion*

Let us consider Mercosur first. Table 2 identifies the buckets that have experienced the most serious intrusion:

**Table 2: Mercosur - Legislative Buckets Under the Most Intense Threat (Quadrant I)**

<i>Quadrant I: Wide and Typically Deep Intrusion</i>	
<ul style="list-style-type: none"> <li>• Customs: tariffs (1B)</li> <li>• Agriculture: definitions, production procedure (2A, 2B)</li> </ul>	<ul style="list-style-type: none"> <li>• Industrial Policy: classification, manufacturing standards (13A, 13B)</li> <li>• Consumers: health &amp; safety, information (16A, 16B)</li> </ul>

Table 2 indicates that heaviest intrusion occurs in buckets directly concerned with the trade of goods. Tariffs for physical goods (1B), agricultural definitions and procedures (2A-B), industrial classifications and standards (13A-B) have all experienced the production of very intrusive and wide-reaching supranational law. An apparently endless stream of regulations, as Hargain,<sup>32</sup> Duran Martinez<sup>33</sup> and other legal scholars have already noted, defines almost all major fruit and vegetable products. Industrial production has been targeted with somewhat less intense, but still expansive and deep, legislation. Resolution 128/96 thus asserts with great precision that cars shall be constructed to comply with specific limits of gaseous emissions and noise pollution. Resolution 88/93 specifies, by contrast, hygiene norms, building specifications, and definitional matters for factories of pharma-chemical products.

The two remaining buckets are indirectly related to the production of goods. These are consumer health and safety (16A) and consumer information (16B).<sup>34</sup> Producers have been put under tight constraints with regard to health and information requirements. Resolution 13/95, for instance, requires producers to use similar procedures for the weighing of meat products. Similar initiatives concern toys, medicines, a host of health products, automobiles, foods, and other consumer products. Resolutions 123/96, 124/96, 125/96 and 127/96 thus offer a comprehensive set of definitions for terms such as 'consumer' and are all intended to serve ultimately as the bases for a consumer's bill of rights. We do not notice, by contrast, comprehensive legislative presence in three of the four areas central to common markets: services, capital and labor.

**Table 3: Mercosur- Legislative Buckets Under Selective but Typically Deep Intrusion (Quadrant II)**

<i>Quadrant II: Selective but Typically Deep Intrusion</i>	
<ul style="list-style-type: none"> <li>• Customs: classification (1A)</li> <li>• Labor &amp; social policy: workers' rights (4A)</li> <li>• Transportation: air, water, land (6A-6C)</li> <li>• Competition: unfair practices , public unfair practices (7B,7C)</li> <li>• External Relations: international representation, international agreements (11A, 11C)</li> </ul>	<ul style="list-style-type: none"> <li>• Environment: air (15A)</li> <li>• Public Health: protective measures (17A)</li> <li>• Science, R&amp;D, Information: standards, information, registration of products (18C, 18D, 18E)</li> <li>• Undertakings: economic &amp; commercial law (21C)</li> <li>• Political System: administrative practices and structure (24C)</li> </ul>

In Table 3, selective though still deep intrusion concerns two buckets directly related to the trade of goods: custom classification of goods (1A) and transportation of goods (6A-C). Resolution 13/98, for instance, is one of dozens of laws seeking to classify objects for the purposes of homogeneous tariff imposition. Decision 2/94 is one of many measures regulating specifying in detail how dangerous goods ought to be handled and transported by air, water, or land.

Almost all remaining buckets deal indirectly with the free circulation of goods. The environment, specifically with regard to air (15A) and thus the polluting activities of manufacturers, unfair practices targeted to manufacturers (7B, 7C), and science-R&D-information standards, statistics and product registration (18C, 18D, 18E) have all been targeted. As to pollution, Mercosur has so far concentrated on the automotive and oil and gas industries, asking manufacturers to ensure that products do not pollute beyond certain limits and that combustibles comply with certain chemical properties. Resolution 36/94 specifies, for these purposes, acceptable combustibles. Decision 11/97, regulating the dumping of goods, exemplifies the approach to fair competition. Selective representation for the purposes of trade of goods with third parties (11A, 11C) is also becoming a reality. With Decision 23/97 and Resolution 32/93, for instance, Mercosur begins trade cooperation with the EU. Other laws give Mercosur representation power with Canada, Bolivia, Chile, and other South American countries. Again, we notice no serious presence in buckets related to services, capital or labor, except for workers' rights (4A), where Mercosur does define some social security rights (health care above all, with Decision 19/97) of workers residing outside their home country.

**Table 4: Mercosur - Legislative Buckets Under Wide but Typically Shallow Intrusion (Quadrant III)**

<i>Quadrant III: Wide but Typically Shallow Intrusion</i>	
<ul style="list-style-type: none"> <li>• Customs: border inspection procedures (1D)</li> <li>• Capital: tariffs and modalities (10A, 10E)</li> <li>• Industrial Policy: sectoral intervention, cooperation (13C, 13D)</li> <li>• Consumer: economic protection, rights (16C, 16D)</li> </ul>	<ul style="list-style-type: none"> <li>• Public Health: intervention measures (17B)</li> <li>• Education: higher education (19C)</li> <li>• Justice, Home Affairs: penal code (23B)</li> <li>• Civic Life: people movement (25E)</li> </ul>

With Table 4 we enter the area of lighter intrusion: laws that barely affect national norms or simply accept the validity of foreign objects, processes, degrees, etc. Such laws have affected certain aspects of capital and, indirectly, labor. We notice some convergence in tariffs and some basic principles of stock market operations (10A, 10E), people movement (25E), higher education degrees (19C), and border inspections (1D). Decision 7/95 and Decision 8/96, for instance, ask for the recognition, not harmonization, of numerous types of higher education degrees, making labor movement a little more of a

reality. Penal code (23B), public health intervention measures (17B), certain forms of sectoral intervention (13C) and consumer protection and rights (16C-D) also appear here.

**Table 5: Mercosur - Legislative Buckets Under Limited or No Intrusion (Quadrant IV)**

<i>Quadrant IV: Limited or No Intrusion</i>	
<ul style="list-style-type: none"> <li>• Customs: non-tariff barriers (1C)</li> <li>• Agriculture: subsidies, third-country trade, trade (2C, 2D, 2E)</li> <li>• Fisheries: all (3)</li> <li>• Labor &amp; Social Policy: pensions, unemployment, migration, children/disabled, housing (4B-F)</li> <li>• Services: all (5)</li> <li>• Transportation: general (6D)</li> <li>• Competition: aid, public enterprises (7A, 7D)</li> <li>• Taxation: all (8)</li> <li>• Monetary Policy: all (9)</li> <li>• Capital: formal (non-tariff) barriers, security, classification (10B-D)</li> <li>• External Relations: development aid (11B)</li> <li>• Energy: all (12)</li> </ul>	<ul style="list-style-type: none"> <li>• Regional Policy: all (14)</li> <li>• Environment: water, land, animals, forests, general (15B-F)</li> <li>• Public Health: rights, medical standards (17C, 17D)</li> <li>• Science, R&amp;D, Information: focus, funding (18A,B)</li> <li>• Education: primary &amp; middle, minimum age, special programs, safety, standards (19A,B,D-F)</li> <li>• Culture: all (20)</li> <li>• Undertakings: company law, intellectual property (21A,B)</li> <li>• Security Policy: all (22)</li> <li>• Justice, Home Affairs: civil code, legal rights of individuals, court jurisdiction, contracts (23A,23C, 23D, 23E)</li> <li>• Political System: constitution, party structure (24A,24B)</li> <li>• Civic Life: association, religion, property rights, citizenship, women's rights (25A-D, F)</li> </ul>

Table 5 includes the majority of buckets. Services (5all) remain untouched,<sup>35</sup> despite their centrality for the realization of Mercosur's objectives. Decision 13/97 announces only the intention of having a free market for services. Capital is unaffected when it comes to formal (non-tariff) barriers (10B), security measures (10C), and classification (10D). Labor, and with it social policy, is unaffected when it comes to most categories (4B-F).<sup>36</sup> The same may be said of fiscal (8all), civic (25A-D, F), and political (24A-B) matters.<sup>37</sup>

We may synthesize our findings by stating that *Mercosur has introduced with the most intensity laws in buckets directly related and indirectly related to the trade of physical goods. A spillover effect may have been responsible for the targeting of indirectly related buckets; additional chronological evidence is needed to confirm this. Buckets related to labor and capital have been targeted generally with very limited incisiveness. Lastly, services and buckets related to social, cultural, political and defense matters have been the least targeted.*

Let us now turn to the European Union. Tables 6-9 show the position of different buckets with regard to intensity:

**Table 6: EU - Legislative Buckets Under the Most Intense Threat (Quadrant I)**

<i>Quadrant I: Wide and Typically Deep Intrusion</i>	
<ul style="list-style-type: none"> <li>• Customs: all (1)</li> <li>• Agriculture: all (2)</li> <li>• Fisheries: processing restrictions (3C)</li> <li>• Labor &amp; Social Policy: workers' rights, migration (4A,4D)</li> <li>• Services: barriers (5B)</li> <li>• Transportation: land (6C)</li> <li>• Competition: private and unfair practices, public and unfair practices (7B,7C)</li> <li>• Monetary Policy: intervention, exchange rate, instruments (9A,9B, 9E)</li> </ul>	<ul style="list-style-type: none"> <li>• External Relations: international agreements (11C)</li> <li>• Industrial Policy: classification, manufacturing standards (13A, 13B)</li> <li>• Environment: air, water (15A, 15B)</li> <li>• Consumers: health &amp; safety, information (16A, 16B)</li> <li>• Public Health: protective measures (17A)</li> <li>• Science &amp; R&amp;D: statistics (18D)</li> <li>• Undertakings: company law, intellectual property (21A,21B)</li> <li>• Civic Life: people movement (25E)</li> </ul>

As with Mercosur, numerous buckets directly related to trade liberalization of physical goods appear here. Customs (1all), product classification and manufacturing standards (13A-B), agriculture (2all), production procedures for fisheries (3C), and other related buckets are all targeted heavily. Michael Mann observed this trend a few years ago: “The content of European law, especially of the secondary law, overwhelmingly concerns the EEC’s two original purposes: trade liberalization and production integration and standardization. It regulates in great detail the *nature* of commodities bought and sold in the Community.”<sup>38</sup> Typical for this area are regulations defining agricultural products and ingredients. Regulation 1748/85, for instance, sets the permissible fat content of maize flour. Also typical are regulations for the proper dimensions, functions, and components of industrial products, such as vehicles, machinery, or food packages.

The majority of the remaining buckets deal indirectly with the trade of physical goods. We see legislation on political representation in the form of international trade agreements (11C), science-R&D-information statistics (18D), land transportation (6C), the environment (15A-B) and consumer information and health & safety (16A-B).

Differently from Mercosur, however, we also notice heavy legislation in the area of labor, especially workers’ rights (4A) and migration (4D). Directive 75/117 on equal pay for men and women, and directives and regulations (like 1408/71) giving workers with jobs the right to live freely in all member states, are good examples. These represent important departures from Mercosur. Importantly, we note the removal of formal barriers for services (5B). We also note intrusion in intellectual property (21B) and monetary policy --- especially in the areas of intervention (9A), exchange rates (9B), and various instruments such as interest rates (9E). Regulation 1467/97, for example, specifies the meaning and acceptability of excessive budget deficits, while Regulation 1466/97 reiterates the convergence criteria for monetary union.<sup>39</sup> Finally, we notice intervention in company law (21A) with principles, such as those of Directive 96/3 specifying capital requirements for investment firms, that are of relevance for companies not involved in the manufacturing or trade of goods.

**Table 7: EU - Legislative Buckets Under Selective but Typically Deep Intrusion (Quadrant II)**

<i>Quadrant II: Selective but Typically Deep Intrusion</i>	
<ul style="list-style-type: none"> <li>• Fishing: catching restrictions and subsidies (3B, 3D)</li> <li>• Services: classification (5A)</li> <li>• Transportation: air, water, general (6A,6B,6D)</li> <li>• Competition: aid, public enterprises and privatization (7A,7D)</li> <li>• Taxation: indirect (8B)</li> <li>• Monetary: bank operations (9D)</li> </ul>	<ul style="list-style-type: none"> <li>• Capital: tariffs, formal (non-tariff) barriers (10A, 10B)</li> <li>• External Relations: international representation (11A)</li> <li>• Industrial Policy: sectoral intervention, cooperation (13C, 13D)</li> <li>• Environment: animals and forests (15D, 15E)</li> <li>• Consumers: economic protection, rights (16C, 16D)</li> <li>• Public Health: protective measures (17B)</li> <li>• Science &amp; R&amp;D: standards, registration of products (18C,18E)</li> <li>• Education: higher education, standards (19C, 19F)</li> <li>• Undertakings: economic and commercial law (21C)</li> <li>• Justice, Home Affairs: penal code, legal rights of individuals (23B, 23D)</li> <li>• Civic Life: women’s rights (25F)</li> </ul>

We notice in Table 7 buckets indirectly related to the trade of physical goods: air and water transportation (6A-B), indirect taxation (8B), consumer protection (16C), protective and intervention measures for public health (17A-B), science and R&D standards (18C), product registration (18E) and certain rights of individuals purchasing consumer products (16D). Typical here are laws like Directive 90/239, which sets the tar-

yield of cigarettes as a way of safeguarding public health. Also present is competition aid (7A), a bucket perhaps more directly related to the creation of a free market of goods.

Again differently from Mercosur, though, we observe an effort to classify some services (5A). In the areas of labor, we see a parallel effort at standardizing the preparation of a few higher education and professional degrees (19F). Directives 84/253 and 80/155, setting standards for certificates for accountants and midwives respectively, offer good examples. Capital appears here as well: aspects of capital investments related above all to movement are targeted (10A, 10B), making the free circulation of investments more of a reality. Hence, Directive 79/279 harmonizes the conditions for admission of securities into stock exchanges. Certain aspects of bank operations (9D) are also affected. Directive 86/635, for example, harmonizes the content and form of consolidated accounts of banks and other financial institutions.

**Table 8: EU - Legislative Buckets Under Wide but Typically Shallow Intrusion (Quadrant III)**

<i>Quadrant III: Wide but Typically Shallow Intrusion</i>	
<ul style="list-style-type: none"> <li>• Monetary Policy: accounting methods (9C)</li> <li>• Energy: oil &amp; gas (12D)</li> </ul>	<ul style="list-style-type: none"> <li>• Regional Policy: subsidies (14B)</li> </ul>

The EU seems careful about targeting buckets with mutual-recognition laws, despite common belief that planners have more recently worked towards mutual recognition. Only a few buckets appear here. Regional subsidies (14B) are somewhat affected. Accounting methods (9C) are mutually recognized (though this might soon change with the advent of monetary union). Energy, especially oil and gas, has been similarly targeted (12D). Hence Directive 76/491 merely requests that states make available information on crude oil and other petroleum prices but falls well short of dictating how states should influence those prices.

**Table 9: EU - Legislative Buckets Under Limited or No Intrusion (Quadrant IV)**

<i>Quadrant IV: Very Limited or No Intrusion</i>	
<ul style="list-style-type: none"> <li>• Agriculture: trade (2E)</li> <li>• Fisheries: classification, third-country trade (3A, 3E)</li> <li>• Social Policy: pensions, unemployment, children-disabled, housing (4B,4C,4E,4F)</li> <li>• Services: all but barriers and classification (5C-5E)</li> <li>• Taxation: direct (8A)</li> <li>• Capital: security, classification, modalities (10C, 10D, 10E)</li> <li>• External Relations: development aid (11B)</li> <li>• Energy: all but oil &amp; gas (12A-12C, 12E)</li> <li>• Regional Policy: rights and responsibilities (14A)</li> <li>• Environment: land and general (15C, 15F)</li> </ul>	<ul style="list-style-type: none"> <li>• Public Health: rights, medical standards (17C, 17D)</li> <li>• Science &amp; R&amp;D: focus, funding (18A, 18B)</li> <li>• Education: primary &amp; middle, minimum age, special programs, safety, standards (19A,B,D,E)</li> <li>• Culture: all (20)</li> <li>• Security Policy: all (22)</li> <li>• Justice, Home Affairs: civic code, court jurisdiction, contracts (23A, 23C, 23E)</li> <li>• Political System: constitution, party structure, administrative practices and structure (all)</li> <li>• Civic Life: association, religion, property rights, citizenship (25A-D)</li> </ul>

In the EU, a number of aspects related to capital, services and labor remain under the regulatory domain of nation states. Capital classification (10D), most security matters (10C), and modalities (10E) appear here. Most aspects related to the regulation of services --- client relations and internal procedures, stage guarantees to service providers, the assignment of public contracts (5C-E) --- remain in the hands of nation states. And,

with regard to labor, benefits (4B) and unemployment compensation (4C) remain in the hands of nation states. Expectedly, there is also no or only limited legislation on housing (4F), various aspects of civic life (24A-C), culture (20all), and numerous other areas related to politics, fiscal policy, culture, and social life. As Mann once noted correctly, “there has been “no attempt at social redistribution”<sup>40</sup> in Europe. The EU also “does not cultivate a real sense of European identity or citizenship . . . [European] cultural identity exists alongside strong and enduring national loyalties.”<sup>41</sup>

Some synthesis about the EU is hence possible. *The EU has, like Mercosur, moved with strength in the trade of physical goods. Buckets indirectly related to the trade of goods have also been powerfully targeted: these include transportation, the environment, wages, production standards, classifications, customs, and many other buckets. Evidence of a spillover process might exist, but cannot be ascertained without a chronological analysis. The EU has selectively targeted certain aspects of services, labor, and capital (particularly those linked with barriers to movement); on the whole, however, it has hesitated to produce comprehensive and deep legislation in most buckets directly related to those spheres. Most of the remaining buckets remain essentially untouched: the social, political, moral, defense, and the educational spheres remain strongly in the hands of nation states.*

#### *The Chronology of Supranational Intrusion*

A chronological examination of supranational legislative activity should reveal additional insights into the specific nature of legislative intrusion, especially its logic and possible future direction. Our main findings so far --- the heavy targeting of buckets related to the trade of goods and of related buckets in non-economic areas in both Mercosur and the EU --- leads us to suspect a temporal connection between the two trends. Intervention in the first area ‘spills over’ later in time into intervention in the other areas. To test this notion, we need to consider only buckets belonging to quadrants I and II, where said intrusion was noted. The coding was designed to permit the identification, with some approximation, of periods of most intense intrusion for any of these buckets:<sup>42</sup> periods in which markets promulgate several narrow but deep laws, or a few broad and deep laws.<sup>43</sup>

Figure 2 shows when individual buckets were targeted for Mercosur:



Figure 2: Timing of Heavy Intrusion in Mercosur for Selected Buckets <sup>(1)</sup>

Quadrant I										Quadrant II									
Period:	1	2	3	4	5	6	7	8	9	Period:	1	2	3	4	5	6	7	8	9
Industrial Policy: manufacturing standards (13B)	←	→								External Relations: intern. agreements (11C)	←	→	←	→					
Customs: tariffs (1B)			←	→						Customs: classifications (1A)	←	→	←	→					
Consumers: health & safety (16A)			←	→						Transportation: water and land (6B-C)			←	→					
Agriculture: definitions, production procedures (2A-B)			←	→						Science, R&D, Info: product registration (18E)				←	→				
Industrial Policy: classification (13A)			←	→						Competitions: unfair practices (7B-C)					←	→			
Consumers: information (16B)					←	→				Undertakings: economic and commercial law (21C)					←	→			
										Environment: air (15A)					←	→			
										Science, R&D, Info: statistics (18D)						←	→		
										Science, R&D, Info: standards (18C)								←	→

<sup>(1)</sup> Buckets considered are those deemed directly or indirectly related to the trade of physical goods only. Periods are yearly increments beginning with 1991 and ending with start of 2000. Thus, Period 1 = 1991, Period 2 = 1992, and Period 9 = 1999.

<sup>(2)</sup> ← → = Period in which market promulgates several narrow but deep laws, or a few broad and deep laws.

Legislative buckets in Quadrant I, which are most intimately connected with the trade of physical goods, are indeed targeted early. These include industrial manufacturing standards (13B: 1991-1995), tariffs (1B: 1994-1995), industrial classification (13A: 1994-1996), and agricultural definitions and production procedures (2A-B: 1994-1996). Laws in consumer health & safety (16A: 1994-1995) appear perhaps a little earlier than what one would expect, though their tight connection to industrial manufacturing costs may explain this. Later intrusion concerns a spillover bucket: consumer information (16B: 1996-1997).

Quadrant II exhibits a roughly similar pattern. Customs classification (1A: 1994-1996) is targeted early on, as are international trade agreements (11C: 1992, 1994). Transportation by water and land (6B-C: 1994-1996) is, perhaps a little surprisingly, targeted early on, but here one must recall its general focus on dangerous substances. Later buckets concern topics less directly related to the trade of goods: science-R&D-information registration of products (18E: 1996-1997), various attempts at defining fair or unfair competitive practices (7B-C: 1996-1997), undertakings law (21C: 1996-1997), and environment --- especially air (15A: 1996-1998), statistical matters, and standards for science-R&D-information purposes (18D: 1997-1999, 18C: 1998-1999).

These findings suggest that *legislative intrusion in Mercosur indeed indicates a progressive expansion of intrusive laws from buckets related to the trade of physical goods to buckets related to spillover areas.*

We can execute a similar analysis for the EU:<sup>44</sup>

Figure 3: Timing of Heavy Intrusion in the European Union for Selected Buckets <sup>(1)</sup>

Quadrant I									Quadrant II									
Period:	1	2	3	4	5	6	7	8	Period:	1	2	3	4	5	6	7	8	
Agriculture: definitions (2A)	←	→							Competition: aid (7A)	←	→							
Competition: unfair practices (7B)	←	→				←	→		Science, R&D, and Information: standards (18C)	←	→							
Customs: border inspection procedures (1D)	←	→				←	→		Environment: animals (15D)			←	→					
Customs: classification, tariffs (1A,1B)	←	→				←	→		Fisheries: catching restrictions (3B)			←	→					
Industrial Policy: classification, manufact. standards (13A-B)		←	→						Taxation: indirect (8B)			←	→			←	→	
Competition: public unfair practices (7C)			←	→	←	→			Transportation: water (6B)					←	→			
Agriculture: production procedures (2B)			←	→					Consumers: economic protection (16C)					←	→			
Environment: air and water (15A-B)			←	→					Science, R&D, and Information: product registration (18E)								←	→
Consumers: health & safety, information (16A-B)			←	→														
Fisheries: processing restrictions (3C)				←	→													
Transportation: land (6C)						←	→											
Science, R&D, and Information: statistics (18D)						←	→											

<sup>(1)</sup> Buckets considered are those deemed directly or indirectly related to the trade of physical goods only. Periods are 5-year increments beginning with 1960 and ending with start of 2000, Period 1 = 1960-1964, Period 2 = 1965-1969, and Period 8 = 1995-2000. For Period 1, legislation from 1958 and 1959 is also included.

<sup>(2)</sup> ←→ = Period in which market promulgates several narrow but deep laws, or a few broad and deep laws.

Early laws in Quadrant I concern predominantly buckets immediately related to the trade of physical goods. The EU turns early on to (though it certainly revisits later on) agricultural definitions (2A: 1960-1975), unfair practices (7B: 1960s), customs classifications and tariffs (1A, 1B: 1960-1968), border inspection procedures (1D: 1960s) and industrial manufacturing classifications and standards (13A-B: 1970s). Agricultural production (2B) procedures, perhaps surprisingly, are not considered until the 1980s, most likely because then technological issues become relevant.

As with Mercosur, matters indirectly related to the trade of good generally come later. The environment (15A-B: 1977-1987) is especially targeted in the late 1970s and 1980s. Consumer health & safety and information (16A-B: 1978-1990) are targeted in the late 1970s and 1980s. Statistics for science-R&D-information purposes (18D: 1991-1998) do not occur until the 1990s. The prevention of unfair public practices (7C) is addressed in the late 1970s and late 1980s. Land transportation (6C) is addressed with some seriousness only in the 1990s. Perhaps surprising is the late targeting of fish processing restrictions (3C: 1980s). The fact that laws here concern mostly marketing issues (i.e., size of boxes, etc.) and not the processing of fish itself may explain this delay.

Quadrant II, which contains partially but deeply targeted buckets, reveals little activity in the earliest period --- with the exception of competition aid (7A), a bucket more directly related to the trade of physical goods --- and then heavy activity in spillover buckets. Consumer economic protection (16C: 1983-1986), indirect taxation (8B: 1975-79 and the early 1990s), water transportation (6B: the 1980s), standards and the registration of products (18C: 1968-1977 and 18E: 1990s) for science-R&D-information purposes, environmental protection in the area of animal protection (15D: 1976-1980),

and fishing catching restrictions (3B: late 1970s and early 1980s) all appear relatively late.

We may now draw some initial conclusions about the order of EU legislation. As with Mercosur, *EU law has involved a chronological expansion of intrusive laws from buckets related to the trade of physical goods to buckets indirectly related to such trade.* We must now synthesize our findings for the EU and Mercosur and articulate, if possible, conclusions about the current autonomy of national legislatures in common markets.

#### NATIONAL LEGISLATURES IN COMMON MARKETS

The national legislature has been an essential feature of the nation state for centuries. A review of the impact of common markets on such an institution can help us assess the chances of its continued relevance in the era of supranational economies. Our empirical findings for the EU and Mercosur are similar, despite their differences in age, location, levels of economic development, and size. Let us review these findings and then ponder their implications for other spheres of state power.

On the intensity side, topics directly but also indirectly related to the trade of physical goods, such as the environment, are targeted. Intervention in services, capital, and labor is less intense, relying on selective intrusion (in the areas of tariffs and barriers above all) in the EU or little intervention altogether. All other areas remain essentially untouched. Common markets, then, cause the displacement of legislative authority in areas not necessarily related to their objectives. On the chronological side, by contrast, a logic seems apparent: spillover takes place after certain areas are targeted. However, this can only be observed for those areas intimately connected to the trade of goods. The emerging trend, captured by a combination of hypotheses 1 and 3, is thus as follows: *truly substantial intrusion occurs systematically in buckets related to only one (trade of goods) of the four main official objectives of common markets with spillover affecting other indirectly related buckets thereafter.* What does this mean for the autonomy of national legislatures?

First, we can state that national legislatures have been unquestionably transformed. In some areas of law, we may no longer speak of free domestic legislators dedicated, as pluralists and statists once proposed, to the production of an integral legal system. Legislators have indeed become the executive arms, along with their national administrations, of supranational bodies to be used for the execution of laws that no longer reflect the resolution to conflicting national preferences pursued democratically through domestic institutions. Similarly, structures and institutions with a traditional protective effect on the content of national law have certainly lost their historical power. Our understanding of democracy and representation may thus need serious revisiting. But this is true for only certain legal buckets --- some of which, due to a potentially unforeseen spillover effect, the original planners of common markets did not consider.

Second, we can claim that national legislatures nonetheless retain control of several important legislative areas. In some instances these are clearly outside the realm of the objectives of a common market, such as culture. But in other cases, as with certain aspects of services or labor for instance, they are close to the objectives of common markets. This leads one to conclude that national legislatures control more, in a sense, than what one would expect had objectives been pursued with the same zeal throughout. We may even suggest that in buckets of least displacement national legislatures enjoy an

increased sense of legitimacy, since absence of intrusion may in fact be interpreted as a sanctioning of national authority, in line with the principle of subsidiarity espoused by EU officials. We can thus assert with confidence that the national legislatures retain relevance both in the contexts of the South American and European markets.

The emerging trend may accordingly be described as a division of labor between supranational and national authorities. Common markets reign supreme in certain areas. In other areas, markets and states share authority. Yet in others, common markets make symbolic claims only. In the remaining areas, national structures continue to have full legislative clout. No sooner is this said than we begin to wonder about the causes of such a pattern: might the observed division of labor one day disappear if markets truly realize their purported end (as free trade areas not only of goods but also of labor, services and capital) and spillover mechanisms continue their work? What does our analysis reveal about the logic, and thus future, of supranational legal activity?

Our third point concerns the causes and future of common market law. Our findings reveal no evidence that a single logic drives the process of supranational legislative activity. The economic requirements of common markets alone cannot explain why certain economic areas are fully left alone and others mildly targeted, while certain non-economic areas undergo severe intrusion. Spillover effects as a form of internal market logic hold explanatory power only once supranational laws in certain economic areas are introduced. Other factors must therefore be influencing the selection of economic targets. The commercial interests of certain elements within member states might explain the heavy targeting of goods-related areas.<sup>45</sup> The geopolitical utility of these markets, to prevent wars for instance,<sup>46</sup> might also explain the focus on goods (the EU started, after all, with an agreement on coal and steel). Public ownership of most crucial services, such as banking or energy, in key member states, such as Brazil or France, might explain hesitance in the sphere of services. In addition, other factors may explain, along with spillover, why areas such as education (in the EU especially) and the environment, are targeted. One such factor might be the independent desire to create a common citizenry.

No single factor is likely to explain the observed patterns of common market law. Common markets reflect economic, social and other considerations.<sup>47</sup> There is therefore no reason to believe that observable trends, depicting a mixed and somewhat disorderly division of labor between national and common market structures, are to end in the foreseeable future. Simple claims of either inevitable decline or unperturbed strength in various spheres of the nation state, so common in the contemporary literature, are inapplicable in the realm of national legislative activity.

#### *New Opportunities for State Power*

We might do well to contemplate whether some decline in the power of traditional national legislative structures does not imply gained strength in other areas. Can states assert their authority with all the more power in other spheres precisely because their national legislative branches are becoming weaker?

States can certainly increase their administrative strength while accepting supranational law. The implementation of EU and Mercosur law is left in the hands of nation states. These must create administrative structures strong enough to ensure compliance with the adopted principles. Where administrative units were previously

absent, new units emerge. The legitimacy of weaker administrations, such as in Italy or Greece, is also bolstered, as the new mandates legitimize the exercise of authority and the spirit of the law. The executive function of states may thus strengthen as a result of participation in supranational markets.

The executive function may also gain power since members of the executive branches make up the Council of Ministers in the EU and the Common Market Council and Common Market Group in Mercosur. To the extent that these can be said to control the content of common market law, we may state that members of national executives gain strength as the legislative branch loses. But here we must immediately remind ourselves of the fact that not all ministers of all nations represented in these bodies have their way. German, French, Brazilian ministers may claim some advantage over national legislatures; the same may not be said as easily of Portuguese, Greek, or Uruguayan ministers.

Nation states may also obtain further power if supranational markets --- including supranational laws --- offer them the opportunity to obtain objectives otherwise beyond their reach. As Moravcsik<sup>48</sup> suggests, this may indeed have occurred in the European Union, whose existence has essentially served to promote the commercial power of each member state. More conservative claims could be made about the fact that the European Union and other supranational markets in fact produce outcomes which strengthen some, rather than all, of their member states. Enduring peace, otherwise less secure in a world without the European Union, also allows for the continuation of states as we know them. European states, as Milward<sup>49</sup> reminds us, risked extinction during World War II.

States may even be able to become powerful legislative agents in those areas previously not subject to any type of legislative presence. Supranational law may, in fact, legitimize corollary or tangential national law in spheres hitherto considered beyond the scope of national regulation. Certainly, the limits and scope of such new intervention are set by the principles of supranational law. This, however, may pose more opportunities than drawbacks from a legislative point of view. An analysis of national legislative activity following the arrival of supranational law would be needed to evaluate this thesis.

Finally, we must remember that states can always refuse to implement supranational law, both in terms of transposition into national law and practical application. In a perverse way, this affords states, and especially elements within a state, a chance to assert their viewpoints and independence in the international arena. A look at the EU's implementation record indicates that refusal to implement is certainly pervasive.<sup>50</sup> With the exception of Denmark, no EU member state could boast, for instance, to have transposed more than 25% of the Single European Act's directives on time.<sup>51</sup>

All of this points to a complex picture of state transformation in the era of supranational economies. Rather than heralding either the death of the nation state or its unperturbed survival, we should examine with care the intricate changes affecting the nation state and their multiple, contradictory implications for the various components of states. We would also be wise to recall that states have never existed as a fixed entity in history, but have in fact been constantly evolving since their inception.

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ENDNOTES

<sup>1</sup> John A. Hall and John G. Ikenberry, *The State* (Milton Keynes: Open University Press, 1989); Michael Mann, *States, War, and Capitalism: Studies in Political Sociology* (Oxford, New York: Basil Blackwell, 1988); Karl Marx, *A Contribution to the Critique of Political Economy* (New York: International Publishers, 1970); Charles Tilly, *Coercion, Capital, and European States, AD 990-1990* (Cambridge: Basil Blackwell, 1990); Max Weber, *Economy and Society* (New York: Bedminster Press, 1968).

<sup>2</sup> Gerald Epstein, "International Capital Mobility and the Scope for National Economic Management," in *States Against Markets*, ed. Robert Boyer and Daniel Drache (London and New York: Routledge, 1996), 211- 224; Kenichi Ohmae, "The Rise of the Region State," *Foreign Affairs* Spring (1993): 78-87; Vivien Schmidt, "The New World Order, Incorporated," *Daedalus* 124, no.2 (1995): 75-106; Jan Aart Scholte, "Global Capitalism and the State," *International Affairs* 73, no.3 (1997): 427-452.

<sup>3</sup> Stephen Gill and David Law, *The Global Political Economy: Perspectives, Problems and Policies* (New York: Harvester/ Wheatsheaf, 1988); Matthew Horseman and Andrew Marshall, *After the Nation- State: Citizens, Tribalism and the New World Disorder* (London: HarperCollins Publishers, 1994); Susan Strange, "The Defective State," *Daedalus* 124, no.2 (1995): 55-74.

<sup>4</sup> Andrea Boltho, "Has France Converged on Germany? Policies and Institutions since 1958," in *National Diversity and Global Capitalism*, ed. Suzanne Berger and Ronald Dore (Ithaca and London: Cornell University Press, 1996), 89- 104; Hervez Dumez and Alain Jeunemaitre, "The Convergence of Competition Policies in Europe: Internal Dynamics and External Imposition," in *National Diversity and Global Capitalism*, ed. Suzanne Berger and Ronald Dore (Ithaca and London: Cornell University Press, 1996), 216- 238.

<sup>5</sup> John Meyer et al., "World Society and the Nation-State," *American Journal of Sociology* 103, no.1 (1997): 144-181; Wolfgang Wessels and Dietrich Rometsch, "German Administrative Interaction and European Union: The Fusion of Public Policies," in *Adjusting to Europe: The Impact of the European Union on National Institutions and Policies*, ed. Yves Mény, Pierre Muller and Jean-Louis Quermonne (London and New York: Routledge, 1996), 73- 109.

<sup>6</sup> Eric Helleiner, "Sovereignty, Territoriality, and the Globalization of Finance," in *States and Sovereignty in the Global Economy*, ed. David A. Smith, Dorothy J. Solinger and Steven C. Topik (London and New York: Routledge Press, 1999), 138- 157; Paul Hirst, "The Global Economy: Myths and Realities," *International Affairs* 73, no.3 (1997): 409-425; Robert Wade, "Globalization and Its Limits: Reports of the Death of the National Economy Are Greatly Exaggerated," in *National Diversity and Global Capitalism*, ed.

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Suzanne Berger and Ronald Dore (Ithaca and London: Cornell University Press, 1996), 60- 88.

<sup>7</sup> Vincent Cable, "The Diminished Nation-State: A Study in the Loss of Economic Power," *Daedalus* 124, no.2 (1995): 23-53; Eli Lauterpacht, "Sovereignty: Myth or Reality," *International Affairs*, 73, no.1 (1997): 137- 150; Saskia Sassen, "Embedding the Global in the National: Implications for the Role of the State," in *States and Sovereignty in the Global Economy*, ed. David A. Smith, Dorothy J. Solinger and Steven C. Topik (New York: Routledge Press, 1999), 158- 171; Linda Weiss, 1997. "Globalization and the Myth of the Powerless State," *New Left Review* 24 (1997): 3-27.

<sup>8</sup> Robert Boyer, "State and Market: A New Engagement for the Twenty-first Century," in *States Against Markets*, ed. Robert Boyer and Daniel Drache (London and New York: Routledge, 1996), 84- 114; Ramesh Mishra, "The Welfare of Nations," in *States Against Markets*, ed. Robert Boyer and Daniel Drache (London and New York: Routledge, 1996), 316-333; Vivien Schmidt, "Convergent Pressures, Divergent Responses: France, Great Britain, and Germany between Globalization and Europeanization," in *States and Sovereignty in the Global Economy*, ed. David A. Smith, Dorothy J. Solinger and Steven C. Topik (New York: Routledge Press, 1999), 172- 192.

<sup>9</sup> Ernst B. Haas, "International Integration: The European and the Universal Process," *International Organization* 15, no.3 (1961): 366-392; Paul Pierson and Stephan Leibfried (eds), *European Social Policy: Between Fragmentation and Integration* (Washington, D.C.: The Brookings Institution, 1995); George Ross, *Jacque Delors and European Integration* (New York: Oxford University Press, 1995); Anne-Marie Slaughter, "The Real New World Order," *Foreign Affairs* 76, no.5 (1997): 183-197.

<sup>10</sup> Geoffrey Garrett, "The Politics of Maastricht," *Economics and Politics* 5 (1993): 105-124; Alan Milward, *The European Rescue of the Nation-State* (London: Routledge, 1992); Andrew Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach," *Journal of Common Market Studies* 31 (1993): 473-524.

<sup>11</sup> Anne- Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," *International Organization* 47, no.1 (1993): 41-76.

<sup>12</sup> Montserrat Guibernau, *Nations without States: Political Communities in a Global Age* (Cambridge: Polity Press, 1999).

<sup>13</sup> Yves Mény, Pierre Muller and Jean-Louis Quermonne (eds), *Adjusting to Europe: The Impact of the European Union on National Institutions and Policies* (London and New York: Routledge, 1996).

<sup>14</sup> Works on the ability of nation states to pursue freely their own policies while participating in supranational markets only touch upon this matter when one considers

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that policies can have legal consequences. For the most part, however, they offer us little insight about the legislative function.

<sup>15</sup> Weber, *Economy and Society*, vol.2, chapter 9; vol 3 chaps. 10-13; Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in *Bringing the State Back In*, ed. Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985), 3- 37.

<sup>16</sup> John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Company, 1980), 107-108.

<sup>17</sup> Lauterpacht, "Sovereignty: Myth or Reality," 138.

<sup>18</sup> Locke, *Second Treatise of Government*, 78.

<sup>19</sup> Robert A. Dahl, *Dilemmas of Pluralist Democracy: Autonomy versus Control* (New Haven: Yale University Press, 1982); Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach".

<sup>20</sup> Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research"; Sven Steinmo, *Taxation and Democracy: Swedish, British, and American Approaches to Financing the Modern State*. (New Haven: Yale University Press, 1993).

<sup>21</sup> R.H. Folsom, R.B. Lake, and V. P. Nanda, *European Union Law After Maastricht: A Practical Guide for Lawyers Outside the Common Market* (The Hague: Kluwer Law International, 1996), 23-26.

<sup>22</sup> The only exception to this rule are members of the European Parliament; these, however, continue to play a secondary role in the process and in any case do not belong to national legislative functions in the first place.

<sup>23</sup> This is meant to be a comprehensive list of buckets and arenas, and thus goes beyond the list that officials from common markets themselves adopt when classifying existing legislation or that scholars rely upon when examining existing common market legislation only; see, for example: Neil Fligstein and Jason McNichol, "The Institutional Terrain of the European Union," in *European Integration and Supranational Governance*, ed. Wayne Sandholtz and Alec Stone Sweet (Oxford and New York: Oxford University Press, 1998), 59-91.

<sup>24</sup> Assuming of course that we control for laws which, though distinct, cover the *same* person, object, process, or activity. This project controlled for such overlap to a reasonable extent.

<sup>25</sup> For a potentially relevant alternative method of measuring intensity, see: Neil Fligstein and Iona Mara-Drita, "How to Make a Market: Reflections on the Attempt to Create a



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Single Market in the European Union,” *American Journal of Sociology* 102, no.1 (July 1996): 1-33.

<sup>26</sup> Throughout, we must of course remember that the absolute size of a bucket varies. Similarly, we must also recall that the importance of buckets for the nation state varies as well.

<sup>27</sup> For a history of the EU, see: Desmond Dinan, *Ever Closer Union: An Introduction to European Integration* (Boulder and London: Lynne Rienner Publishers, 1999).

<sup>28</sup> The EU has also utilized *decisions* to achieve its goals. These, however, are in effect administrative acts rather than legislative acts (e.g., the decision to initiate a pilot program) and are thus not considered here.

<sup>29</sup> Burley and Mattli, “Europe Before the Court: A political Theory of Legal Integration,” 41-76; Rachel A. Cichowski, “Integrating the Environment: The European Court and the Construction of Supranational Policy,” *Journal of European Public Policy* 5, no.3 (1998): 387-405; Francis Snyder, “The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques,” *The Modern Law Review* 56, no.1 (1993): 19-54.

<sup>30</sup> Both decisions and resolution become effective in Mercosur 30 days after the last member state announces the adoption of the law in question (Article 40, Protocol of Ouro Preto).

<sup>31</sup> The number of EU and Mercosur laws coded would otherwise be significantly higher than 1,302 and 540.

<sup>32</sup> Daniel Hargain, *Circulacion de Bienes en el Mercosur* (Buenos Aires: B de F., 1999).

<sup>33</sup> Augusto Duran Martinez, *Estudios Juridico a Proposito de Mercosu* (Montevideo: Ingranusi, 1999).

<sup>34</sup> Roberto Dromi, *Codigo del Mercosur* (Buenos Aires: Ediciones Ciudad Argentina, 1996), 180-181.

<sup>35</sup> Eva Holz, *La Integracion de los Sistemas Bancarios* (Montevideo: Fundación de Cultura Universitaria, 1997), 25-26.

<sup>36</sup> Dromi, *Codigo del Mercosur*, 185.

<sup>37</sup> Maria Carmen Ferreira and Julio Ramos Olivera, *Las Relaciones Laborales en el Mercosur* (Montevideo: Fundación de Cultura Universitaria, 1997).

<sup>38</sup> Michael Mann, “Nation States in Europe and Other Continents: Diversifying, Developing, Not Dying,” *Daedalus* 122, no.3 (1993): 115-139.

<sup>39</sup> Principles found in treaties and agreements also specify terms of supranational intrusion in monetary policy. Our approach may thus not capture the full degree of lost autonomy by national legislatures.

<sup>40</sup> Mann, "Nation States in Europe and Other Continents: Diversifying, Developing, Not Dying," 125.

<sup>41</sup> Mann, "Nation States in Europe and Other Continents: Diversifying, Developing, Not Dying," 126.

<sup>42</sup> Except for those buckets for which, due to early indications of heavy intrusion, not all laws were coded. In such cases, additional research was conducted to determine timing of most severe intensity.

<sup>43</sup> Naturally, a smaller number of laws was sufficient to deem a period as most intensive when Level 3 buckets were considered.

<sup>44</sup> For secondary references on the timing of EU legislation in specific areas, numerous sources abound. See, for example: Richard. L. Leonard, *The Economist Guide to the European Union* (London: Profile Books Ltd., 1998); Folsom et al., *European Union Law after Maastricht: A practical Guide for Lawyers Outside the Common Market*, 1996.

<sup>45</sup> Andrew Moravcisk, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca: Cornell University Press, 1998); Andrew Moravcisk, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach."

<sup>46</sup> Milward, *The European Rescue of the Nation-State*, 1992.

<sup>47</sup> Just as multiple variables account for the general direction of the European Union and other regional integration efforts. See: Neil Fligstein, "Markets as Politics: A Political-Cultural Approach to Market Institutions," *American Sociological Review* 61, no.4 (Aug. 1996): 656-673; Fligstein and Mara-Drita, "How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union," 1-33; Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge: Cambridge University Press, 1999); Meyer, "World Society and the Nation- State," 144-181.

<sup>48</sup> Moravcisk, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, 1998; Moravcisk, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach," 473- 524.

<sup>49</sup> Milward, *The European Rescue of the Nation-State*, 1992.

<sup>50</sup> Francesco Duina, *Harmonizing Europe: Nation States within the Common Market* (Albany: State University of New York Press, 1999).

<sup>51</sup> The European Commission has launched more and more noncompliance investigations (1,142 in 1996 alone) and the Court has issued more and more judgments. See: Amato Giuliani, "Italy," in *The European Union and Member States: Towards Institutional Fusion?*, ed. Dietrich Rometsch and Wolfgang Wessels (Manchester and New York: Manchester University Press, 1996), 157-174.