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Edited by Beth A. Simmons and Richard H. Steinberg

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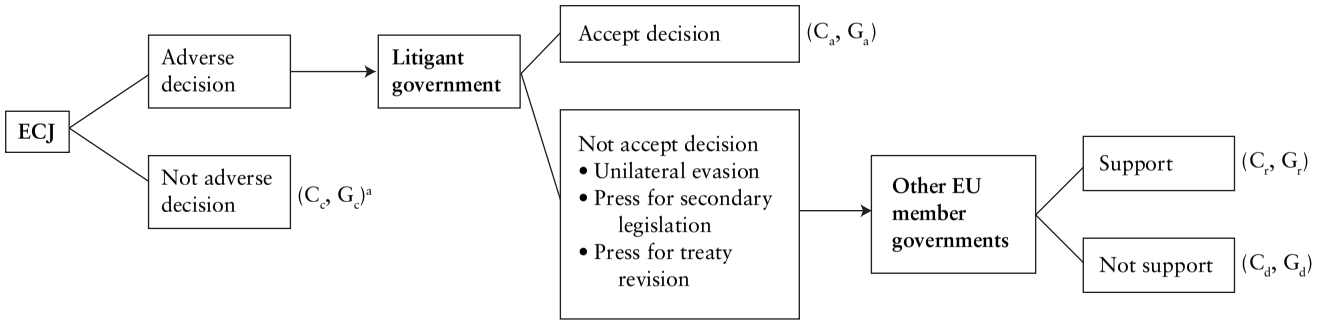

[a]Items in parentheses are payoffs:
C = ECJ
G = Member government involved in case
a = Affected government acquiesces in adverse decision
c = ECJ conciliates with government
d = Adversely affected government unilaterally defies ECJ
r = Member governments collectively restrain ECJ

FIGURE 19.1. *The legal politics game*

losses as a result of them (payoffs from such "acquiescence" are C_a, G_a). If the government chooses not to abide by the decision, it has three ways to respond. The government may engage in overt or concealed evasion of the decision, it may press for new EU legislation to overturn the decision, or it may call for changes in the constitutional foundations of the Court by proposing revisions to the EU treaty base.

The final part of the stage game concerns the reactions of the remaining EU member governments to the decision by one of its members not to accept an ECJ decision. If the other governments support their colleague by "restraining" the ECJ (through new legislation or treaty revisions), the resulting payoffs to the Court and the adversely affected government are C_r and G_r. If the other governments do not support nonacceptance, the adversely affected member government will have to engage in isolated "defiance" (C_d, G_d).

This is the end of the stage game, but the process continues with the next Court decision. The Court's strategic choice is the same: it must decide whether to interpret EU law in a way that adversely affects a member government. In the second round, however, the Court takes into account the information it gained in the previous play of the game ***. The government that plays in the second iteration of the game may be the same as in the first round, or it may be different. After the second decision and reaction by the litigant government and by other EU members, the actors update their information, and the stage game is played again. The indefinite repetition of this process determines the evolution of the EU legal system.

In the stage game, the basic preference ordering of the ECJ (assuming that prima facie legal grounds justify an adverse decision) can be described by the following inequality:

$$C_a > C_d > C_c > C_r \qquad (1)$$

The ECJ has a clear institutional interest in extending the scope of Community law and its authority to interpret it. * The best way for the Court to further this agenda is through the gradual extension of case law (that is, the replacement of national laws by ECJ decisions as the law of the land ***). [One] can think of the conciliation outcome (for which the Court's payoff is C_c) as maintaining the status quo: the ECJ does not expand the scope of its case law, but its authority is not questioned by government defiance.[7] From the Court's perspective, situations in which

[7] It is important to remember here that the ability of the ECJ to engage in judicial review of legislation is not guaranteed by the founding treaties of the EU. ***

it makes adverse decisions that the relevant government accepts are clearly preferable to the status quo ($C_a > C_c$). However, if an adverse ECJ decision results in other EU governments rallying around in support of the litigant government to restrain the Court, *** this would be a worse outcome for the ECJ than maintaining the status quo. *** As a result, $C_c > C_r$.

The Court's preferences are less clear-cut regarding the situation in which an adverse ruling is not followed by the litigant government, but that government's position is not supported by its colleagues (C_d). The Court would clearly prefer that the litigant government accept its adverse decision (that is, $C_a > C_d$); the worst outcome for the ECJ would be where a government's nonacceptance of an adverse decision is supported by the other EU governments ($C_d > C_r$). But how should the Court compare isolated defiance with maintenance of the status quo? We believe that, in general, $C_d > C_c$. Our reasoning is that at least one EU member state (tacitly) approves of the Court's decision (in cases where unanimity is required to restrain the Court), or a substantial minority (under qualified majority voting). Even though having even a single government flout its authority is a matter of concern for the ECJ, this would likely be outweighed by the implicit support of the decision by other member governments. Nonetheless, it should be pointed out that our analysis does not depend on $C_d > C_c$ (see the next section). ***

We now consider the basic preference order of the litigant member government in the stage game, which we assume to be generally expressed by the following inequality:

$$G_c > G_r > G_a > G_d \qquad (2)$$

[We] assume the EU member governments support a powerful system of EU law in which the ECJ faithfully implements the governments' intentions as laid out in the EU treaty base. * Governments understand that having a well-defined rule of law fosters mutually beneficial economic exchange. But it is very difficult *** to write complete contracts (in the case of the EU, treaties). Delegating authority to the ECJ is thus essential to the efficient functioning of the rule of law in Europe ***. Any time a member government rejects an ECJ decision, this not only undermines the legitimacy of the EU legal system, but also threatens to earn for the government a reputation as an actor that does not play by the rules. By contrast, when member states comply with an adverse ruling, they strengthen the EU legal [system.] The more a member government benefits

from the economic exchanges made possible by the rule of law in Europe, the greater its respect for ECJ decisions.

At the same time, adverse decisions will always be costly to governments ***. As a result, the status quo is the best outcome for the litigant government (G_c). Once the Court makes an adverse decision, however, the litigant government would most prefer the situation in which it does not accept the decision *** and where it is supported by the other EU member governments through new legislation or a treaty revision that restrains the ECJ (that is, $G_r > G_a$). Finally, we assume that the worst outcome for a litigant government is isolated defiance of an adverse ECJ decision (C_d). *** As was the case with the Court's preference order, however, our analysis would be unaffected if we were to assume that governments might prefer isolated defiance to acceptance (that is, $G_d > G_a$) – for example, by virtue of placing a very heavy weight on sovereignty ***.

We have now described the preference orders of the ECJ and litigant governments in the legal politics stage game. The equilibrium outcome in the stage game depends on the behavior of the EU member governments that are not party to the case at hand. If they support the litigant government, *** the ECJ would not make an adverse decision, since the litigant government would not abide by the ruling ***. If, on the other hand, the other governments decide not to act, the ECJ would rule against the litigant government, which in turn would accept the decision ***. Moreover, changes in the legislative rules of the EU will also affect the behavior of the ECJ and litigant governments. [The] use of qualified majority voting makes collective resistance easier and more likely. This suggests that court activism should have decreased since the ratification of the Single European Act in 1987. ***

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ECJ PRECEDENT, DOMESTIC POLITICS, AND EU COALITIONS

If the theoretical framework presented in the preceding section is to provide us with analytic leverage over the actual jurisprudence of the ECJ, it must generate comparative statics results that relate differences in the specific circumstances of a case to variations in outcomes (both case law and government reactions to decisions). We begin this task by discussing the factors that will influence the preferences of the ECJ and member governments as the dynamics of the legal politics game unfold over time with respect to lines of case law.

The ECJ

[Legal] precedent greatly concerns the ECJ. * All independent judiciaries are expected to make decisions based on legal principles. Although the foundations for such principles are often enshrined in constitutions (or treaties in the case of the EU), they are invariably modified in case law where courts assert powers or interpretations that are not transparent in such foundational documents. If a court's jurisprudence were to change frequently from case to case ***, however, the court would surely lose legitimacy. This is because a court's claim to power ultimately rests on its image as an impartial advocate for "the law." ***

This argument suggests that from the standpoint of the ECJ, a tension will often exist between the desire not to make judgments that adversely affect the interests of member governments and the importance of legal consistency. Avoiding member government defiance may call for one verdict; following precedent may dictate another. Can we put a metric on the costs of inconsistency for the ECJ? The simple answer is that these costs are a function of the clarity of existing precedent. Where there are more conflicting cases on the books or where the treaties of the EU are more ambiguous on a given point of law (for example, Articles 30 and 36 concerning "free movement"), the costs of inconsistency will be lower. * More generally:

H1: The greater the clarity of EU treaties, case precedent, and legal norms in support of an adverse judgment, the greater the likelihood that the ECJ will rule against a litigant government.

This hypothesis suggests that the Court's ceteris paribus preference ordering outlined in inequality (1) should be modified to take into account the clarity of legal precedent. *** Consider a scenario in which case law precedent is transparent and dictates that the ECJ should take an adverse decision against a member government. * The effects of this change on the first part of the game tree in Figure 19.1 are clear. Unambiguous precedent increases the attractiveness to the ECJ of taking an adverse decision that the litigant government subsequently accepts (that is, the gap between C_a and C_c would increase). *** Clear precedent should also increase the utility the Court would derive from the isolated defiance outcome relative to the situation in which the litigant government's defiance is supported by other ECJ governments (thus, the gap between C_d and C_r would increase).

But what if the Court prefers an outcome in which its (precedent-driven) decision ultimately leads the member governments collectively

to restrain the ECJ to the scenario in which the Court does not make an adverse decision in the first place and hence does not provoke an intergovernmental reaction (that is, if $C_r > C_c$)? This change in the Court's preferences would have a dramatic impact on the legal politics game. *** Irrespective of how the litigant government and its other EU colleagues behaved, the Court would still rule the extant national law or practice illegal. In this extreme case, the litigant government would face a clear choice between accepting the decision (G_a) and trying to enlist the support of the other member governments to restrain the Court (G_r). The litigant government's preferred outcome (G_c) would no longer be feasible. Clearly, litigant governments will always prefer G_r to G_a, but restraint can only be achieved with the support of other member governments (we discuss the conditions that make this more likely with respect to H3). ***

The Litigant Government

The international preferences of national governments over foreign policy no doubt contain both internal and external elements. For some, government preferences are largely a function of the constellation of domestic interests,[8] perhaps conditioned by the institutional structure of national polities.[9] But observers of the EU often suggest that sovereignty concerns are preeminent for at least some member governments ***. These two views can be integrated by arguing that governments typically value sovereignty because they view it as a pre-requisite for winning in domestic politics.[10] ***

With respect to domestic factors, the short-termism inherent in democratic politics means that distributive politics will generally tend to dominate the incentives to increase aggregate prosperity. ECJ decisions often threaten to impose heavy costs on segments of the economy – for example, by overturning national laws that act as nontariff barriers supporting specific sectors. Other Court decisions may harm the agendas of feminist, environmental, or other interest groups. For governments, the operative question is the importance of these groups to their reelection efforts. ***

But ECJ decisions may also have deleterious consequences for national governments in a more direct sense – for example, by imposing

[8] See Frieden 1991; and Frieden and Rogowski 1996.
[9] Garrett and Lange 1995.
[10] Powell 1991.

new responsibilities on the state or by reducing tax receipts. Finally, the potential for governments to be held liable for the violation of EU law increases the threat that the Court could impose sanctions itself – for example, through orders to compensate citizens and firms that have suffered due to the violation. Our intent here is not to develop a detailed algorithm for weighting these various factors. * Rather, we only wish to propose the following hypothesis:

H2: The greater the domestic costs of an ECJ ruling to a litigant government, the lesser the likelihood that the government will abide by an adverse ECJ decision.

*** The simplest consequence of H2 is that the gap between G_c and all other outcomes would increase with the greater costs to the government of an adverse decision. That is, the desirability to the litigant government of the Court's not taking an adverse decision would rise. H2 also implies that the payoff gap between collective restraint of the ECJ (G_r) and accepting adverse decision (G_a) would increase ***.

The pivotal issue, however, concerns how the litigant government's domestic circumstances would affect its utility comparison between G_a and defying the ECJ in isolation (G_d). If the government is sufficiently concerned about the domestic costs of an adverse decision, then $G_d > G_a$. As was the case for the Court's decisional calculus, this would give the litigant government a dominant strategy in cases where the ECJ makes an adverse decision. The government would not accept the decision, irrespective of whether it thought other member governments would support its defiance. ***

Other Member Governments

* * *

The most decisive way that member governments can restrict ECJ activism without violating the basic tenets of the EU legal system is to revise EU treaties. Although this has occasionally been done (see our discussions of the Barber protocol in the next section), the threshold to such constitutional revision is very high – unanimity among the EU member governments and subsequent ratification by national parliaments, national referendums, or both.

An easier path for restraining legal activism is the passage of new EU legislation to counteract the effects of ECJ decisions. *** [Since] the mid-1980s much legislation requires only the support of a qualified majority in the Council, significantly reducing the obstacles to passage. *

Clearly, however, an inverse relationship exists between the ECJ-restraining power of these strategies and their ease of implementation. Secondary legislation is relatively easy to pass, but it cannot be guaranteed to rein in the Court's activism in a given area. The ECJ could simply respond by arguing that its interpretation is consistent with the EU treaty base, and that the new legislation is not. Treaty revision is much harder to achieve, but it is the ultimate constraint on the Court (which views itself as the protector of the treaties).

When should we expect the EU governments collectively to seek to restrain ECJ activism? Two conditions stand out. First, the greater the importance of a particular case to more member governments, the greater the likelihood that they will collectively support a litigant government seeking to defy an adverse judgment. Second, the greater the number of cases within a similar branch of the law that the Court adversely decides, the greater the likelihood of a collective response to constrain the ECJ. ***

Thus our third hypothesis is:

H3: The greater the potential costs of a case, the larger the number of governments potentially affected by it, and the larger the number of adverse decisions the ECJ makes in similar areas of the law, the greater the likelihood that the EU member governments will respond collectively to restrain EU activism.

The effects of variations in EU-wide support for litigant governments on the legal politics game are straightforward. The greater the probability of a collective restraint response to adverse ECJ decisions, the lesser the weight that the Court and the litigant government should attach to the pair of payoffs C_d, G_d. Indeed, if both actors were to attach zero probability to this outcome, the strategic dynamics of the legal politics game would change considerably. The litigant government would know that its defiance would be supported by its EU colleagues. It would thus not accept any adverse decision by the ECJ because it could always do better by pressing for new secondary legislation or treaty revisions (because $G_r > G_a$). In turn the ECJ would not make an adverse decision in the first place, because conciliating the litigant government is better for it than inciting a collective act of restraint ($C_c > C_r$).

A STRATEGIC HISTORY OF ECJ CASE LAW

The preceding two sections have developed a simple framework for analyzing EU legal politics and a set of hypotheses about the dynamics of ECJ–litigant government interactions. This section assesses how well our theory and hypotheses fit the actual history of ECJ jurisprudence,

using three lines of cases: nontariff barriers to agricultural trade, equal treatment of the sexes, and state liability for the violation of EU law.

Import Bans on Agricultural Products

The 1958 Treaty of Rome demanded as part of the effort to create a common market that extant trade quotas among member states be abolished during a transitional period ending on 31 December 1969 (Articles 8 and 32). The treaty spelled out a detailed timetable for the progressive elimination of these quotas (Article 33). The treaty also required that the establishment of a Common Agricultural Policy among the member states (Article 38 (4)) accompany the development of the common market. Thus domestic deregulation was combined with deregulation at the EU level ***.

By the end of the transition period, however, member states had not established common policies for a few agricultural products. In the 1970s the ECJ heard a series of cases concerning the effect of the Rome treaty on these products. The *Charmasson* case involved a requested annulment of a quota for banana imports imposed by the French government on 28 October 1969.[11] *Charmasson* argued that the quota violated the timetable set forth in Article 33 for eliminating quantitative restrictions to trade. The French government contended that because a national marketing organization for bananas was already in place in 1958, Article 33 did not apply. ***

The ECJ decided that the existence of a national marketing organization could preclude the application of Article 33 and made it clear that the French quota scheme could be viewed as such a national organization. The Court added, however, that such marketing organizations could suspend the application of Article 33 only during the transitional period. After 31 December 1969 Article 33 would have to be applied, regardless of whether or not the member states had established a communitywide marketing organization.

*** The contradictions between a free-trade article (Article 33) and the agricultural provisions (Articles 38–46) gave the ECJ leeway in interpreting the Rome treaty. The Court made a bold pro-integration interpretation by ruling that national marketing organizations could not stand in the way of free trade after the end of the transition period. *** The French government opposed this interpretation and, given the domestic

[11] Case 48/74, *Mr. Charmasson v. Minister for Economic Affaires and Finance* [1983] ECR 1383.

sensitivity of the banana sector, was likely to defy the ECJ (consistent with H2). * The likelihood of immediate French defiance, however, was somewhat tempered by the Court's use of the classic *Marbury v. Madison* technique. The ECJ decided for the French government in the case at hand, while establishing a principle that the government opposed (Article 33 would be applied after the end of the transitional period). Nonetheless, the French government was likely to oppose the dissolution of its banana marketing organization.

Why did the Court make such a pro-integration ruling, knowing that it would likely provoke French defiance? Consistent with H3, the fact that the ECJ had little reason to expect a collective response from the member governments was likely [very important.] Given the divisive nature of banana politics in the EU, and because few other products had not yet been incorporated into the Common Agricultural Policy, a treaty revision was most unlikely. *** A more probable collective response was that the ruling would spur the member states to create a common marketing organization for bananas (which is what the Court wanted).

The *Charmasson* precedent was subsequently tested in a dispute over potatoes. In the *Potato* case, the Commission challenged the United Kingdom's national market organization ***.[12]

The precedent established in *Charmasson* made it more likely that the ECJ would rule against the United Kingdom in the *Potato* case – as eventually transpired. ***

The next development in this line of ECJ jurisprudence was the *Sheep Meat* case, in which the French government claimed that it should be allowed to maintain its national market organization for mutton.[13] *** The French government asserted that in the period between the abolition of its national rules and the establishment of EU rules, domestic producers would be unfairly disadvantaged in competition with British producers who were subsidized by their government.[14] *** The French government also declared that it would continue banning imports regardless of the Court's decision. * Nonetheless, the Court held that the French sheep meat regime had to be discontinued. This decision sparked what came to be known as the "sheep meat war." France refused to comply with the Court's ruling, declaring that it would do nothing until a common market organization for sheep meat was established. *

[12] Case 231/78, *Commission v. UK* [1979] ECR 1447.
[13] Case 232/78, *Commission v. France* [1979] ECR 2729.
[14] Rasmussen 1986, 339.

The domestic costs of the *Sheep Meat* decision led the French government to defy the ECJ (consistent with H2). Given the high cost of an adverse decision to French farmers and given the French government's open unwillingness to comply with an adverse decision the Court might have chosen not to rule against France. This was a case, however, where H1 and H3 dominated H2. On the one hand, the ECJ knew that if it violated its own clear and recent precedents under pressure from the French, it would lose legitimacy as an impartial arbiter in the eyes of other member governments. On the other hand, the Court had little reason to believe that the member governments would act collectively to oppose its decision. Overturning the decision would require unanimous member government support for a treaty revision, whereas at least one member government, the United Kingdom, was known to oppose the French position (as it was eager to export sheep meat to France). In this case, the cost of caving in to member government pressure apparently was higher to the Court than the cost of isolated French defiance.

The sheep meat dispute was ultimately resolved in the manner suggested by the French government – a common market organization for sheep meat was established at the Dublin meeting of the Council in May 1980. At the same meeting, in a clear reference to the *Sheep Meat* ruling, President Valéry Giscard d'Estaing of France suggested that the member states should jointly constrain the ability of the ECJ to make "illegal decisions." * Giscard suggested an institutional reform that would have given the "big four" member governments an additional judge on the Court (similar to Roosevelt's efforts to pack the Supreme Court with New Dealers in 1936). * Ultimately, however, no such changes were made.

In sum, this line of cases provides some support for each of our three hypotheses. The ECJ took advantage of the conflict between a free-trade provision (Article 33) and agricultural policy provisions (Articles 38–46) to establish a controversial precedent [(H1).] *** The conflict came to a head in the *Sheep Meat* case, and when push came to shove the French government was not prepared to back down given the high domestic costs of so doing (H2). The Court was willing to maintain its adversarial stance because it did not think that a restraining collective response from the member governments was likely (H3).

Equal Treatment of the Sexes

Article 119 of the Treaty of Rome states that men and women should receive equal pay for equal work. Pay is defined broadly (in ironically