Vanderbilt Journal of Transnational Law

Volume 31
Issue 1 *January 1998*

Article 3

1998

Language and the Globalization of the Economic Market: The Regulation of Language as a Barrier to Free Trade

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ABSTRACT

The European Union has devoted recent efforts to establishing an integrated global economy, free of barriers or hindrances, primarily through Article 30 of the Treaty Establishing the European Community, the central free movement of goods principle. By eliminating barriers to free trade, the European Union seeks to achieve a single globalized economy among its Member States. Not surprisingly, economic globalization in the European Union has given rise to an integration of political and cultural values among European nations. As a result of this "convergence of values," Member States have responded by enacting protectionist measures that reassert their regulatory autonomy over their culture to counter the undesired effects of the cultural invasion by other nations. The loi Toubon, a recent French regulation which requires the use of the French language in a range of social and commercial contexts, is an example of such a protectionist measure. By mandating the use of French in various areas of French life, the French government asserts its nationalism through the regulatory protection of its language. This Note examines the loi Toubon, specifically the provision mandating the use of French in the labeling, packaging and advertising of goods, in the context of the economic globablization in the European Union and analyzes this law under the prevailing body of jurisprudence surrounding Article 30's protection of free trade. This Note concludes by suggesting that the loi Toubon violates the principle of free movement of goods and is inconsistent with the European Union's general design to integrate and harmonize the economic market.

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I. INTRODUCTION

> [L]anguage must be recognized and reckoned with as an important factor of the economy.[1]

Language is a fundamental and unique aspect of human behavior; it differentiates human beings from one another.[2] Law regulates and mediates human behavior through written words. Because language delineates and identifies human beings, it is not surprising that governments would seek to control this aspect of human behavior.[3] Language policy may be used as the "social glue" by governments to construct a "stable political and social whole" within a particular region.[4] A primary motivation of language regulation is to protect and preserve a group's national and cultural identity. Simply stated, the protection of language relates to the protection of culture.[5]

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1. Florian Coulmas, *European Integration and the idea of the national language*, *in* A LANGUAGE POLICY FOR THE EC 1, 28 (1991) [hereinafter Coulmas, *European Integration*].

2. Douglas A. Kibbee, Legal and Linguistic Perspectives on Language Legislation 1 (Mar. 1996) (unpublished manuscript, on file with author). *See also* James E. Jacob & William R. Beer, Introduction, *in* LANGUAGE POLICY AND NATIONAL UNITY 1, 1 (James E. Jacob & William R. Beer eds., 1985) ("language constitutes both a cultural boundary and a marker of social stratification"); Harald Haarmann, *Language Politics and the New European Identity*, *in* A LANGUAGE POLICY FOR THE EC, *supra* note 1, at 111 ("The need for the individual to identify himself/herself as a member of the group, and to distinguish his or her own group from other (*i.e.*, foreign) groups is so basic that it must be considered a stable component in man's evolution."); Robert Huntington, Note, *European Unity and the Tower of Babel*, 9 B.U. INT'L L. J. 321, 321 (1991) ("Language is one of the primary ways cultural groups identify themselves.").

3. Kibbee, *supra* note 2, at 1.

4. Jacob & Beer, *supra* note 2, at 1. *See also* Haarmann, *supra* note 2, at 105 ("This notion of national identity as exclusively related to the mother tongue has persisted in the European nation states as an elementary component of their inhabitants' way of thinking, and it has been transmitted—as a political idea with a still dominant range of influence—into the EC by its member states."); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 368-69 (1992) ("Language is a trait easily manipulated for the assertion of political status and control.").

5. Michele Belluzzi, *Cultural Protection as a Rationale for Legislation: The French Language Law of 1994 and the European Trend Toward Integration in the Face of Increasing U.S. Influence*, 14 DICK. J. INT'L L. 127, 129 (1995). *See also* Joseph P. Gromacki, *The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights*, 32 VA. INT'L L. REV. 515, 515 (1992) ("The protection of language and linguistic rights . . . becomes essential to the protection of human dignity."); Frank M. Lowrey, IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223, 223 (1992) (stating that language is "a unique obstacle to the unity of a nation"). For a historical discussion of the nexus between language and nations, see *Coulmas, European Integration*, *supra* note 1, at 18-21.

Languages are valuable to different nations for different reasons, and thus, nations present different rationales in their efforts to protect their respective languages. In this light, the regulation of language differs according to the purpose served by the language or languages present in a particular nation.[6] For example, language in France represents the highest embodiment of French culture.[7] Modern language legislation in France has been devoted to protecting the purity of the language, and consequently the culture, from the pernicious encroachments of foreign languages, primarily English.[8] The most recent government measure to regulate language use in France is the *loi Toubon*[9] (Toubon Law), named for its originator and author, the former Minister of Culture and current Minister of Justice of France, Jacques Toubon. The Toubon Law itself proclaims that the French language is "a fundamental element of France's personality and heritage."[10]

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6. *See generally* FLORIAN COULMAS, LANGUAGE AND ECONOMY 68 (1992) ("The functional potential of language is always the result of historical processes concerning both the language itself and the socioeconomic and cultural circumstances of its speech community.") [hereinafter COULMAS, LANGUAGE AND ECONOMY].

7. HAROLD F. SCHIFFMAN, LINGUISTIC CULTURE AND LANGUAGE POLICY 80 (1996). *See* RONALD WARDHAUGH, LANGUAGES IN COMPETITION 133 (1987) ("The French insist on identifying that language with their culture and maintain that France and its ways are somehow centrally involved in the French language, the language and the culture being inseparable.").

Prior to the enactment of the Toubon Law, former French Minister of Culture Jacques Toubon stated on the Senate Floor: "The French language is a language of liberty, of democracy. It is the language of dreams for many persons imprisoned, who, for years, have dreamed of democracy, of liberty, of independence." Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285, 321 (1996) (quoting J.O., Débats Parlementaires, Sénat, Sess. of Apr. 12, 1994, at 950).

Moreover, Toubon spoke of the French language as the French people's "primary capital, the symbol of their dignity, the passageway to integration, the diapason of a universal culture, a common heritage, part of the French dream." Alan Riding, *'Mr. All-Good' of France, Battling English, Meets Defeat*, N.Y. TIMES, Aug. 7, 1994, at 6.

8. Such incursions are evidenced by the development of *Franglais*, referring to "a form of speech and writing which resorts to anglicisms in place of traditional French words and phrases." James E. Jacob & David C. Gordon, *Language Policy in France*, *in* LANGUAGE POLICY AND NATIONAL UNITY, *supra* note 2, at 106, 119.

9. Law No. 94-665 of Aug. 4, 1994, Relative á l'emploi de la langue française, J.O., Aug. 5, 1994 [hereinafter Toubon Law].

10. Toubon Law, art. 1. The full text of Article 1 provides:

> Language of the Republic by virtue of the Constitution, the French language is a fundamental element of France's personality and heritage (patrimonie).
> It is the language of teaching, of labor, of commerce (échanges) and of public services.
> It is the privileged link between the nations of the French-speaking community (la francophonie).

Little scholarly attention has been devoted to the impact of language legislation on commerce and the free movement of goods.[11] At first glance, this association seems unlikely—how might the written or spoken word hinder commerce? An examination of the values inherent in trade policy, however, reveals that scrutiny of language laws under a free trade analysis is both appropriate and worthwhile. At the most fundamental level, if language serves as a mechanism to differentiate and delineate, the potential exists that this line of delineation will be drawn to exclude individuals and groups from certain settings, such as the international marketplace. In this way, it becomes apparent that language restrictions may prevent access to economic markets, and ultimately, create barriers to trade.

The economic market is a "place of encounter for the exchange of goods where communication and agreement are achieved."[12] Nations within a larger community are witnesses to the transformation of the global market economy.[13] Economic

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This and subsequent references to the text of the Toubon Law are based on the English version translated from French in Wexler, *supra* note 7, at 370-77 (Appendix). Such translation incorporates the invalidation of certain provisions based on the French Constitutional Council Decision of July 29, 1994, 1994 Recueil Dalloz, No. 94-345. Wexler, *supra* note 7, at 370.

11. Historically, language legislation has been challenged in terms of its impact on the rights of minority language speakers, particularly in the context of employment, voting, and education.

For analysis of language legislation and employment, see Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849 (1995); Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341 (1994); Sid Smolen, *English-Only Rules in the Workplace: Employers' Prerogative of Prima Facie Discrimination?*, 23 W. ST. U. L. REV. 149 (1995).

For analysis of language legislation and voting rights, see Alexander Athan Yanos, Note, *Reconciling the Right to Vote With the Voting Rights Act*, 92 COLUM. L. REV. 1810 (1992).

For analysis of language legislation and education, see Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249 (1988).

In addition, the validity of language legislation is often scrutinized according to doctrines equivalent to the substantive U.S. constitutional law on First Amendment and Equal Protection. For an analysis of the constitutionality of attempts in the United States to legislate language, see, for example, Daniel J. Garfield, Comment, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690 (1995).

12. COULMAS, LANGUAGE AND ECONOMY, *supra* note 6, at 39-40.

13. *See, e.g., id.* at 48 (stating that the level of international integration has become so intense that it is virtually impossible for a country to "look for its own path and its own pace of development in 'splendid isolation' "); Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1444 (1994) (describing the globalization phenomenon as "[p]roducts, people, and communications . . . crossing international boundaries"); John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 17 (1996) (describing the pace of international economic activity and the interdependence of national economies as "head spinning").

globalization, according to one scholar, is the "world-wide integration of markets."[14] As a result of this international integration and economic globalization, nations are becoming increasingly economically interdependent.[15] International organizations manage economic globalization by pursuing international commerce free of barriers and adopting aggressive free trade policies.[16] Essentially, these measures seek to effectuate a unified marketplace in which goods and services circulate freely among nations.

This global transformation of the economy cannot be viewed independent of cultural or sociopolitical change.[17] The increasing economic globalization has resulted in the intermingling of people, culture, and products among nations.[18] One scholar refers to this subsequent intermingling as "political globalization."[19]

Thus, economic globalization, as described by one scholar, has brought about a "convergence of values."[20] Through the integration of the market economy, global economic values such as free trade have converged on the cultural values of nations within the integrated economy.[21] This cultural and economic intermingling has cultivated an increased awareness of nationalism, multiculturalism, and cultural protectionism.

In asserting their nationalism, what do nations seek to preserve from their cultural heritage? Language regulation represents one way in which a nation reasserts its autonomy and

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14. Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 429 (1997). Seita describes four features of economic globalization: (1) increase in opportunities for sellers and buyers; (2) creation of new competition; (3) a developing interdependency among nations; and (4) support of principles of the free market economy. *Id.* at 439.

15. *Id.* at 430.

16. This Note will focus on the established trade policy in the European Union (EU), particularly as codified in the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, art. 30, O.J. (C 224) (1992), 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]. *See infra* Part III.

17. COULMAS, LANGUAGE AND ECONOMY, *supra* note 6, at 48-49.

18. Lawrence M. Friedman, Essay, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 89 (1996) ("[The] powerful forces of globalization include mass communications, mobility, and tourism, and the rapid spread of fashions and tastes.").

19. Seita, *supra* note 14, at 453 (suggesting that the cultural impact of economic globalization stimulates political globalization).

20. *Id.* at 469-71.

21. Another scholar explains this "convergence of values" by recognizing that nations tend to draw lines between the local and global aspects of society; the cultural expressions of nations are local, while economies are globalized. Friedman, *supra* note 18, at 87. As Friedman concludes, "modern nationalism has a distinct tendency to draw lines between social and cultural aspects of group identity on the one hand, and economic aspects on the other hand." *Id.* at 88.

counters the undesired effects of political and cultural globalization.

Absorption of different languages into one another is a natural phenomenon.[22] Particularly as a consequence of international commerce, language borrowing and absorption among nations are inevitable.[23] In turn, this multilingualism has created a heightened need for protectionist measures to counteract problems posed by the "cultural invasion."[24] Such government efforts to control language use through legislation marks a resistance to the natural phenomenon of language assimilation and absorption. Professor Lawrence Friedman describes this reassertion of autonomy and resultant protectionist national measures in the Member States of the European Union (EU) as the "nationalist backlash."[25] Friedman further remarks that this modern nationalism is rooted in the notion that each nation's cultural, linguistic, and religious traditions are entitled to sovereignty.[26]

Examples of such protectionist and nationalist measures are reflected in laws that regulate the use of language in particular social and economic contexts. Nations—individual regions within a broader economic market—such as France within the EU,[27] pursue policies of language protection to reassert their national boundaries within the increased cross-national activity. Viewed independently, the underlying protectionist rationale behind such measures is legitimate. If each individual nation, however, responds to increased globalization and integration by pursuing and adopting protectionist language regulations, the wider

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22. Roderick Munday, *Legislating in Defense of the French Language*, 44 CAMBRIDGE L.J. 218, 232 (1985) ("[A]ll languages are prone to borrow from one another. This process is normally considered innocuous and the absorption often unperceived.").

23. *See, e.g.*, Thomas E. Carbonneau, *Linguistic Legislation and Transnational Commercial Activity: France and Belgium*, 29 AM. J. COMP. L. 393, 411 (1981) ("it is well to remember that foreign borrowings are part of the normal process of language evolution, that English language influence, although substantial, is limited primarily to the commercial sector. . ."); Munday, *supra* note 22, at 220 ("Commerce and technology are norespecters of national frontiers.").

24. *See, e.g.*, Friedman, *supra* note 13, at 1444 (arguing that the increasing internationalization of commerce has been accompanied by increased regulation at the local level).

25. Friedman, *supra* note 18, at 86. *See supra* note 222.

26. *Id.* at 87. Friedman refers to sovereignty of a cultural and expressive nature, not to economic or political sovereignty. *Id.* In this framework, the Toubon Law is plainly seen as a national measure that seeks to counter the unwanted effects of economic globalization on its language. As discussed in Part II, the primary rationale of France's effort to regulate language is cultural protectionism.

27. To date, the EU comprises Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *What is the European Union?* (visited Oct. 13, 1997) <http://europa.eu.int/en/eu/states.htm> (Web Site of the EU).

economic market will exist without harmony or uniformity. Moreover, if the substance of language regulation directly affects the flow of commerce and the behavior of individuals in commerce, such regulation violates the spirit and values of free trade policies and possibly specific provisions of trade regulation agreements.

This investigation into language regulation reveals that the international community is not only experiencing globalization, but is also undergoing a simultaneous wave of nationalism in which the values of globalization on one hand, and of nationalism on the other, converge and often conflict.[28] Will states' affirmative regulation of language use pose a barrier to free trade? If so, is such a barrier justifiable both in legal and normative terms? If the goal of trade regulation in today's complex multicultural, multilingual society is to achieve an integrated market, free of trade barriers, is there a need for a common language policy? Regardless of necessity, is a common language policy desirable? Will the failure to establish such a common language policy, in turn, frustrate the goal of free trade?

This Note explores the difficulties posed by these questions through an examination of one nation's exercise of its autonomy to regulate the use of language and the implications of such regulation on international commerce in the European market. France, as a Member State of the EU, has most recently exercised its sovereignty through the enactment of the Toubon Law, a regulation requiring the use of the French language in a broad range of settings, including commercial transactions.

Part II of this Note briefly surveys the history of French language policy prior to and including the enactment of the Toubon Law and examines several relevant provisions of the Toubon Law itself. Part III explores the current trade policy regime in the EU, particularly the jurisprudence and policies underlying the free movement of goods principle codified in Article 30 of the EC Treaty. Part IV scrutinizes the Toubon Law under EU trade policy, illuminating whether such a national measure to protect language violates the prevailing EU trade policy. Part V considers some general principles that influence the free trade doctrine, assessing whether they are helpful in the analysis of language legislation. Moreover, broader, normative questions are considered, such as whether the free trade framework is an appropriate method of challenging and evaluating language

28. Friedman, *supra* note 18, at 89. *See* Huntington, *supra* note 2, at 325 (positing that language diversity will limit the degree to which the EU can achieve unity).

legislation, and, if so, whether any larger issues regarding the legislation of language are illuminated.

II. THE REGULATION OF LANGUAGE IN FRANCE

> France is the most extreme case . . . of a nation totally identified with one language, but which goes beyond this to defend the integrity of this linguistic personality in all aspects of social life against the claims and encroachments of any and all languages from inside or outside its borders.[29]

Modern efforts by the French to legislate language "ha[ve] to be viewed from the wider perspective of French cultural and linguistic history."[30] Accordingly, this discussion must begin with a brief account of the context in which language policy exists in France. Linguistic rights have historically been a political issue in France, and thus, government's involvement in formulating French language policy did not originate with the recent enactment of the Toubon Law.[31] The link between the need to preserve France's national identity and language and to prevent the increasing encroachments of the English language has motivated the French government's involvement in modern language policy in France.[32]

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29. Schiffman, *supra* note 7, at 75 (quoting Renée Balibar, L'Institution du Français: Essai sur le Colinguisme des Carloingiens á la Rêpublique 9 (1985)).

30. Munday, *supra* note 22, at 222. *See also* Jacob & Gordon, *supra* note 8, at 106 ("The role of language policy is central to the history of state and nation-building in France."). For a discussion of how the social, political, cultural, and economic backgrounds of a particular region affect language regulation, see generally Perea, *supra* note 4, at 369 (suggesting that the debate about official languages is "at its core, a debate about cultural and political dominance and power").

31. For a discussion of France's historical involvement in regulating language, see generally SCHIFFMAN, *supra* note 7, at 77-123; Jacob & Gordon, *supra* note 8, at 109-29; Belluzzi, *supra* note 5, at 130-37; Carbonneau, *supra* note 23, at 394 ("Throughout its history, France has endeavored to preserve the character of its national language through official government action.") & 395-405; Munday, *supra* note 22, at 219-32, 233 ("[T]he French language is something precious to be actively policed and regularly reviewed by a centralised, authoritative body of intellectuals."); Loretta Nelms-Reyes, Comment, *Deal Making on French Terms: How France's Legislative Crusade to Purge American Terminology From French Affects Business Transactions*, 26 CAL. W. INT'L L.J. 273, 276-85 (1996); Malcolm Offord, *Protecting the French Language—the Role of Private Organizations*, 4 FRENCH CULTURAL STUD. 167, 167 (1993) ("Protecting the French language has a long history. Official involvement dates back to the sixteenth century . . .") [hereinafter Offord, *Private Organizations*]; Wexler, *supra* note 7, at 296-312.

For a specific discussion of the efforts to protect French by private organizations, see Offord, *Private Organizations*, *supra*, at 168-83.

32. Various modern mechanisms have been employed by the French to defend and protect their language from threatening forces and to supervise the

A. *Bas-Lauriol Law*

The *loi Bas-Lauriol* (Bas-Lauriol Law),[33] enacted by Parliament in 1975, represents France's first legislative effort to regulate language.[34] The legislative history of the Bas-Lauriol Law reveals that the statute was designed to "prohibit[ ] misleading language in the sale of goods and services," and thus, amounted to a consumer protection measure.[35] That is, the law reflects the principle that French consumers purchasing products

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quality of French used in official documents and the media. Malcolm Offord, *Protecting the French Language, in* CHANGING VOICES OF EUROPE 75 (M.M. Parry et al. eds., 1994) [hereinafter Offord, *Protecting the French Language*].

Government involvement in the French language dates back to 1635 and the establishment of l'Académie Française, chartered by Parliament in 1637. The mission of the Academy was to establish clear rules on the language and to maintain its, purity. Wexler, *supra* note 7, at 299-300. For further discussion of l'Académie Française, see Schiffman, *supra* note 7, at 85-89.

In addition, the French developed la Francophonie, an international alliance of French-speaking nations, to "safeguard French influence in the world and to arrest any further decline of their language and culture." WARDHAUGH, *supra* note 7, at 149. *See also* Offord, *Protecting the French Language, supra*, at 84 (Francophonie "refer[s] to the French speaking world in a very general way, without especially evoking the French language, but rather relating to any matter of common concern to the countries sharing the French language."); *About France: La Francophonie* (visited Oct. 12, 1997) <http://www.france.net.au/official/press/af/franc.html> (defining Francophonie as "the community of French-speaking countries, or the collective unit formed by French-speaking people").

As evidence of the active role the French government has taken in linguistic policy, one author notes the system of "positive incentives" for encouraging the use of French:

> The government subsidises the translation of French publications into foreign languages; it subsidises French libraries abroad and French publications for distribution abroad; it offers special aid to theater or film productions using the French language; French language "world" radio and the French language song also receive official financial support.

Bruno De Witte, *The Impact of European Community Rules on Linguistic Policies of the Member States, in* A LANGUAGE POLICY FOR THE EC, *supra* note 1, at 173. The effect of such subsidies is largely to promote French in the cultural and social aspects of life in France. This Note demonstrates that the Toubon Law's requirements, however, send a stronger message and affect a larger scope of the population—other Member States involved in the economic market.

33. Law No. 75-1349 of Dec. 31, 1975, Relatif á L'Emploi de la Langue Française, J.O., Jan. 4, 1976, at 189 [hereinafter Bas-Lauriol Law].

34. Nelms-Reyes, *supra* note 31, at 280.

35. *Id.* In its interpretation of the Bas-Lauriol Law, the French government agreed with this characterization:

> The legislator attempted to protect French users in the widest sense of that term (consumers or users of products, of goods and services, of public documents and information) against a faulty understanding occasioned by the use either of texts written exclusively in a foreign language or of French texts containing foreign terms or expressions.

Carbonneau, *supra* note 23, at 399 (quoting Circulaire of 14 Mar. 1977, J.O. of 19 Mar. 1977 at 1483.).

on their own domestic market should be free from the miscommunication associated with buying a product advertised and labeled in a foreign language.[36] As one commentator noted, however, original drafts of the Bas-Lauriol Law suggest it was also a measure with strong protectionist undertones, referring to the "contamination" and "degradation" of the French language.[37]

The Bas-Lauriol was designed to require the use of French in key areas of civic life. Specifically, the Bas-Lauriol Law required the use of French in "any business communication offering a product or service to the public."[38] Most relevant to this discussion and most similar to its successor, the Toubon Law, is Article 1 of the Bas-Lauriol Law.[39] Article 1 stated that the marketing and sale of goods and services to be consumed by French citizens must be documented in French.[40] In addition, while the law permitted accompanying foreign translations, the use of foreign terms with French equivalents was prohibited.[41] Words without French equivalents and famous or specialty products were exempted from the ban on foreign words.[42]

Commentary on the effects of the Bas-Lauriol Law varied.[43] One scholar predicted its requirements would not present an undue burden on producers of goods.[44] Yet, in consideration of certain importers of goods, the same scholar admitted that the

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36. Carbonneau, *supra* note 23, at 402.

37. *Id.* at 398. *See also* Munday, *supra* note 22, at 225, 234 (stating that the French Government "openly avowed that one of the chief purposes of [loi Bas-Lauriol] was 'the safeguarding of the cultural status of the French language' . . . . [D]espite the thin pretense that the French legislation is for the protection of consumers, its obvious function is cultural and, viewed in this light, it is something quite out of the ordinary.").

38. Jacob & Gordon, *supra* note 8, at 119.

39. In addition, the Bas-Lauriol Law regulated language use in a variety of areas. Employment contracts to be executed in France were required to be drafted in French, with a similar prohibition on the use of foreign terms with French equivalents. Bas-Lauriol Law, art. 4. In addition, French was also required for the use of signs, notices, and displays in connection with public places, property, or services and in contracts with public entities. Bas-Lauriol Law, arts. 6 & 7.

40. Bas-Lauriol Law, art. 1.

41. Wexler, *supra* note 7, at 328.

42. Nelms-Reyes, *supra* note 31, at 281.

43. *See, e.g., id.* at 288 ("Overall, the 1975 language statute, perhaps because it was camouflaged as a consumer-protection law, had little impact on the increasing number of Anglo-American terms being used in everyday French."); Carbonneau, *supra* note 23, at 411 (recognizing the broad scope of the law and recommending that it be applied "with a good deal of common sense and with due regard to the undeniable realities of international business life.").

44. Carbonneau, *supra* note 23, at 402 ("The application of this regulation is unlikely to impose an overwhelming burden upon the importers and manufacturers of consumer merchandise since most of them, according to the dictates of good business sense, have affixed French language labels to products destined for export to France.").

costs and efforts to comply with the requirements would be "astronomically expensive" and "time-consuming."[45] The Bas-Lauriol Law also incited debate about its impact on the European Community (EC) and its compatibility with common market principles.[46]

The relationship between the Bas-Lauriol Law and free trade policy in the EC was never directly scrutinized, nor was the law's validity formally challenged. Accordingly, the law was never affirmed by a court under European law.[47] An inquiry was directed, however, to the European Commission (Commission)[48]

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45. *Id.* For example, the scholar noted that the Bas-Lauriol Law places a heavy burden on producers and importers of high-tech specialized goods, which are usually accompanied by explanatory literature and instruction manuals. *Id.* Most of these materials are printed in English. Such materials are "ill-suited" for translation and, as the author noted, such translations are often unnecessary given that consumers and users of such high-tech products are often trained to use the products in English. *Id.* Therefore, protection of the user in this instance is usually unnecessary and the underlying consumer protection rationale is no longer served.

46. For example, in 1983, the European Commission responded to a written inquiry that posed the question in what instances does "the language factor prove to be a barrier to trade." 183 J.O. (C359) 11. The Commission responded:

> The obligation to use the language of the importing country is in theory intended to protect the consumer in that country, who is entitled to be informed in his own language of the nature, composition, directions for use, dangers, etc. of a product.
> However, there are limits to this obligation and under certain circumstances it can be unjustified; it is then contrary to Article 30 of the [EC Treaty], as in the following cases -
> - when the use of the national language is required systematically in the supporting documents for customs declarations (invoices, Community transit documents, transport documents, movement certificates, commercial correspondence); the Commission considers that a translation of such documents can only be demanded in cases where there are serious doubts about what they contain or they are not understood at all;
> - when certain expressions which are widely used in common speech are not accepted and serve as a pretext for refusing entry for the products to which they refer;
> - when the requirement for a given language to be used for certain documents or references which are an integral part of goods imported from other Member States (instructions for use, descriptions on the packaging, labels) is enforced at the customs clearance stage.

Id.

Responding to a separate written inquiry regarding French trade protection measures, the Commission took the view that the French government's interpretation of the Bas-Lauriol Law was not compatible with Article 30. *See* 1983 J.O. (C 141) 10.

47. Nelms-Reyes, *supra* note 31, at 282.

48. Article 169 of the EC Treaty empowers the European Commission to assess whether a Member State has violated the obligations that supranational law has imposed on it. Nelms-Reyes, *supra* note 31, at 282 n.57. Article 169 states:

to determine whether the Bas-Lauriol Law constituted a trade barrier under Article 30 of the Treaty Establishing the European Community (EC Treaty).[49] The Commission concluded that the Bas-Lauriol Law "regarding the use of French [was] not compatible with the obligations imposed by Article 30 *et seq.* of the [EC] Treaty."[50] In defense, the French Government emphasized not the consumer protection rationale, but rather the underlying cultural protectionist policies, attempting to justify the law under the Article 36 public policy exception[51] and removing it from the scope of Article 30. Thus, as one commentator remarked, the interpretations of the Bas-Lauriol Law do not focus on the consumer protection aspects, but replace on its attempt to provide broad protection of the French language.[52] It is not surprising, therefore, that the Toubon Law, a broader and more explicit protectionist measure, would follow and supersede the Bas-Lauriol Law.[53]

Several additional factors preceded and further set the groundwork for the enactment of the more expansive Toubon Law. First, in 1992, Parliament amended the French Constitution, declaring French the official language of France.[54] Second, France encouraged government involvement in regulating language to prevent further invasion by Anglo-American vocabulary.[55] Since the Bas-Lauriol Law, the United States has

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> If the Commission considers that a Member State has failed to fulfil [sic] any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.
> If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

EC TREATY art. 169.

49. 1983 O.J. (C 141) 10. The inquiry stated: "Would the Commission agree that these demands [of the Bas-Lauriol Law] constitute abuse of the [EC Treaty] by increasing the costs and lengthening production and despatch times for companies in other Member States wishing to export to France?" 1983 O.J. (C 141) 10. *See supra* note 16.

50. 1983 O.J. (C 141) 10.

51. *See infra* Part III.B.

52. Nelms-Reyes, *supra* note 31, at 283 n.63, 285.

53. *Id.* at 283.

54. FR. CONST. art. 2 (proclaiming that "The language of the Republic is French").

55. SCHIFFMAN, *supra* note 7, at 121 ("[T]he French are not only willing to have their government intervene to defend the French language, they demand that it do so, and there seems to be unanimity in this area from one end of the political spectrum to the other . . .").

The proposition that English threatens the French language and culture is somewhat analogous to the English-only movement emerging in the United States. Proponents of English-only laws fear that non-English speakers threaten the American culture. *See* Yvonne A. Tamayo, *Official Language Legislation: Literal Silencing/Silenciando La Lengua*, 13 HARV. BLACKLETTER J. 107, 120 (1997)

continued to achieve significant advances in science, technology, and the media,[56] resulting in its dominance in these areas on the European market. U.S. dominance has caused a global infiltration of Anglo-American vocabulary into the European market for goods and services in these areas.[57] The infiltration and dominance of English words in the European market in turn expanded the despised *franglais*,[58] further contributing to the pollution of the French language.[59] Thus, the purity of the French language was threatened by English—the "lingua franca of the modern world."[60]

Additionally, the movement toward European integration has in effect displaced France from its dominant position in the EU. As one scholar noted, the EU is being "built above all in fields where the English language has acquired, all over the world, a dominating role."[61] Efforts to integrate and unify Europe are perceived by the French as obliterating their unique identity and culture. These factors considered together account for the broad protectionist tone of the Toubon Law.

B. *Toubon Law*

The Toubon Law was enacted on July 1, 1994.[62] Unlike its predecessor,[63] the objective of the Toubon Law is clearly stated:

("Hearing . . . [a] foreign language represents to some monolingual English speakers a threat to Anglo-American culture. It fuels distrust . . . and fear that 'outsiders' will upset the comprehensible order of an English-speaking America. Speech in a language other than English may be most highly suspect when the communication appears to fortify human bonds, enhance intimacies, or serve as an exchange of useful information between the speaker and listener."). For a discussion of the English-only movement, see generally Wexler, *supra* note 7, at 351-68; Perea, *supra* note 4, at 350-63.

56. *See* Claude Truchot, *Towards a Language Policy for the European Community*, *in* LANGUAGE PLANNING 87, 89 (David F. Marshall ed., 1991) ("English tends to be used in the fields of science and technology"); WARDHAUGH, *supra* note 7, at 129-40 (discussing the widespread distribution of English in the fields of science, technology, broadcasting, education, and literature).

57. The use of English expanded into many areas of European society. *See, e.g.*, Truchot, *supra* note 56 at 92 (citing a developing trend toward the use of English in the print media in Europe); WARDHAUGH, *supra* note 7, at 128 ("People throughout the world . . . want to learn English, a language they often associate with ideas of 'progress' and 'modernity'.").

58. *See supra* note 8 and accompanying text.

59. Jacob & Gordon, *supra* note 8, at 120 ("The problem . . . is not the absorption of new words into French but rather the absurd psychocultural phenomenon of people deliberately affecting American words and ways into their comportment.").

60. WARDHAUGH, *supra* note 7, at 137.

61. Truchot, *supra* note 56, at 90.

62. *See supra* note 9.

63. The Toubon Law replaced the Bas-Lauriol Law. *See* Toubon Law, art. 24 ("Law no. 75-1329 dated December 31, 1975 on the use of the French language

the protection of French language and culture.[64] The Toubon Law mirrors the Bas-Lauriol Law in several respects. First, foreign terms are permitted only where no French equivalents exist; in such cases, a definition of the foreign term must be provided in French.[65] Second, foreign texts are permitted, if accompanied by the French translation.[66] Third, advertisement of well-known foreign and specialty products are exempted from the French-only requirement.[67]

Relevant to this discussion are the provisions of the Toubon Law that concern and affect commerce and the free movement of goods. Article 1 states that the French language is the "language of labor and commerce."[68] Article 2 requires the use of French for the name, offer, presentation, or instruction of goods, including any written, spoken, or audio-visual advertising. Slogans and messages associated with registered trademarks are also encompassed by Article 2. Article 3 requires any announcement intended for public display to be in French. Article 4 requires, of any material in Article 3 presented in both foreign and French languages, that the French portion is as legible, audible, or

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is repealed, except for articles 1 to 3 which will be repealed when article 2 of this law becomes effective . . . .").

64. Nelms-Reyes, *supra* note 31, at 290. For commentary in accordance with this characterization of the Toubon Law, see Niamh McCarthy & Hugh Mercer, *Language as a Barrier to Trade: The Loi Toubon*, 17 EUR. COMPETITION L. REV. 308, 308 (1996) ("The loi Toubon is a measure to protect French culture through the protection of the French language.").

Before enactment, Minister Toubon stated: "France is merely taking measures that everyone else took a long time ago and that exist in part in European Union language regulations—namely, to require the use of the French language in France." Jacques Toubon, *A U.S. Tempest in a French Demitasse*, INT'L HERALD TRIB., Apr. 4, 1994, *available in* LEXIS, News Library, IHT File [hereinafter Toubon, *U.S. Tempest*].

One scholar's examination of the legislative history revealed several secondary justifications for the enactment of the Toubon Law. First, the Toubon Law was enacted to "preempt" the EU from enacting legislation that might have been unfavorable to the French language. Second, the Toubon Law was necessary to prevent the French from relying too heavily on the English language. Wexler, *supra* note 7, at 320 n.141. *See also* Herbert R. Lottman, *France's Campaign to Protect 'la Langue'*, 241 PUBLISHER'S WKLY 16, *available in* LEXIS, News Library, PUBWKL File (1994) (remarking that its advocates say that the Toubon Law's motive is "cultural, to protect French from a new American invasion."); Anne Gaughan Lechartier, *Cultural Preservation: Toubon's Law Aimed at Preserving the French Language*, 7 EUROWATCH, *available in* LEXIS, News Library, EURWCH File (1995) (describing English as the "enemy language" and the fear that it is "taking over the world and extinguishing good languages such as French.").

65. Belluzzi, *supra* note 5, at 138 n.83.

66. *Compare* Toubon Law, art. 4, *with* Bas-Lauriol Law, art. 1. Article 4 of the Toubon Law limits such foreign translations to two, and requires that the French version be as "legible, audible and intelligible as the foreign language version."

67. *Compare* Toubon Law, art. 2, *with* Bas-Lauriol Law, art. 1 (each exempting well known, typical products and foreign specialties).

68. Toubon Law, art. 1.

intelligible as the foreign translation. This provision prevents importers from circumventing the law's objective by using a French translation in a small typeface. Article 12 requires all radio and television programs and advertising to be in French, excluding films and audiovisual works in their original forms.[69]

Failure to comply with the conditions of the Toubon Law is sanctioned by a maximum personal fine of 5000 francs (about $1000), and a maximum corporate fine of 25,000 francs (about $5000). In addition, in the context of Article 2, a judge is permitted to penalize a corporate infringer for each product that fails to comply with the labeling requirements.[70]

The constitutionality of the Toubon Law was reviewed by the Constitutional Council,[71] pursuant to a challenge brought by sixty deputies of the National Assembly under Article 61 of the French Constitution. The challengers asserted that the Toubon Law violated Article 11 of the Declaration of the Rights of Man,[72] arguing that the law's prohibition of certain words constituted a

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69. The Toubon Law also regulates the use of language in other aspects of life not within the scope of this Note—including employment contracts, education, academic conferences, and the posting of public notices. Article 5 requires all contracts to which "a public entity or private person acting in public capacity are parties" to be in French. This provision, however, does not provide any criteria as to what constitutes public and private functions. Contracts within the scope of this provision, between one or more foreign parties, may be executed in one or more "equally authentic" languages, in addition to the mandatory French version. Furthermore, a party to a contract who violates Article 5 is not entitled to rely on any foreign language provision of the contract if it would prejudice the opposing party.

Article 7 mandates that all foreign language publications, reviews, and communications distributed in France be accompanied by a French summary.

Article 8 requires written employment contracts to be in French; further, when the work to be performed in such contracts can only be described in a foreign language, the contract must include a French explanation of the foreign terms.

Article 10 regulates the advertisement of offers of employment in any language other than French.

While not directly relevant to this Note, these additional provisions of the Toubon Law nonetheless have implications on the free movement of services and persons.

70. Tara Patel, *'Toubon' Law Will Impose a Certain Je Ne Sais Quoi*, J. OF COM., Apr. 10, 1995, at 2A, *available in* LEXIS, Market Library, PROMT File.

71. The Constitutional Council, France's constitutional court, reviews the constitutionality of French legislation before it becomes effective. *See* Laurel Wentz & Bruce Crumley, *Language Law Hits a Closed French Door*, ADVERTISING AGE, Aug. 8, 1994, at 44, *available in* LEXIS, News Library, TXTNWS File. For a discussion of the Constitutional Council's authority to review the constitutionality of statutes, see Nelms-Reyes, *supra* note 31, at 291-92 n.121; Wexler, *supra* note 7, at 327 n.176. *See generally* FR. CONST. art. 56 (addressing the membership and control of Constitutional Council).

72. Belluzzi, *supra* note 5, at 141 n.109 (quoting the Declaration of the Rights of Man and of the Citizen of 1789, Article 11 ("[f]reedom of communication of thought and opinions is one of the most precious rights of man; each citizen may speak and write freely, except in those cases where abuse of this freedom is determined by law.")).

restriction of the free communication of thoughts and opinions.[73] The Constitutional Council agreed with this argument, holding that the French legislature could not compel private citizens to use particular French terms and expressions.[74]

As a consequence of the Constitutional Council's judgment, the Toubon Law has undergone significant alteration. Those provisions regulating private citizens' use of language were nullified. Furthermore, the Toubon Law's application is now restricted to public entities and private individuals or entities engaging in public activities.[75] Private citizens are no longer subject to the regulation of the Toubon Law.

In addition, the Constitutional Council struck down a provision in Article 2 mandating the use of French in "all writings describing usage, guaranties, conditions, and receipts for commercially manufactured products."[76] Finally, the Constitution Council held it would be responsible for determining fines against infringers.[77]

C. *Prosecution under the Toubon Law*

According to a Ministerial Order, five private organizations have been given authority to sue for damages for violations of Articles 2 through 4, 6, 7, and 10 of the Toubon Law.[78] As of early 1996, as many as 2000 inspections had reportedly been conducted by these watchdog organizations. Of these, half led to legal proceedings, which resulted in warnings and often fines.[79] Nonetheless, prosecutions have not been widely publicized. The following discussion highlights several notable claims brought under Article 2 of the Toubon Law.

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73. Wexler, *supra* note 7, at 327. In addition, they challenged the law's restriction on the freedom of expression in teaching and in research. *Id.* at 330.

74. *Id.* at 329.

75. As several commentators have noted, this amendment may not be overly restrictive, given the absence of criteria on how to delineate public activities from those that are private. Nelms-Reyes, *supra* note 31, at 293. *Compare* Belluzzi, *supra* note 5, at 138 (arguing that what remains of the Toubon Law seems "unnecessary and repetitive in light of existing legislation"), *with* McCarthy & Mercer, *supra* note 64, at 308 (suggesting that the Toubon Law "builds on and strengthens" the existing Bas-Lauriol Law).

76. Belluzzi, *supra* note 5, at 142.

77. *See Ads Still Under Fire in French Toubon Legislation*, ADWEEK, Aug. 8, 1994, at 14., *available in* LEXIS, News Library, ADWEEK File.

78. Nelms-Reyes, *supra* note 31, at 304-05 n.199.

79. *See* Tara Patel, *En Garde! France Cracking Down on Firms That Violate Language Laws*, J. OF COM., Jan. 30, 1996, at 3A.

1. The Body Shop

The French government successfully prosecuted The Body Shop for violating Article 2 of the Toubon Law by failing to supplement its English labels with French translations.[80] The branch located in Chambery, France, was fined 1000 francs (approximately $200) after volunteers for an association defending the French language filed a complaint in a local court.[81]

2. Walt Disney

A Parisian citizen, together with a consumer affairs group, sued Walt Disney for failing to provide French labeling on seven of the five thousand toys in its store on the Avenue des Champs-Élysée.[82] Although the suit was dismissed, Disney removed those non-complying products from its store in France.[83]

3. Georgia Tech-Lorraine

The prosecutors of the Toubon Law suffered a major setback in July 1997 in a case that received much international attention and engendered a fierce debate about the scope of the Toubon Law and the Internet. Two private watchdog organizations sued the Georgia Institute of Technology's European campus in Metz, in the Lorraine region of France, for violating Article 2 by operating an English-only Web site without accompanying French translations.[84] This suit marked the first time the Toubon Law was applied to the Internet.[85]

The prosecutors argued that the Toubon Law applied to the Georgia Tech-Lorraine Web site because the Lorraine campus was incorporated and operated under French law. In addition, the Web site was accessible in France over the Internet. Marceau Dechamps, the administrator of the prosecuting organization,

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80. *See* Andrew Jack, *Body Shop Hit by French Move*, FIN. TIMES, Jan. 20, 1996, at 2, *available in* LEXIS, News Library, FINTME File. The Body Shop is a British chain of retail stores specializing in beauty products.

81. *See French Body Shop Fined for English on Labels*, REUTERS EUR. COMMUNITY REP., Jan. 22, 1996, *available in* LEXIS, News Library, REUEC File.

82. *See* Paul Klebnikov, *Minister Toubon, Meet General Gamelin*, FORBES, May 22, 1995, at 292.

83. *See id.*

84. The Georgia Tech-Lorraine Web site is located on a French server and has a French domain name: www.georgiatech-metz.fr. *See Wrong Web Tongue May Get Site a Lashing*, MULTIMEDIA & WEB STRATEGIST, Dec. 1996, at 5, *available in* LEXIS, News Library, NWLTRS File.

85. *See* Tom Ladner, *The French Say Non to English-Language Web Site*, (visited Oct. 7, 1997) <http://www.wired.com/news/story/911.htm>.

stated, "Whether the site is in English, Chinese or Russian is no problem. The problem is that it is not also in French. We are not against English, we are for the French language. We are in France, after all."[86] Georgia Tech defended on grounds that the law did not apply to the Web site because it was private. The Web site was intended for students enrolled in the Lorraine program, who are required to be fluent in English and to attend classes in English. Georgia Tech faced fines of as much as 25,000 francs ($4300) for each time the English-only page was accessed.[87]

The question was whether the Internet is a forum for private conversation or a public place. The answer ultimately would determine whether Article 2 applied to Georgia Tech. On June 9, 1997, the Tribunal del Police de Paris dismissed the suit against Georgia Tech on procedural grounds; in particular, the court declined to recognize the suit due to plaintiffs' failure to report the violations to the police, as required by the law. In addition, the court concluded that prosecutions under the Toubon Law could only be initiated by the government and not by private organizations.[88] Despite the favorable outcome, Georgia Tech has redesigned its Lorraine Web site to include French translations.[89]

Although not decided on the merits, the Georgia Tech case gave the French government an opportunity to apply its rationale for the Toubon Law to the Internet. Ninety percent of communication on the Internet is in English.[90] In this light, the Internet heightens France's fear that this English-dominated medium will give rise to the extinction of its own culture and language. Accordingly, the French government justifies regulating the Internet by asserting its right to protect its language and culture from extinction.[91]

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86. Anne Swardson, *French Groups Sue to Bar English-Only Internet Sites*, WASH. POST, Dec. 24, 1996, at A1.

87. *See Georgia Institute of Technology has Added Multilingual Translations*, (last modified June 9, 1997)<http://www.globalvis.com/toubon.html>.

88. *Multimedia Docket Sheet: Recent and Pending Cases*, MULTIMEDIA & WEB STRATEGIST, June 9, 1997, at 8, *available in* LEXIS, News Library, NWLTRS File. Additionally, it was reported that the suit was dismissed because the prosecuting organization was not authorized to bring such a claim on behalf of the government.

89. *See French Judge Rules in Favor of Georgia Tech Lorraine* (last modified June 6, 1997) <http://www.gatech.edu/techhome/webcast/adv.html>.

90. Swardson, *supra* note 86.

91. With respect to the Internet, Toubon himself stated that "France is menaced by a new form of colonialism. The United States is in the process of taking the dominant position. If we do nothing . . . [w]e will be colonized." *Id.*

France has resisted extensive use of the Internet. Only about 500,000 computers in France have access to the Internet. France's lagging support for the Internet is explained by the widespread use of the Minitel system, France's free national online service provided by the phone company. Over six million households in France haveMinitel terminals. *Id.*

III. TRADE REGULATION POLICY IN THE EU

EU law is pluralistic; that is, more than one body of laws exists within a single legal entity.[92] Moreover, the EU is approaching a federalist system, in which supranational EU law coordinates intricately with national laws of Member States.[93] The founding and constitutional treaties of the EU are the Treaty Establishing the European Economic Community,[94] the EC Treaty[95] and the Treaty on European Union.[96] None of these treaties specifically or explicitly contains a supremacy clause subordinating domestic Member State law to EU law. In the absence of a supremacy clause, the individual Member States affirmatively reflect their commitment to the supremacy of EU law in their respective domestic laws.[97]

The EC Treaty provides the constitutional framework of the EU and is "designed to achieve a common market for products, labor, services and capital" free of barriers.[98] Under Article 5 of the EC Treaty,[99] a Member State's sovereignty, and thus its

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92. Friedman, *supra* note 18, at 67.

93. *Id.* at 70.

94. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11.

95. EC TREATY, *supra* note 16 (incorporating amendments to the Treaty Establishing the European Economic Community).

96. TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 719 (1992) (entered into force Nov. 1, 1993) (renaming the European Economic Community the European Union).

97. Patrick G. Crago, *Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services With the European Union*, 20 HASTINGS INT'L & COMP. L. REV. 467, 487-88 (1997). For instance, Article 55 of the French Constitution states:

> Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party.

FR. CONST. art. 55, *translated in French Constitution of 4 Oct. 1958* (visited Oct. 18, 1997) <http//:www.globalreports.com/france/5d6/htm>. Thus, the French have committed themselves to the principle that EU law takes precedence over subsequent national laws. *See* Crago, *supra*, at 488. For a historical background of the foundational treaties of the former EC and EU, see Rebecca Means, Note, *Kalanke v. Freie Hansestadt Bremen: The Significance of the* Kalanke *Decision on Future Positive Action Programs in the European Union*, 30 VAND. J. TRANSNAT'L L. 1085, 1087-91 (1997).

98. Kurt Riechenberg, *The Merger of Trading Blocks and the Creation of the European Economic Area: Legal and Judicial Issues*, 4 TUL. J. INT'L & COMP. L. 63, 66 (1995).

99. Article 5 states:

> Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims.

authority to legislate, is subject to and may be restricted by EU law. That is, in the event that a national measure conflicts with EU law, a Member State must defer to its supranational authority.[100] This principle has been affirmed by the European Court of Justice (ECJ).[101] "The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights."[102] Furthermore, those matters not within the specific power of the EU are "left within the jurisdiction of the Member States."[103]

The EU's developing trade doctrine has evolved rapidly in the form of treaties, tribunal-made doctrine, legislative acts, communications and directives, and customary principles. Most recently, trade law has focused on promoting the free movement of goods and eliminating barriers and trade discrimination. Thus, to determine whether the Toubon Law is consistent with EU law, one must examine the prevailing supranational trade policy of the EU to which Member States must defer in the event of conflict.

A. *Article 30 of the EC Treaty*

Regulations challenged as restricting trade between Member States are analyzed under the central provision of the EC Treaty, Article 30, which sets forth the basic principle of free movement of goods: "Quantitative restrictions on importation and all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States."[104]

They shall abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty.

EC TREATY art. 5.

100. *See, e.g.*, Nelms-Reyes, *supra* note 31, at 281, 302 ("Domestic law which violates supranational European law may be invalidated . . . . National legislation must comport with European Union law.").

101. *See* Means, *supra* note 97, at 1099-*1103* (discussing the inter-related doctrines of direct effect and supremacy in the EU). The ECJ is the main body adjudicating matters for the EC and is vested with the responsibility of ensuring the application of the EC Treaty. Nelms-Reyes, *supra* note 31, at 281 n.50. On the ECJ, see generally Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 657-64 (1997); Manfred Zuleeg, *A Community of Law: Legal Cohesion in the European Union*, 20 FORDHAM INT'L L.J. 623, 625-632 (1997); Riechenberg, *supra* note 98, at 67-68.

102. Case 26/62, Van Gend En Loos v. Nederlandse Administratie Der Belastingen, 1963 E.C.R. 1. For a discussion of the authority and jurisdiction of the ECJ, see Means, *supra* note 97, at 1097-107.

103. De Witte, *supra* note 32, at 164.

104. EC TREATY art. 30. Article 34 contains identical language for exports between Member States. Id. art. 34. *See* Richard Chriss, Keck *Considered: A New Doctrinal Model for the Free Movement of Goods in the European Union*, 7 PACE INT'L L. REV. 149, 152 (1995) (referring to Article 30 as a "broad anti-protectionist

Given the EU's emphatic commitment to establishing a common market, it is no surprise that Article 30 sweeps broadly in its pursuit of an obstacle-free economic environment.[105]

1. Quantitative Restrictions and MEQRs

Two types of national measures[106] affecting imported goods[107] are prohibited by Article 30: (1) quantitative restrictions and (2) those measures having the equivalent effect of quantitative restrictions (MEQRs). Quantitative restrictions refer to measures relating to the attributes (size, weight, composition, presentation) of goods themselves and "amount to a total or partial restraint of . . . imports, exports or goods in transit."[108] MEQRs relate not to the goods themselves, but to factors extraneous to the goods. Because the concept of MEQRs is "considerably wider and more complex" than that of quantitative restrictions,[109] the ECJ in *Procureur du Roi v. Benoit & Gustave*

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charter" that is designed "to advance the economic and social cohesion and solidarity among the Member States").

105. *See, e.g.*, Chriss, *supra* note 104, at 152 (stating "[t]he brevity of Article 30 belies its vigor"); Stephen Weatherill, *The Free Movement of Goods*, 38 INT'L & COMP. L.Q. 689, 689 (1989) (quoting European Commissioner Lord Cockfield, who referred to "the magnificent sweep" of Article 30, and commenting on its effectiveness in the "vigorous pursuit ofprotectionist barriers to trade").

106. It is necessary to determine what types of national measures would come under the scrutiny of Article 30. The Commission issued a directive in which it stated that for the purposes of Article 30, "'measures' means laws, regulations, administrative provisions, administrative practices, and all instruments issuing from a public authority, including recommendations." PETER OLIVER, FREE MOVEMENT OF GOODS IN THE EUROPEAN COMMUNITY § 6.14 (1996) (quoting Commission Directive 70/50, 1970 J.O. (L13/29) 1).

As a threshold matter, this Note presumes that the Toubon Law, a legislative act, falls within the scope of the Commission's definition of a "measure" under Article 30.

107. See *supra* note 104 regarding restrictions on exports.

108. OLIVER, *supra* note 106, at §§ 5.09 & 5.11. *See also* David T. Keeling, *The Free Movement of Goods Principle in EEC Law: Basic Principles and Recent Developments in the Case Law of the Court of Justice of the European Communities*, 26 INT'L LAW. 467, 467 (1992) (referring to quantitative restrictions as "quotas and prohibitions").

Directive 70/50 cites examples of MEQRs as those which do as follows:

> (h) . . . subject imported products to conditions which are different from those laid down for domestic products and more difficult to satisfy; . . .
> (j) subject imported products only to conditions, in respect, in particular of shape, size, weight, composition, presentation, identification or putting up, or subject imported products to conditions which are different from those for domestic products and more difficult to satisfy.

Commission Directive 70/50, 1970 J.O. (L 13/29) 1.

109. OLIVER, *supra* note 106, at § 6.01.

Dassonville (*Dassonville*)[110] provided the model definition of what constitutes an MEQR: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered" MEQRs.[111]

2. Distinctly Applicable and Indistinctly Applicable MEQRs

To further clarify, the Commission separated MEQRs into two concepts, "distinctly applicable measures" and "indistinctly applicable measures."[112] Distinctly applicable or overtly discriminatory measures are defined as "those which apply to imported products only and make importation more costly or more difficult and those which impose on imported products a condition differing from that required for domestic products and more difficult to satisfy."[113] Indistinctly applicable or nondiscriminatory measures govern the marketing of products, and in particular, relate to the "shape, size, weight, composition, presentation, identification . . . and are equally applicable to [both] domestic and imported products."[114] Distinctly applicable national measures are automatically considered MEQRs and are thus inconsistent with Article 30. Indistinctly applicable national measures have a presumption of compatibility with Article 30.[115]

The ECJ later rejected this presumption in *Rewe-Zentral v. Bundesmonopolverwaltung fur Branntwein* (*Cassis de Dijon*), holding that Article 30 applies to both indistinctly applicable measures (nondiscriminatory) and to distinctly applicable measures.[116] The ECJ affirmed the broad *Dassonville* definition

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110. Case 8/74, Procureur du Roi v. Benoit & Gustave Dassonville, 1974 E.C.R. 837, 14 C.M.L.R. 436 (1974).

111. *Id.* Since the *Dassonville* decision, numerous commentators have remarked on the breadth of the doctrine set forth by the ECJ. *See, e.g.*, Chriss, *supra* note 104, at 153-54 (stating that "*Dassonville* is an example of how bold judicial legislation by the Court has transformed a spartan legal principle into a vital, flexible doctrine [sic] wide application.").

It is worth noting that in the definition of MEQR set forth by the ECJ, the threshold of hindrance to trade is relatively low. Its use of words such as "*capable* of hindering" and "actually or *potentially*" suggests that a violation of Article 30 can occur without an actual barrier to trade (emphasis added).

112. Commission Directive 70/50, arts. 2 & 3, 1970J.O. (L 13/29) 1.

113. *Id.* The free trade analysis under Article 30 is similar to the analyses under GATT and the Dormant Commerce Clause. *See generally* Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401 (1994) (discussing similarities between free trade policies underlying GATT and the Dormant Commerce Clause of the U.S. Constitution).

114. Commission Directive 70/50, art. 3, 1970 J.O. (L13/29) 1.

115. OLIVER, *supra* note 106, at § 6.38.

116. Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung Fur Branntwein, 1979 E.C.R. 649 [hereinafter *Cassis de Dijon*]. In this case, the

of MEQRs: "any national measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[117] In response to the *Dassonville* decision, the Commission clarified the interests protected by Article 30: "Any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State."[118]

Relevant to this analysis is whether the ECJ or the Commission has indicated that a language regulation may constitute an MEQR:

> Rules on language use may constitute barriers to trade . . . . One very common example is that of requirements concerning the language to be used in the labelling of goods or in documentation accompanying those goods. If those requirements are different from one country to another (and they are bound to be), there are extra costs for those producers who want to market their goods in several countries and have to comply with the (different) linguistic requirements of each of those. Therefore, such linguistic rules may be analysed as a potential restriction on trade.[119]

The ECJ has only infrequently addressed the subject matter of national measures requiring the use of specific language on labeling. Its opinions state that when the required language may in fact be readily understood by the consumers of the importing country, the national measure may fall within the scope of Article 30. Furthermore, a Member State may not require the labeling of products to be in its own language when the information contained on the original label in another language is equally

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plaintiffs, seeking to import into Germany the French liquor Cassis de Dijon with an alcohol content of between 15-20%, contested a German measure prohibiting liquor with an alcohol content below 25%. *Id.* at 651. The ECJ rejected the German argument that the measure was compatible with Article 30 because it applied indistinctly to both domestic and foreign products. Rather, the ECJ held that the restrictions in Article 30 applied to national measures that did not discriminate solely against foreign goods. *Id.* at 665.

117. *Id.* at 668.

118. Communication Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in Case 120/78, [1980] O.J. C 256/2. The Commission continued:

> Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced . . . and is marketed in the territory of the latter. This principle implies that *Member States*, when drawing up commercial or technical rules liable to affect the free movement of goods, *may not take an exclusively national viewpoint and take account of requirements confined to domestic products. The proper functioning of the common market demands that each Member State also give consideration to the legitimate requirements of the other Member States.*

Id. (emphasis added).

119. De Witte, *supra* note 32, at 166.

comprehensible to consumers in that Member State.[120] In addition, the Commission has further stated that a Member State may only demand a translation if "serious doubts" exist concerning the contents of the products or documents, or if they are incomprehensible.[121]

The ECJ's recent decision in *Republic of Fr. v. Bernard Keck & Daniel Mithouard* (*Keck*) altered the existing free movement of goods doctrine in the EU.[122] Limiting the scope of *Dassonville* and *Cassis de Dijon*, the ECJ examined the national measure at issue "in view of the increasing tendency of traders to invoke Article 30 . . . as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States."[123] The ECJ was prepared to address the overreaching effects of Article 30.[124] Specifically, the ECJ provided that indistinctly applicable national measures that neutrally regulate "selling arrangements" do not fall within the scope of Article 30 and thus do not pose a potential barrier to free trade principles. Selling arrangements essentially encompass those circumstances in which goods may be sold or used. The ECJ in *Keck* reasoned that such selling arrangements were not incompatible with the objective of creating a unified market comparable to a domestic market and thus did not constitute a trade barrier.[125] By removing from Article 30 scrutiny those national measures that regulate selling arrangements, the *Keck* decision effectively grants Member States

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120. *See* OLIVER, *supra* note 106, at § 7.60 (citing Case 27/80, Criminal proceedings against Anton Adriaan Fiejte 1980 E.C.R. 3839, 3 C.M.L.R. 722 (1981)).

121. *See id.*

122. Joined Cases C297 & 268/91, Republic of France v. Keck & Mithouard, 1993 E.C.R. I-6097 (1995) [hereinafter *Keck*].

123. *Id.* at ¶ 15.

124. *Compare* OLIVER, *supra* note 106, at § 6.78 (stating that *Keck* is "a welcome attempt to bring the scope of Article 30 back within reasonable bounds and to restore a degree of legal certainty to this area of the law."), *and* Chriss, *supra* note 104, at 150 (stating that the *Keck* decision advances and provides a more "coherent development" of intra-Community law), *with* Laurence W. Gormley, *Two Years After Keck*, 19 FORDHAM INT'L L.J. 866, 866 (1996) (stating that the *Keck* decision places "another nail in the coffin of systematic reasoning and coherent analysis").

125. Chriss, *supra* note 104, at 171. The ECJ stated:

> [T]he application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of *Dassonville* so long as those provisions applied to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

Keck, at ¶ 15.

more freedom to regulate market selling conditions.[126] Selling arrangements remain outside Article 30 analysis if they are applicable "to all affected traders operating within the national territory" and "affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States."[127]

The *Keck* decision, however, left untouched the broad *Cassis de Dijon* doctrine with respect to national measures affecting labeling and packaging requirements. In this regard, the ECJ held in *Cassis de Dijon*:

> in the absence of harmonisation of legislation, obstacles to the free movement of goods which are the consequence of applying to goods from other Member States where they are lawfully manufactured and marketed rules that lay down requirements to be met by goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.[128]

Thus, in light of *Keck*, an Article 30 inquiry must begin by determining whether a national measure regulates selling arrangements or imposes requirements to be met by goods.[129] Selling arrangements consist of measures "applicable to all affected traders operating within national territory and affect in the same manner, in law and in fact, the marketing of domestic products and from other Member States."[130] Moreover, selling arrangements "relate to matters extrinsic to the goods themselves such as when, where, by whom and at what price goods may be sold."[131] Rules imposing requirements for goods consist of measures that "relate to the inherent characteristics of products," such as those relating to the designation, form, size, weight, composition, presentation, labeling, and packaging.[132] This distinction is essential to assessing the validity of the Toubon Law under Article 30.

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126. Henk Jaap Albers & Christof Swaak, *The Trouble With Toubon: Language Requirements for Slogans and Messages in the Light of Article 30*, 21 EURO. L. REV. 71 , 74 (1996).
127. *Keck*, at ¶ 15.
128. *Id.*
129. *See id.*
130. Albers & Swaak, *supra* note 126, at 74 (citing *Keck*).
131. OLIVER, *supra* note 106, at § 6.69.
132. *Id.* at § 6.56.

B. *Article 36 and the* Cassis de Dijon *Mandatory Requirements*

Two categories of exceptions under EU trade policy liberate national measures from the scope of Article 30 restrictions: (1) Article 36 of the EC Treaty and (2) the mandatory requirements recognized by the ECJ in *Cassis de Dijon.*

First, Article 36 recognizes an exemption from Article 30 restrictions for legislation of a certain nature:

> The provisions of Article 30 . . . shall not be an obstacle to prohibitions or restrictions in respect of importation . . . justified on grounds of public morality, *public order,* or public safety; the protection of human or animal life or health, the preservation of plant life; the protection of national treasures of artistic, historic or archaeological value or the protection of industrial and commercial property.[133]

The EC Treaty does not define public policy as used in Article 36.[134] Based on its interpretation of all the exceptions, the ECJ has concluded that Article 36 applies solely to non-economic matters.[135] Moreover, the ECJ has applied a least restrictive means and proportionality analysis to Article 36. A Member State must not rely on the public policy exception any more than necessary to secure the interests it intended to achieve. Additionally, the measure must not create obstacles disproportionate to the objectives on which the measure is justified. As the ECJ concluded: "Measures adopted on the basis of Article 36 can therefore be justified only if they . . . serve the interest which that article protects and if they do not restrict intra-Community trade more than is absolutely necessary."[136]

Accordingly, Article 36 does not grant to Member States exclusive jurisdiction to regulate commerce in the enumerated areas without regard for Article 30. Rather, Member States are permitted to derogate from the free movement of goods only if the measure is justified and proportional to achieve one of the enumerated objectives.

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133. EC TREATY art. 36 (emphasis added). Article 36 applies to both quantitative restrictions and MEQRs, regardless of whether the latter are distinctly or indistinctly applicable. OLIVER, *supra* note 106, at § 8.01. As the ECJ has stated, Article 36 is "directed to eventualities of a non-economic kind." *Id.* at § 8.19 (citing Case 7/61 Commission v. Italy, [1961] E.C.R. 317, 319, [1962] C.M.L.R. 39).

134. Likewise, the European Council did not define public policy in its Directive addressing the contours of the exception. *See* David O'Connor, Note, *Limiting "Public Morality" Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union,* 22 BROOKLYN J. INT'L L. 695, 721 & n.124 (1997).

135. Case 72/83, Campus Oil Ltd. v. Minister for Industry & Energy, 1984 E.C.R. 2727, 3 C.M.L.R. 544 (1984).

136. *Id.*

Second, the ECJ in *Cassis de Dijon* provided a nonexclusive list of mandatory requirements, effectively surpassing the justifications set forth in Article 36,[137] which provide Member States with a means to protect "vital national concerns"[138] free of Article 30 constraints:

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of a product must be accepted in so far as those provisions may be *recognized as being necessary in order to satisfy mandatory requirements relating in particular to* the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the *defence of the consumer.*[139]

In general, "the sale of a product should never be prohibited when the consumer will be sufficiently protected by adequate labelling requirements."[140] The ECJ has held that national measures requiring the use of a certain language in the labeling of products "may fall within the scope of Article 30, where the language used may in fact be readily understood by consumers of the importing country."[141]

The ECJ limited the consumer protection justification:

> [I]t is not open to a Member State to place reliance upon Article 36 of the [EC] Treaty as a legal basis for contending that such a restriction, being designed for the protection of consumers and for the fairness of commercial transactions . . . is included amongst the exceptions set out in Article 36. It follows that those grounds cannot be relied upon as such under Article 36.[142]

The ECJ did not, however, slam the door on a Member State's use of the consumer protection justification altogether:

> On the other hand a prohibition on the use of a particular term for the marketing of goods, when applied indiscriminantly to domestic and imported goods does not necessarily entail a breach of Article 30 . . . . It may be justified . . . to protect consumers against information which may mislead them.[143]

In a recent case, the ECJ stated, "The fact that consumers in a Member State in which the products are marketed are to be informed in the language . . . of that country is therefore an appropriate means of protection."[144] The ECJ, however, invalidated the national measure on the grounds that, while it

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137. *See supra* note 133 and accompanying text.
138. Chriss, *supra* note 104, at 159.
139. *Cassis de Dijon*, at 649 (emphasis added).
140. OLIVER, *supra* note 106, at § 8.86.
141. McCarthy & Mercer, *supra* note 64, at 309.
142. Case 193/80, Commission v. Italian Republic, 1981 E.C.R. 3019, 3042.
143. *Id.* at 3042-43.
144. Case C-51/93, Meyhui v. Schott Zwiesel Glaswerke, 1994 E.C.R. I-3879, 3900.

provided adequate protection to the consumer, it did not properly account for the principle of free movement of goods.[145] Hence, the ECJ seems willing to entertain the validity of consumer protection as a mandatory requirement, but only in instances when it is narrowly tailored to meet its objective and does not unduly derogate other principles, such as the free movement of goods.

C. *Arbitrary Discrimination and Disguised Restrictions*

The last sentence of Article 36 provides: "Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States."[146] Thus, on falling within one of the justifications, a national measure also must not be arbitrarily discriminatory or constitute a disguised restriction.

Arbitrary discrimination exists, for instance, when a restriction falls solely or more heavily on imports to the exclusion of domestic products, even when some of the domestic products are affected by the heavier restrictions.[147] This prohibition is "designed to prevent restrictions on trade based on the grounds [in Article 36] from being diverted from their proper purpose."[148] In addition, national measures regarded as protectionist constitute "evidence that a measure is not justified."[149]

D. *Proportionality*

Once it is established that a national measure is justified either under Article 36 or a mandatory requirement in *Cassis de Dijon*, and is neither arbitrarily discriminatory nor a disguised restriction, it must further be analyzed according to the principle of proportionality;[150] a national measure is proportional if "it is necessary to achieve its legitimate object."[151]

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145. OLIVER, *supra* note 106, at § 8.90.

146. EC TREATY art. 36.

147. Oliver, *supra* note 106, at § 8.05. For additional examples of national measures that arbitrarily discriminate, see *id.*

148. OLIVER, *supra* note 106, at § 8.09 (quoting Case 34/79, Regina v. Henn & Darby, 1979 E.C.R. 3795).

149. *Id.* ("Even where a measure was in itself undoubtedly justified under Article 36 it could nevertheless be held to fall outside the protection of that Article on the grounds that the Member State concerned had acted out of wrong motives.").

150. Essentially, "when a state measure is justified on the grounds that it conforms to a mandatory requirement, the national court is required to determine whether the measure adopted is proportional to the end sought." Chriss, *supra* note 104, at 160 (quoting *Cassis de Dijon*).

IV. TOUBON LAW AS APPLIED TO EU TRADE POLICY

Analysis of whether the Toubon Law violates Article 30 of the EC Treaty requires analysis under the prevailing supranational EU doctrine.[152] The EU has no legislation regarding language requirements. Nor does the EC Treaty provide any explicit regulation of language. In the absence of such EU legislation, it is within the scope of each Member State's autonomy to regulate language.[153] The ECJ has recognized that the EC Treaty does not prevent national measures that regulate and protect national languages.[154] In so regulating, however, Member States may not violate or encroach on a fundamental freedom guaranteed by the EC Treaty or other Community laws.[155] Thus, while the EC Treaty does not set forth an explicit language policy, language regulation is not entirely beyond the scope of the doctrine and principles of supranational EU law.[156] As this section illustrates,

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Proportionality requires that a national measure (1) bear a reasonable relation to a legitimate government purpose, (2) produce benefits greater than corresponding costs, and (3) represent the least burdensome or intrusive alternative to accomplish that government objective. George A. Bermann, *Subsidiarity and the European Community*, 17 HASTINGS INT'L & COMP. L. REV. 97, 111 (1993) [hereinafter Bermann, *Subsidiarity and the EC*].

151. OLIVER, *supra* note 106, at § 8.10.

152. *See supra* Part III.

153. Albers & Swaak, *supra* note 127, at 77. Furthermore, "the fact that there are no common rules or harmonization directives on the production and marketing of specific goods is not sufficient to remove those goods from the scope of the prohibition enacted in Article 30 . . . ." Case 193/80, Commission v. Italian Republic, 1981 E.C.R. 3019, 3034.

154. *See* Case 379/87, Groener v. Minister for Educ. & Dublin Vocational Educ. Comm., 1989 E.C.R. 3967, 3993 ("The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is . . . the national language.").

155. De Witte, *supra* note 32, at 169.

156. The issue of the Toubon Law's compatibility with Article 30 was initially submitted as a written question to the Commission:

> 1. Does the Commission agree that this [Toubon Law] constitutes a non-tariff barrier to trade, which is incompatible with internal market rules, since, in practice, it has the same effect as many technical standards?
> 2. If so, what steps will the Commission take?
> 3. What steps would the Commission take if other Member States adopted similar laws?

1996 O.J. (C 56) 45.

Problems posed by the Toubon Law in the business context have been recognized since its enactment. *See, e.g.*, Bruce Crumley, *France's Restrictive New Laws Create Headaches for Ad Industry*, ADVERTISING AGE, July 4, 1994, *available in* LEXIS, News Library, TEXTNWS File (quoting ad manager for Nike Europe as describing the Toubon Law as "intrusive" and as one that "definitely poses obstacles."); Lechartier, *supra* note 64, at 57 (stating that the Toubon Law "covers enough ground to make life difficult for many trying to do business in France");

there are limits on each Member State's ability to regulate its own national language.[157]

A. *Does the Toubon Law Constitute a Measure Affecting Selling Arrangements or Product Requirements?*

In light of the case law highlighted in Part III, it is necessary to determine what category the Toubon Law would fall under—that of the *Keck* selling arrangement and thus permissible and outside of the scope of Article 30, or that of a product requirement and thus within the scope of Article 30 scrutiny.

The task of classifying the Toubon Law under one of these schemes is a difficult one. In an attempt to delineate the two categories, the ECJ has suggested that restrictions placed on advertising constitute selling arrangements, and thus are permissible and outside of the scope of Article 30.[158] In this light, Article 2 of the Toubon Law, requiring all written, spoken, or audio-visual advertising of products to be in French, constitutes a regulation of selling arrangements and is exempted from the scrutiny of Article 30. Moreover, because the Toubon Law regulates advertising, a factor extrinsic to the goods themselves, and not specifically the "when, where, by whom and what price" of the goods, it is further a regulation of the selling arrangement of such products.[159] Thus, the regulation of advertising in Article

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What's the French for Cock-up?, ECONOMIST, Aug. 12, 1995, *available in* LEXIS, News Library, ECON File (arguing that foreign lenders may be apprehensive about signing a binding contract in French); Tara Patel, *'Toubon' Law Will Impose a Certain Je Ne Sais Quoi*, J. COMMERCE, Apr. 10, 1995, *available in* LEXIS, News Library, PAPERS File; Antonin Besse, *Mandatory Use of French in Financing Agreements*, INT'L FIN. L. REV., Feb. 1995, at 22 (arguing that the Toubon Law requirements make cross-border funding more costly and time-consuming).

157. De Witte, *supra* note 32, at 170 ("Member States should refrain from imposing certain linguistic obligations on persons participating in transfrontier economic activities.").

158. *See, e.g.*, Case C-292/92, Hünermund v. Landesapothekerkammer Baden-Wurttemberg, 1993 E.C.R. I-6787 (holding that rules regulating publicity are selling arrangements); Case C-412/93, Leclerc-Siplec v. TFI Publicite, 1995 E.C.R. I-179 (holding that a ban on advertising certain products on television amounted to a selling arrangement). *But see, e.g.*, Case C-470/93, Verein Gegen Unwesen im Handel v. Mars, 1995 E.C.R. I-1923, 3 C.M.L.R. 1 (1995) (holding that a restriction on advertising of a candy bar wrapper related to the presentation of a product and thus did not constitute a selling arrangement.); Case C-315/92, Verband Sozialer Wettbewerbe v. Clinique Lab. & Estée Lauder Cosmetics, 1994 E.C.R. I-317 (holding that a restriction on the use of product name both for purposes of packaging and advertising did not constitute a selling arrangement).

159. *See supra* notes 123-28 and accompanying text.

2 of the Toubon Law would seem to be permissible under Article 30.[160]

The ECJ in *Keck* noted, however, that measures relating to presentation, labeling, and packaging are analyzed under the *Cassis de Dijon* principle and not within the *Keck* definition of selling arrangements.[161] Thus, the labeling requirements in Article 2 of the Toubon Law constitute product arrangements and would be subject to Article 30 scrutiny.[162]

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160. In addition, the ECJ has regarded the regulation of the physical qualities of a product, such as use of a name, as products requirements. *See Clinique Lab. & Estée Lauder Cosmetics*, 1994 E.C.R. I-317.

161. *See supra* notes 128-32 and accompanying text.

162. Some commentators argue that the distinction between selling arrangements and product requirements should be assessed according to the degree to which such measures limit access to the internal market. Albers & Swaak, *supra* note 126, at 76 ("[T]he criterion of market access is not the backbone of Article 30 EC.").

On the other hand, the labeling, packaging, and presentation prescriptions of Article 2 of the Toubon Law constitute product requirements because they prescribe certain conditions for the marketing and presentation of products in France. In this light, product requirements, which relate to the goods themselves, would limit access to the market in a more direct way than would selling arrangements, which regulate activities merely affecting the advertising, promotion, and selling of goods. *Id.*

To illustrate the argument that the distinction between selling arrangement and product arrangement depends on the degree of market access, assume Article 2 of the Toubon Law only regulated advertising and not packaging and labeling requirements. In this instance, the measure would be more consistent with Article 30 because it is less restrictive on foreign importers of the French market. For example, a Spanish producer and importer of goods into France would be prohibited from advertising on French television if such advertisement were in Spanish. This prohibition constitutes a restriction only on the method or arrangement of selling the product, and under *Keck* does not result in a direct barrier in the market. Under this hypothetical Toubon Law without product arrangement restrictions, the Spanish importer would ultimately remain able to sell such products in France without violating the Toubon Law.

The labeling and packaging requirements in Article 2 of the Toubon Law, however, create a greater likelihood of violating Article 30. The Spanish producer would simply be prohibited from entering the French market if his goods were not labeled and packaged in accordance with Article 2. In this way, the packaging and labeling requirements seem to limit access to the market more than advertising requirements.

Other commentators have questioned the value of distinguishing measures that affect selling arrangements from those that affect product requirements:

> Indeed there is no inherent logic in differentiating between the various means of promoting a product or service. From a marketing point of view, the communication strategy for a particular product is usually based on a broad marketing mix of advertising media. From a business point of view, the net result is the same: the barrier to trade results from the costs incurred as a result of the need to modify the advertising campaign in order to comply with the national law . . . . If a particular marketing slogan cannot be used, then it is the whole campaign which will have to be changed: products labels, packaging, posters, television and advertising copy.

Overall, the scope of Article 2 extends to and regulates both selling and product arrangements. For this reason, it is necessary to further analyze whether the Toubon Law's product requirements, namely the labeling and packaging conditions, are compatible with Article 30.

In determining whether the Toubon Law satisfies the rigorous scrutiny of Article 30, it must first be established whether the Toubon Law is a national measure that constitutes either a quantitative restriction or an MEQR.[163]

B. *Does the Toubon Law Constitute a Quantitative Restriction?*

As set forth in Part III, a measure that constitutes a quantitative restriction is prohibited under Article 30. Article 2 of the Toubon Law makes the use of French "compulsory with respect to the name, the offer, *the presentation,* the instructions . . ." of products.[164] Thus, even from its text, it can be established that the Toubon Law constitutes a quantitative restriction and accordingly, is a violation of Article 30. One characteristic of a national measure constituting a quantitative restriction is its effect on the presentation of the goods themselves.[165]

C. *Does the Toubon Law Constitute an MEQR?*

The other type of national measure prohibited under Article 30 is an MEQR, one that has the equivalent effect of a quantitative restriction.[166] The Commission includes within the

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McCarthy & Mercer, *supra* note 64, at 310. The authors further stated: "A product will be labeled so as to inform the consumer as to the nature of the product, but the label will also often be used as a vehicle for the promotion or advertisement of the product brand." *Id.* at 309.

This perspective properly recognizes the integration of the advertising and packaging of a product. Rules that regulate and restrict the advertising and selling arrangements will inevitably influence the way the product is packaged and labeled. Thus, an analysis that views each component separately may be unrealistic and may understate the actual effects of a national measure on the free movement of goods.

Ultimately, for the purpose of this Note, distinguishing between selling arrangements and product arrangements is inconsequential because the Toubon Law does not fit exclusively within either category.

163. *See supra* notes 109-11 and accompanying text.

164. Toubon Law, art. 2 (emphasis added).

165. *See supra* note 108 and accompanying text. Moreover, it is worth noting that the requirements in the area of advertising and labeling also suggest that the Toubon Law is a quantitative restriction. Arguably, such advertising and labeling restrictions ultimately affect the manner in which a particular product is offered and displayed to the consuming public, thus they influence the presentation of that product.

166. *See supra* Part III.A.

definition of MEQRs "measures . . . which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production."[167] Furthermore, using the *Dassonville* analysis, the Toubon Law should not be scrutinized according to its intention or purpose,[168] but rather by its effect on trade between Member States.

Thus, it can be argued that the Toubon Law constitutes an MEQR and accordingly, violates Article 30. Commentators agree that the Toubon Law constitutes an MEQR: "The Toubon language requirements for slogan and message fall within the *Dassonville* formula, as they are capable of hindering the trade in goods between France and the other Member States of the Community."[169] Under the *Dassonville* formula, it is necessary to identify whether the Toubon Law constitutes an indistinctly applicable or distinctly applicable measure.

1. Is the Toubon Law an Indistinctly Applicable MEQR?

At first glance, it seems the Toubon Law would fall under the category of national measures that are indistinctly applicable—those measures that "are equally applicable to domestic and imported products alike."[170] Article 2 applies to the sale, marketing, and labeling of products in France, regardless of their origin. Because the Toubon Law applies to both importers of goods and French producers of goods,[171] it could be argued that the measure be given the presumption of validity under Article 30 by virtue of its evenhandedness and nondiscriminatory character. The French producer using English words and phrases in promoting and packaging products is prohibited by the Toubon Law from doing so. The ECJ has stated, however, that a national measure may violate Article 30 even when the Member State

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167. Commission Directive 70/50, art. 2, 1970 J.O. (L 13/29) 1. The Commission cited examples of measures that would constitute MEQRs: those that "prescribe that imported products are to conform, totally or partially, to rules other than those of the importing country" as one which would constitute an MEQR, and those that "subject imported products only to conditions, in respect of particular of shape, size, weight, composition, presentation, identification or putting up, or subject imported products to conditions which are different from those for domestic products and more difficult to satisfy." *Id.* at 3(j) & 3(p).

168. The ECJ in *Dassonville* applied an object-effects principle to such national measures, thus rendering the legislative intent of the regulation irrelevant. Instead, whether a measure constitutes an MEQR is simply a question of its effect on intra-Community trade among Member States.

169. Albers & Swaak, *supra* note 126, at 72.

170. Commission Directive 70/50, art. 3, 1970J.O. (L 13/29) 1.

171. That is, the Toubon Law applies to non-French speakers and French speakers alike.

imposing it is affected by the rule.[172] Thus, the Toubon Law is not entitled to a presumption of compatibility with Article 30 simply because it impacts French producers, particularly in light of *Cassis de Dijon*.[173]

2. Is the Toubon Law a Distinctly Applicable MEQR?

While the Toubon Law applies to French producers in every situation in which it applies to foreign importers, the law does not affect the two equally. By compelling foreign importers' compliance with the advertising, labeling, and packaging requirements, the effect of Article 2 is to make "importation more difficult or costly" than the advertising, labeling, and packaging of domestic products in France. According to the Commission, this constitutes a distinctly applicable measure, one automatically considered to be an MEQR, prohibited under Article 30.[174]

As an illustration of the effects of Article 2 on trade among Member States, consider a Spanish importer of products in France. The Spanish importer is required to translate all advertising in France associated with the product, both audio and printed, into the French language. In addition, those products shipped for sale into France must be labeled and packaged in French. Products with limited labeling space will be forced to label exclusively in French,[175] due to lack of space to label in Spanish as well. Assuming the Spanish importer does not speak French,[176] he will have to pay for translations of the advertisements and labels for only those products shipped for sale

172. *See* OLIVER, *supra* note 106, at § 6.38.

173. As noted, *Cassis de Dijon* held that Article 30 applies to both distinctly and indistinctly applicable measures.

174. Commission Directive 70/50, art. 3, 1970 J.O. (L 13/29) 1. In addition, the Toubon Law disregards the Commission's warning to Member States concerning the taking of an exclusively national viewpoint in the course of legislating. *See supra* note 118 (discussing the Commission's communication warning against Member States' taking an exclusively national viewpoint when regulating in an area likely to affect the free movement of goods). Admittedly, this does not deny France, or any other Member State, the right to exercise its regulatory powers for the benefit of its citizens, particularly in the name of consumer protection. Conflicts arise, however, when such powers are exercised to the economic detriment of other Member States.

Cf. Case 13/77, GB-INNO-BM v. ATAB, 1977 E.C.R. 2115, 1 C.M.L.R. 283 (1978) (where a national measure has the effect of facilitating abuse of a dominant position capable of affecting trade between Member States, such a national measure will generally be incompatible with Article 30).

175. McCarthy & Mercer, *supra* note 64, at 311.

176. Such costs and burdens of compliance will be heavily endured by each of the Member States, with the likely exceptions of Belgium and Luxembourg, both of which are members of the French-speaking Francophonie.

in France.[177] As one commentator remarked, this clearly constitutes "a *de facto* prohibition on the use of another language [that] plainly affects trade."[178] In *Commission v. Italian Republic*, the ECJ agreed:

> When . . . the national law imposes an obligation to use a particular appellation, in a specified language, for all products of a certain kind, it may amount to a restriction upon trade between Member States since it imposes upon the importer the inconvenience and expense of placing new labels on his products.[179]

Further consider a domestic producer of goods in France, subject to the same labeling and advertising requirements in Article 2 of the Toubon Law. The domestic producer is free from the burdens or costs associated with such requirements and is able to satisfy these requirements more quickly and at a lower cost than the Spanish importer. In most cases, the domestic producer need not obtain a translation of advertising and labeling materials because French is likely his native language and such arrangements will have already been printed in French. In this light, Article 2 constitutes a measure that subjects importing producers to conditions more difficult to satisfy than those of domestic producers.[180] Accordingly, the French producer is afforded an advantage over the Spanish producer because the French producer may advertise his goods more quickly and more effectively[181] than the Spanish importer.

Without additional labeling requirements, the French producer is likely to get his product on the French market before the Spanish importer, resulting in a systematic disadvantage to

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177. As noted, under Article 4 of the Toubon Law, when the Spanish importer chooses to supplement the required French translation with a Spanish translation, the French version must be "as legible, audible and intelligible as the foreign language version." Toubon Law, art. 4. Thus, as some commentators note, "it is not sufficient to have the French translation appear somewhere on the advertisement." McCarthy & Mercer, *supra* note 64, at 310. Rather, "[t]he French version must be as significant as the foreign language version." *Id.*

178. *Id.* at 311.

179. Case 193/80, Commission v. Italian Republic, 1981 E.C.R. 3019, 3042. *See also* Verein Gegen Unwesen im Handel v. Mars, 1995 E.C.R. I-1923, 3 C.M.L.R. 1 (1995) ("By requiring a imported product to be repackaged . . . in order to be sold in the State of importation, such rules constitute an obstacle to trade by making imports more costly or more difficult and therefore favouring, or creating a competitive advantage for, the domestic industry of that State.").

180. *See supra* note 119 and accompanying text.

181. Consider, for example, the use of a one-minute radio advertisement by both producers: the French producer will be able to more effectively use that minute, covering more aspects of the product, while the Spanish importer's coverage is restricted because he must repeat the same message in French as well. Of course, the Spanish importer could purchase a larger block of time in which to cover more information; however, this results in additional costs not borne by the French producer.

the importer. Moreover, the Spanish producer is significantly disadvantaged given the competing domestic producer's lead time on the French market.

A foreign producer in compliance with Article 2 requirements may discover that, without the cultural advertising and promotional techniques developed in his native language, he is unable to cultivate an effective or even accurate image of his product.[182] Thus, the Toubon Law may compel foreign producers to reword slogans associated with trademarks while simultaneously sacrificing the commercial success of their products.[183]

Moreover, as more foreign producers of goods become aware of the onerous requirements of the Toubon Law, it is likely some will be deterred from importing goods to France.[184] Such instances will have an unknown and unmeasurable negative impact on the French market and the wider European market. In addition, a national measure such as the Toubon Law, which may discourage the importation of products into a Member State, will have a devastating effect on the bedrock principles of free movement of goods in the EU.

In light of the Georgia Tech suit,[185] analysis of Article 2 should account for its effect on the Internet as well. The Internet must be recognized as a medium and tool of commerce.[186] In this light, efforts to control obstacles to free trade should protect the Internet from national measures as well. The advertising

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182. As some commentators suggest, the Toubon Law's language requirements "not only make it more difficult and complicated for foreign producers and traders to market their products in France, but more importantly, also seriously reduce the possibility of using cultural and emotional value of a foreign language for the promotion and creation of (the image of) a particular product." Albers & Swaak, *supra* note 126, at 73.

183. The example of American Express' slogan "Don't Leave Home Without It" illustrates this point. While proper names are exempted under the Toubon Law, under Article 2, the phrase "Don't Leave Home Without It" is required to be translated into French if advertisers wish to promote American Express in France. Thus, any advertisements would appear as "American Express—*Ne Quittez Pas Chez Vous Sans Elle.*" This condition detaches the individual components of the advertising campaign—the source and the slogan—and may even lead to confusion among consumers as to whether the advertisement is for the "real" American Express. *See generally id.* at 72-73.

184. Given the skyrocketing unemployment rate in France, the French government should be particularly mindful of the effect Article 2 of the Toubon Law might have on the French market. *See Talk of the Nation: International Roundtable* (Nat'l Pub. Radio broadcast, June 4, 1997), *available in* LEXIS, News Library, NPR File (stating that the unemployment rate in France is more than 12%).

185. *See supra* Part II.C.3.

186. Georgia Tech President Wayne Clough remarked: "The Web is the personification of the global economy. It does not recognize national or linguistic borders." *Computer Underground Digest File 4* (visited Oct. 12, 1997), <http://www.infowar.com/iwftp/under/cu9-56.txt>.

requirements of Article 2 are imposed on foreigners using the Internet, a medium accessible not solely in France but throughout the world. If enforced, this requirement would have a devastating effect on foreigners' ability to transact business over the Internet. If France's concern with protecting its language is sincere, the government might better serve its citizens by encouraging use of the Internet,[187] rather than attacking nations that stimulate the global economy through commerce in cyberspace.

Thus far, the product requirements of the Toubon Law constitute an MEQR and are subject to the scrutiny of Article 30. Once within the scope of Article 30, the Toubon Law's only savior is the recognized set of justifications. For a national measure to be justified, it must (1) fall either within the justifications of Article 36 or the mandatory requirements set forth in *Cassis de Dijon*, (2) not arbitrarily discriminate or constitute a disguised restriction on trade between Member States, and (3) be proportional.[188]

D. *Is the Toubon Law Justified under Article 36?*

If acceptable under one of the enumerated justifications, Article 36 could exempt the Toubon Law from Article 30 scrutiny.[189] Proponents of the Toubon Law would likely argue it is justified under Article 36 as a matter of public policy of the Member State.[190] The Toubon Law itself explicitly states, "This law is a matter of public policy."[191] Moreover, just prior to the law's enactment, Toubon himself was quoted as saying: "[T]he use of languages—not their quality—is a legitimate subject of

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187. It is noteworthy that Yahoo, the Internet search directory company, has recently implemented a Yahoo-France directory that operates in French.

188. *See* OLIVER, *supra* note 106, at § 8.04.

189. *See supra* Part III.B.

Article 36 "does not expressly refer to the protection of culture or heritage as a ground for derogating from the application of Article 30." McCarthy & Mercer, *supra* note 64, at 312.

190. Another potentially applicable justification of the Toubon Law under Article 36 is the "protection of national treasures of . . . historical . . . value." EC TREATY art. 36. Given the unique historic role language has played in the national identity of France, this would seem to be at least a plausible justification. With respect to the Bas-Lauriol Law, see Truchot, *supra* note 57, at 93 (arguing that the Bas-Lauriol cannot be justified under Article 36, "unless . . . consider[ed] . . . 'national riches of historic value.' "). This justification is, however, "rarely, if ever" invoked, and the ECJ has only been asked to apply such a justification on one occasion, which it denied. *See* OLIVER, *supra* note 106, at § 8.74 (citing Case 7/68, Commission v. Italy, 1968 E.C.R. 423, [1969] C.M.L.R. 1 (1969) (holding that the protection of national treasures possessing artistic value under Article did not justify a tax on art treasures)). Accordingly, it is unlikely that the Toubon Law will be exempted from Article 30 based on the "protection of a national treasure possessing historic value" justification.

191. Toubon Law, art. 20.

public policy, like other issues, and [ ] political leaders have a responsibility to mandate certain requirements."[192]

EU institutions have not actively sought to define the contours of the public policy justification in Article 36. Thus, it remains open to debate whether the Toubon Law is exempt from Article 30 scrutiny based on the public policy justification. While Member States are given autonomy to regulate in areas within these justifications, they must do so in the least restrictive manner. Accordingly, the Toubon Law, as a measure of public policy, must restrict free movement of goods only as much as necessary to achieve its objective. Given either stated rationale of the Toubon Law, consumer or cultural protection, the French government might have enacted a language regulation which was truly national in scope, tailored more toward achieving the objectives of protecting the French people and less intrusive on the supranational principles of free movement of goods in the EU.

E. *Does the Toubon Law Fall within any Mandatory Requirements under* Cassis de Dijon?

The mandatory requirements set forth in *Cassis de Dijon* provide a set of additional safeguards against the application of Article 30.[193] With respect to the Toubon Law, the most relevant mandatory requirement enumerated by the ECJ in *Cassis de Dijon* is that of consumer protection.

Language requirements, such as the Toubon Law, that concern the labeling of products are often considered to fall within the mandatory consumer protection requirement articulated in *Cassis de Dijon.* The basic rationale for the consumer protection justification is that each Member State has an interest in protecting its native consumers from the hazards of mislabeled products; one such mode of protection is through national measures requiring the labeling of products in the national language of the consumers.[194] Proponents of the Toubon Law,

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192. Toubon, *U.S. Tempest, supra* note 64.

193. *See supra* Part III.B.

194. *See* Communication from the Commission to the Council and the Parliament Concerning Language Use in the Information of Consumers in the Community, COM (93) 456 at 1-2 ("Consumers have a right to information on the qualities and characteristics of products and services on the market. In practice this means that basic information must be readily available to consumers. The questions as to the language chosen to disseminate the information is a crucial one .... There is a link between the growth in trade of products and services and the legitimate expectations of Community consumers, since the deepening of the large European market will bring benefit to consumers in their daily life."); 1983 O.J. (C 359) 11 ("The obligation to use the language of the importing country is in theory intended to protect the consumer in that country, who is entitled to be

including its author, have argued that it ought to be viewed as such an effort: "[France is merely taking measures] so that product instructions and safety warnings are written in the language of the consumer . . . ."[195]

Limitations exist on the consumer protection justification, however. As one commentator cautioned, national measures requiring labeling in a Member State's own language will not always be justified by this mandatory requirement.[196] As EU case law suggests, the consumer protection rationale may be successfully used to justify a national measure, but only to the extent it promotes consumer safety in an effective manner and does not extend beyond fundamental EU principles, including the free movement of goods. Ultimately, this consideration requires a balancing approach.

In light of the development, transformation, and integration of the EU market, this consumer protection rationale should not justify the language requirements in the Toubon Law. Note the consumer protection justification invoked in the context of the Bas-Lauriol Law.[197] Given the similarities between the two measures, it follows that a similar rationale would justify the Toubon Law. With respect to the Toubon Law, however, the consumer protection argument is less compelling, considering the changes in the European market. While it is a legitimate contention that French consumers have the right to read and understand information accompanying products sold on their market as a matter of consumer protection, this does not authorize the French government to impose conditions that use language to the detriment of foreign producers on the economic market.[198]

Moreover, in an integrated global economy, delineating goods on the French market from goods of other Member States is not a meaningful distinction. The need to distinguish where goods are purchased has been reduced and will be further reduced upon the widespread operation of the Euro, which will eliminate the

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informed in his own language of the nature, composition, directions for use, dangers, etc. of a product.").

195. Toubon, *U.S. Tempest*, *supra* note 64.

196. *See* OLIVER, *supra* note 106, at § 8.88.

197. *See supra* note 35 and accompanying text.

198. In response to a written question with respect to the Toubon Law, the Commission stated that it:

> has always taken the view that legislation imposing the use of a given language in relations between economic operators cannot be justified as being in the interests of consumers and may constitute an obstacle to free trade within the meaning of Article 30 of the EC Treaty on the free movement of goods.

1996 O.J. (C 56) 45.

circulation of national currency within Member States.[199] In this light, the consumer protection measure should be reserved for the supranational authority of the EU to protect European consumers as a whole.

Hence, when stripped of its consumer protection rationale, the Toubon Law appears to be a protectionist attempt to maintain the purity of the French language in a variety of contexts, namely that of business transactions involving the movement of products between Member States. When subject to a balancing approach, the justifications are not compelling enough to warrant such a significant derogation of free movement of goods principles.[200]

F. *Does the Toubon Law Arbitrarily Discriminate or Constitute a Disguised Restriction?*

In the event the Toubon Law could be justified under either Article 36 or, more likely, one of the *Cassis de Dijon* mandatory requirements, it must, in addition, neither arbitrarily discriminate nor constitute a disguised restriction.

Given the discriminatory effects Article 2 of the Toubon Law has on foreign importers, the Toubon Law could likely constitute an arbitrarily discriminatory measure. The prescription of using French in the advertising and labeling of products falls more heavily on foreign importers than on domestic producers, given the costs and burdens of complying with the translation and labeling requirements.[201] This is so regardless of whether some French producers seek to advertise and package their goods in English are prohibited from doing so under Article 2.

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199. One step in this process, which is already under way, is the integration of a single currency in the EU. *See infra* note 219 and accompanying text.

200. Considering that the mandatory requirements enumerated by the ECJ in *Cassis de Dijon* were not intended to be exclusive, one could attempt to justify the Toubon Law under some other mandatory requirement. For instance, commentators have proposed that the Toubon Law might be justified under Article 30 if the protection of culture constituted a mandatory requirement. *See* McCarthy & Mercer, *supra* note 64, at 313.

The ECJ's opinion in the *Groener* case, which recognized the cultural value in promoting and protecting an official language, may support a mandatory requirement that justified the Toubon Law as a measure that protects culture. Even if this were so, it would still be subject to a balancing test, measuring any disproportionate frustration of supranational principles. *See also* De Witte, *supra* note 32, at 169 ("[T]he reasoning of the [*Groener*] Court also indicates that there are limits to the autonomy of national linguistic policy decisions . . . . [T]he requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States.").

201. *See supra* Part III.B.2.

It is also reasonable that the Toubon Law could be considered a disguised restriction, given its strong protectionist undertones. Such protectionism constitutes evidence that such a national measure is not justified under Article 30. Thus, even if it were justified under either Article 36 or a mandatory requirement, the Toubon Law would likely fail under these secondary considerations.

G. *Is the Toubon Law Proportional?*

Nonetheless, assuming the Toubon Law were to escape the arbitrarily discriminatory or disguised restriction prongs, it could still fail under Article 30 if it does not achieve the intended ends. That is, the Toubon Law must be proportional to the objective pursued and that objective must be incapable of being accomplished in a manner less restrictive of trade between Member States. The objectives of the Toubon Law are the protection of French language and culture for the benefit of French citizens. It is questionable whether prescribing foreigners' use of French in commercial settings is the most effective means of protecting the French language or culture. Moreover, any protection and purity achieved by the Toubon Law is likely outweighed by the substantial detrimental effects on the principle of free movement of goods and the European market. As one commentator remarked:

> If the stated aim is truly the protection of language, and not economic interests, can the [Toubon] Law be said to be the least restrictive means of ensuring the preservation of the French language? On an objective test of proportionality, the loi Toubon should be considered as creating disproportionate obstacles to access to the French market for foreign goods.[202]

Overall, this section suggests that the Toubon Law (1) falls within the scrutiny of Article 30 of the EC Treaty and (2) does not endure such scrutiny in light of the frustration of the free movement of goods doctrine in the EU in Article 2.

V. GENERAL PRINCIPLES AND NORMATIVE CONSIDERATIONS

> The entry into force of the Toubon Law will almost certainly prompt debates on the role of law in society and on the extent to which linguistic matters should be regulated by governments, if at all.[203]

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202. McCarthy & Mercer, *supra* note 64, at 313.
203. Albers & Swaak, *supra* note 126, at 71.

In addition to the prevailing free trade doctrine under Article 30 of the EC Treaty, it is also necessary to analyze a Member State's regulation according to broader principles adopted and adhered to by the EU. In recognition of these broader, more abstract commitments, it is worth considering whether the EU ought to bring the regulation of language within its own grasp to prevent derogation of such principles.

A. *Subsidiarity*

The Commission has stated that linguistic policy "naturally falls under the purview of the Member States, especially in light of the application of the principle of subsidiarity."[204] Subsidiarity "stands for the proposition that action to accomplish a legitimate government objective should in principle be taken at the lowest level of government capable of effectively addressing the problem."[205] This principle is codified in EU law in Article 3b of the EC Treaty: "[T]he Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore . . . be better achieved by the Community."[206] Essentially, subsidiarity has become the power-sharing principle between the EU and the Member States. It creates a presumption in favor of Member States' rights and autonomy, giving the EU the authority to act only when a Member State cannot accomplish its task.[207] As one author remarked, the terminology used in Article 3b suggests that some areas typically belong under either EU authority or Member State autonomy.[208]

A fundamental tension exists, however, between subsidiarity and the EU commitment to promoting the free movement of goods and ultimately to creating a harmonized, internal market. As one scholar noted: "Market uniformity is simply not a value that subsidiarity is capable of measuring. EU policymakers will have to approach [such] issues . . . with a quite different set of analytical tools, and it is to be hoped that subsidiarity will not get in the way."[209]

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204. Nelms-Reyes, *supra* note 31, at 303 n.196 (quoting Communication De La Commission Au Conseil Et Au Parlement Concernant L'Emploi Des Langues Pour L'Information Des Consommateurs Dans La Communauté, COM (93) 456).

205. Bermann, *Subsidiarity and the EC*, *supra* note 150, at 97.

206. EC TREATY art. 3b.

207. Daniel T. Murphy, *Subsidiarity and/or Human Rights*, 29 U. RICH. L. REV. 67, 71 (1994).

208. T. Koopmans, *The Quest for Subsidiarity*, *in* INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION 43, 44 (Deirdre Curtin & Tom Heukels eds., 1994).

209. Bermann, *Subsidiarity and the EC*, *supra* note 150, at 110.

Another scholar suggested: "Surely when the Court rules that a Member State may not[,] in conformity with the principle of free movement, regulate the intrastate marketing of a particular good in the interest of consumer . . . protection, it is itself in effect taking action at the Community level and preventing action at the Member State level . . . ."[210]

The scholar remarked further that the *Cassis de Dijon* mandatory requirements, justifying certain restrictions on trade, are a positive reinforcement of the principle of subsidiarity, given the potential deference to Member States' concerns.[211] In essence, the ECJ must balance "whether the incremental gains in free movement that result from the Court's rejection of a particular Member State marketing rule are substantial enough to justify the Member State's loss of freedom to govern subjects that lie squarely within its sphere of competence."[212] This balancing, of course, is not an easy exercise.

Viewed in connection with Article 30 jurisprudence and policies, the principle of subsidiarity illuminates this fundamental tension between free trade and Member States' authority to enact protectionist measures.[213] On one hand, the principle of subsidiarity suggests that the Toubon Law is a valid exercise of France's authority to regulate its own language. On the other hand, the principle of free movement of goods and efforts to integrate the market suggest that the Toubon Law, and its effects on other importing Member States, is in conflict with these goals. If every Member State were to exercise this authority and enact similar protectionist measures regulating the use of language, the result be would a fragmented, detached market, rather than a more unified, integrated one.

B. *Integration and the Common Market*

Harmonization is a technique applied to a pluralistic legal system, such as the EU, to avoid conflicts between laws of different jurisdictions. As Friedman explains, "When laws are

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210. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 400 (1994) [hereinafter, Bermann, *Taking Subsidiarity Seriously*].

211. *Id.* at 401.

212. *Id.* Similarly, the *Keck* decision, which exempts selling arrangements from Article 30 scrutiny, is a positive reinforcement of the principle of subsidiarity, in that it gives Member States the autonomy to regulate selling conditions. *Id.* at 402.

213. WARDHAUGH, *supra* note 7, at 28 (noting that, when a state pursues its own internal linguistic policy, two opposing trends are apparent—one of the larger organization seeking cooperation and assimilation and the other toward separatism and differentiation).

'harmonized,' they are reconciled and in tune with each other, although the texts are not necessarily identical."[214] Through various provisions of EU treaties and legislation, harmonization is emphasized as a means of achieving such integration. At the heart of Article 30 jurisprudence is the creation of the Common Market.[215] Under Article 8A of the EC Treaty, the EU seeks through harmonization to merge the market of multiple countries into "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."[216] Article 100A of the Single European Act seeks the "passage of harmonisation measures designed to achieve the completion of the internal market."[217]

In the absence of harmonization principles in a particular area of Member States' sovereignty, a Member State has the autonomy to regulate. While so regulating, however, Member States must still recognize and comply with the other principles of EU law, such as the free movement of goods.[218] In addition to complying with explicit Article 30 doctrine, the Toubon Law's restriction of language must also comport with the EU's general design to unify, integrate, and create a Common Market.

The analysis of the Toubon Law begins with a recognition that the EU has not sought to harmonize its laws in the area of language regulation. Thus, France has the autonomy to regulate in this area, but only without derogating the principles of free movement of goods and the EU's design of an integrated economy. This Note attempts to demonstrate that the Toubon Law frustrates both.

Given the EU's commitment to the Common Market, it follows that the EU would provide the infrastructure and support for successfully and effectively maintaining the Common Market.[219] For the successful operation and integration of the

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214. Friedman, *supra* note 18, at 71.
215. *See* Chriss, *supra* note 104, at 152.
216. EC TREATY art. 8.
217. Weatherill, *supra* note 105, at 692.
218. *See* Crago, *supra* note 97, at 492.
219. For example, on July 1, 2002, a common European currency, the Euro, will begin circulation. The national currencies of the Member States will be withdrawn from circulation and will no longer constitute legal tender. Moreover, the Euro, not the Member States' national currencies, will be quoted against the U.S. Dollar and the Japanese Yen. Bruce Barnard, *Countdown to the Euro*, EUR. MAG., Sept. 1997, at ESR8, *available in* LEXIS, News Library, MAGS File.

For discussion on the implementation of a single EU currency, see RALPH J. MEHNERT-MELAND, ECU IN BUSINESS: HOW TO PREPARE FOR THE SINGLE CURRENCY IN THE EUROPEAN UNION (1994); Lionel Barber, *Setting the Stage for the Single Currency*, EUR. MAG., Sept. 1997, at ESR3, *available in* LEXIS, News Library, MAGS File.

National currency, like language, is a subject that engenders protectionism. Even in the context of efforts to integrate the EU monetary system, Member

global marketplace, minimal transaction costs and an effective means of human communication between the market participants are essential. The question then becomes whether a successful economically integrated market necessitates a common language.

C. *A Common Language Policy in Europe?*

Walter Hallstein, an architect of the EC, stated: "That the Europeans do not speak the same language cannot disturb us."[220] Language, however, is "too conspicuous to be ignored."[221] As this Note illustrates, a Member State's use of its authority to regulate language can upset fundamental principles of EU law and create barriers to the free movement of goods among Member States. Moreover, it is not unrealistic to expect that on taking note of France's linguistic regime, other Member States will regulate their own languages in a similar way.[222] As noted above, if this were to occur, the European market would become more differentiated and even disjointed, rather than more integrated and harmonized. Thus, considering the protectionist potential of a multilingual EU market, the implications on intra-Community trade can be quite disturbing. Hence, it is worthwhile to consider whether the EU should answer the call for uniformity on the issue of language business transactions and further protect itself against the potential onslaught of language regulation by each individual Member State. One potential action the EU might take would be to declare a common language in the EU market.[223]

States expressed their nationalism. For instance, before the selection of the Euro as the single monetary unit, the French suggested that the currency be called the ECU. While this term is the acronym for "European Currency Unit," it also happens to be the name of an old French coin. *Morning Edition: Designing the Euro* (Nat'l Pub. Radio broadcast, May 22, 1997), *available in* LEXIS, News Library, NPR File.

220. Coulmas, *European Integration*, *supra* note 1, at 24.

221. *Id.*

222. WARDHAUGH, *supra* note 7, at 27 (citing W. Connor, *Ethnonationalism in the First World: the Present in Historical Perspective*, *in* ETHNIC CONFLICT IN THE WESTERN WORLD 19, 30 (M.J. Esman ed. 1977)). This phenomenon is referred to as the demonstration effect, in which "[e]ach claim to national self-determination has tended to trigger still others." *Id.*

223. In addition to the debate surrounding a common language in the EU, there is also an increasingly prominent movement for the use of language engineering as a means to solve the disharmony of language in the EU economic market. The language engineering industry develops software-based solutions to the problems of multilingualism. One particular aspect of the language engineering industry is the creation of translation devices that reduce the time and expense of human translation and increase accuracy and efficiency. For a discussion of language engineering in the EU, see Communication from the European Commission to the European Parliament, the European Council, the Economic and Social Committee and the Committee of the Regions, COM (95) 486.

Just as language can differentiate and exclude groups, language can also unify and integrate groups. In light of the EU's commitment to market integration, very practical reasons support the implementation of a common language policy that would apply to the exchange of goods on the European market.[224] These reasons exist largely independent of the preceding discussion regarding the Toubon Law and suggest that a common language policy is necessary to achieve successful integration of the market. By adding the difficulties posed by the Toubon Law, the arguments in favor of a supranational common language in the economic market are only strengthened.

First, in light of these efforts, a common language would facilitate fulfilling some of the "wide communication needs" warranted by the transformation of the market.[225] The Commission stated that the "lack of capacity to communicate is a handicap to the increasing business and trading connections within the Community."[226] The modern economic market requires a precise, effective means of communication, both spoken and written. More so than ever, "it is crucial in the information society to have rapid access to information of every conceivable kind." Language should facilitate, not obstruct, trade among members of the internal market.

Second, some scholars argue that "'efficiency' prevails over the 'diversity of cultures'."[227] A common language policy in the EU would substantially reduce the time and expense of translating documents for each of the nine official languages of the EU.[228]

See generally Language Engineering: A Greater Use of Language in Every Sense (visited Oct. 18, 1997) <http://salt.essex.ac.uk/salt/general/europe/docs/le.html> (discussing language engineering).

224. The purpose here is not to explore the logistics of choosing and defining particular common language policy, but rather to consider the advantages of such a possibility. For a discussion of selecting and implementing a common language policy for the EU, see generally Truchot, *supra* note 57, at 95-104; Coulmas, *European Integration*, *supra* note 1, at 5.

225. Truchot, *supra* note 57, at 90.

226. Coulmas, *European Integration*, *supra* note 1, at 25 (citing COM (88) 280 at 14).

227. Truchot, *supra* note 57, at 94.

228. As of January 1, 1996, the EU has 11 official languages: Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, and Swedish. *The Multilingual Information Society* (visited Oct. 17, 1997) <http://www2.echo.lu/mlis/en/atlas-intr.html#lang>. Though an official language, Irish is not a working language for purposes of official EU documents. Fennelly, *supra* note 101, at 660 n.29.

With 11 official languages, translators must be prepared to translate the 110 possible combinations of an official document. On this grand scale, the already problematic issues of terminological precision and interpretation and expense in translating become overwhelming. Coulmas, *European Integration*, *supra* note 1, at 8. Forty percent of the administrative budget is devoted to maintaining the

Finally, the adoption of a supranational authority in the form of an EU common language policy would essentially preempt language regulation in economic areas. It would also eliminate Member States' exercise of protectionist measures, such as the Toubon Law, which frustrate EU trade policy.[229] Member States would retain the power to regulate cultural aspects of life outside of the economic context. One scholar, arguing in favor of English as a common language for the EU, remarked that English can "expand within a space of communication where 'national technical obstacles' and the 'cultural protectionism of nations' would have to come to an end."[230]

Several scholars have argued in favor of the implementation of English as the common language of the EU, given its dominance in the world marketplace.[231] In consideration of the multilingual members of the EU, English is the "common linguistic denominator" of all European countries.[232] English is

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translating and interpreting services of these various languages on the supranational level. Haarmann, *supra* note 2, at 104. It is estimated that the EU translates more than 100 million pages of text annually, which requires the efforts of more than 100,000 people. Communication from the European Commission to the European Parliament, the European Council, the Economic and Social Committee and the Committee of the Regions of 28 November 1996, 1996 O.J. (L 306), *available in The Multilingual Information Society* (visited Oct. 18, 1997), <http://www2.echo.lu/mlis/en/comm.html#language>.

229. *Cf.* COULMAS, LANGUAGE AND ECONOMY, *supra* note 6, at 27 ("If there is to be more identification with the European idea and more of a European identity of its citizens, languages cannot continue to place the role of the most important catalysts of social community and thus appear to be an obstacle to creating a supranational European unity."); Friedman, *supra* note 18, at 69 ("One cannot do business internationally without some sort of common language . . . .").

230. Truchot, *supra* note 57, at 94. *See also* COULMAS, LANGUAGE AND ECONOMY, *supra* note 6, at 33 (suggesting the "need for using a single standard language by means of which all members of society who are drawn into the economic process can be reached.").

231. *See, e.g.*, WARDHAUGH, *supra* note 7, at 135 ("In world trade English is used more than any other language. Whether one counts imports or exports or adds the two together, countries using English far surpass those using any competing language."); Truchot, *supra* note 57, at 91 (stating that English is the "language of contact not only with a large number of countries, but also with richer economic partners of Europe."); Tamayo, *supra* note 55, at 118 ("English is . . . the primary language of commerce and communication in international business. . . .").

232. Truchot, *supra* note 57, at 91. Another author has similarly stated that English is by far the "most widespread of the world's languages." WARDHAUGH, *supra* note 7, at 128. He continued:

> There is also no indication that English is in any way ceasing to spread; indeed it seems to be on the ascendant in the world with no serious competitor. In contrast, French, while not a threatened language, is struggling to maintain its former glories as a world language and even to preserve its integrity within France itself. However, the efforts the French are currently making may be quite unsuccessful. The international linguistic tide has turned in favour of English, and French is in danger of

taught as a compulsory or near-compulsory language everywhere in Europe.[233] U.S. advances in the areas of technology and science have further bolstered the dominance of English in the European market. After English, German, French, and Japanese are the most common languages in the area of trade.[234]

Overall, the examination of a Member State's exercise of its sovereignty in the area of language regulation has illustrated the extent to which such regulation can frustrate the supranational principles and general design of the EU and its goal of economic integration. Given the potential for such derogation, it was suggested that an EU common language policy would address these concerns by placing the authority to regulate language in the supranational body in an effort to use language to unify and create an efficient economic market.

In examining the merits of implementing a common language in the EU, the Author does not disregard the implications such a policy might have on the cultural diversity and sovereignty of Member States. Rather, this Note recognizes that in a pluralistic entity such as the EU, the sovereignty of Member States often is asserted in the form of protectionist measures that preserve aspects of culture or society inherent to Member States, such as language. Such measures are legitimate when fashioned either to have solely a national effect or in a manner least restrictive of global free trade.

Nonetheless, the implementation of a common language policy is subject to legitimate criticism. The rhetoric of "efficiency" and "uniformity" is insensitive against the backdrop of cultural, social, and religious diversity in a particular nation.

This Note marks the convergence of the values of global free trade policies and protectionist national measures in the context of a society with pluralistic legal systems. When nations regulate beyond the legitimate scope, conflict and tension are inevitable: the EU framework explicitly indicates goals to promote and establish uniformity and harmony in its economy. If a Member State seeks to exercise its sovereignty by enacting measures that protect its uniqueness and diversity, a tension with the globalized goals of the EU arises. Moreover, if such national measures extend beyond cultural protectionism into the global economic market, tension is heightened. Article 2 of the Toubon Law is

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being left high and dry on the shore along with all other possible contenders as a world language.

Id.

233. Truchot, *supra* note 57, at 91.

234. In particular, France lags far behind, with French-speaking countries accounting for only one-fifteenth of all goods and services in the world. WARDHAUGH, *supra* note 7, at 135-36.

such a measure: It imposes protectionist cultural requirements on a globalized market economy.

VI. CONCLUSION

Language may be used as a mechanism to delineate and exclude groups on the basis of national identity. In a community of multilingual nations seeking economic integration and unification, the regulation of language by one nation can frustrate the fundamental principles of the supranational governing body. If the goal of the EU is to achieve an integrated economic market free of barriers to the movement of goods, a Member State's enactment of a national measure that disproportionately disadvantages the importation of goods by other Member States plainly derogates this goal. This Note suggests that France's enactment of the Toubon Law conflicts with the EU's supranational policies regarding the free movement of goods and the general design for an integrated economic market.

Given the potential of Member States to frustrate these fundamental principles, this Note further suggests that the EU address this dilemma by confronting linguistic policy on a supranational level by adopting a common language. Adopting a common language would facilitate the EU's economic integration and common market framework, as will the forthcoming common currency. Specifically, a common language would quell some of the difficulties posed by coordinating and proving an effective means of communication. In addition, a common language would eliminate the costs and burdens of translating written and oral communication among many multilingual nations. Finally, a common language would address the concerns raised in this Note with respect to the barrier to intra-Community trade created by using language to unify, rather than divide, Member States.

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