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*Professor J.H.H. Weiler
European Union Jean Monnet Chair*

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Marco Dani

**Economic Constitutionalism(s) in a Time of Uneasiness –
Comparative Study on the Economic Constitutional Identities of
Italy, the WTO and the EU**

NYU School of Law • New York, NY 10012

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New York University School of Law
New York, NY 10012
USA

Abstract

Constitutionalism has developed in the last two centuries almost exclusively in context of the state. Particularly, its categories and institutional solutions have been fashioned in respect to the functional concerns progressively assumed by the state form of government. In the current situation, a massive process of re-organization of the public space is taking place. States are outsourcing their functions to commonly established international or supranational agencies which often originate autonomous legal orders and, in some cases, even claim constitutional status.

This paper advocates the idea that the monopoly on constitutionalism by the states may be considered an historical contingency and that the ideal inherent in constitutionalism – to achieve fundamental objectives by enabling and limiting political institutions – may be developed also in non-state contexts, originating autonomous constitutional spheres and doctrinal categories in the light of the functional concerns of post-national units.

This paper tests this general thesis in respect to economic constitutionalism(s). After questioning the exclusively state-centered approaches to constitutionalism, a core of constitutional elements shared by the Italian (as a sample of the EU member states), the WTO and EU legal orders is singled out. The concept of Economic Constitutional Identity (ECI) is therefore introduced as the most appropriate device to investigate, according to the methodology of comparative law, the attitudes towards the economic issues of the legal orders at hand. Hence, the ECIs of Italy, the WTO and the EU are analyzed in detail by stressing in turn their divergent and convergent elements. On the basis of this more specific understanding of the characters of the ECIs, criteria for interpreting their interactions are provided in the light of the idea of benefiting from (rather than being concerned with) the uneasiness caused by their diversity.

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Abbreviations

AJCL	American Journal of Comparative Law
CMLRev	Common Market Law Review
ECR	European Court Reports
EJIL	European Journal of International Law
ELJ	European Law Journal
ELR	European Law Review
GC	Giurisprudenza Costituzionale
IJGLS	Indiana Journal of Global Legal Studies
JEPP	Journal of European Public Policy
JWT	Journal of World Trade
LIEI	Legal Issues of European Integration
MLR	Modern Law Review
MJECL	Maastricht Journal of European and Comparative Law
NJILB	Northwestern Journal of International Law and Business
OJLS	Oxford Journal of Legal Studies
QC	Quaderni Costituzionali

Economic Constitutionalism(s) in a Time of Uneasiness – Comparative Study on the Economic Constitutional Identities of Italy, the WTO and the EU

Marco Dani*

I. From Abundance to Uneasiness – Re-Organization of Public Space and Challenges to the Monopoly of States on Constitutionalism

It may seem we live in a time of abundance in which the laws administered to citizens increasingly consist of blends of various ingredients. Such abundance is the outcome of a massive process of re-organization of the public space of government¹ whereby states outsource their functions to commonly established agencies which, for disparate reasons, are supposed to perform them more efficiently.² Hence, in almost all fields of substantive law³ the monopoly of states on the business of producing rules is being challenged by emerging non-state units potentially originating non-state legal regimes.⁴

Against this background, constitutional law is radically questioned. Assuming the legality of the delegation of functions to non-state legal orders, more serious concerns arise in respect to the impact of the re-organization of public space on the fundamental principles enshrined and enforced within national constitutions. Although in principle there is agreement on the idea of assisting the outsourcing of states' functions with comparable constitutional guarantees, scholarly debate is divided between those who maintain that non-state public units ought not to impair the standards of protection

* Emile Noël Fellow 2004-05 at the Jean Monnet Center – NYU School of Law. Research Scholar of Comparative Public Law – Faculty of Law, University of Trento (Italy). Email: dani@jus.unitn.it. My sincere thanks to the Jean Monnet Center of the NYU School of Law and, particularly, to Professor Joseph Weiler, for his encouragement and critical support in writing this paper. I want to thank also Professor Roberto Toniatti, Federico Ortino and Francesco Palermo for their valuable comments on draft versions of the paper. The usual disclaimer applies.

¹ A synthetic description of the processes of re-organization of public space is provided in S. Cassese, *Lo spazio giuridico globale*, Roma-Bari, 2003, pp. 6-10.

² The post-national agencies are considered as performing better than states acting individually because of the trans-border character of the issues they are called upon to deal with. In such cases, indeed, uncoordinated initiatives by individual states are likely to generate negative externalities for their partners. The process of re-organization does not consist only in the empowerment of supranational or international agencies. It has been observed that a somewhat similar functional rationale underpins the allocation of political and administrative powers to sub-national and territorial authorities. In this regard, see M. Keating, *Europe's Changing Political Landscape: Territorial Restructuring and New Forms of Government*, in P. Beaumont, C. Lyons, N. Walker (eds.), *Convergence & Divergence in European Public Law*, Oxford-Portland Oregon, 2002 and the essays contained in R. Toniatti, F. Palermo, M. Dani (eds.), *An Ever More Complex Union – The Regional variable as a missing link in the EU constitution?*, Baden Baden, 2004.

³ Depending upon the substantive fields, the extent and the nature of the delegations of course vary. There are cases where functions and procedure are completely outsourced to external authorities and, by contrast, cases where states retain parts of their powers and segments of procedures.

⁴ See J. Delbrück, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, in *IJGLS*, 2004, 11, p. 31, where it is argued the process of re-organization of public space creates forms of “transnational federalism”.

afforded in the national spheres and those who contend that, since the standards of protection depend upon the functional mandate of non-state units, a tolerable degree of difference ought to be accepted.⁵

Nevertheless, the most controversial issues emerge when newly established legal orders employ intensively the instruments and the language of constitutional law and, eventually, begin to invoke for themselves autonomous constitutional status. Predictably, also in this regard sharp divisions cross the doctrinal debate. On the one hand, those who cherish the integrity of traditional constitutionalism decline constitutional nature altogether for the non-state entities as not fulfilling its fundamental requirements. On the other hand, those who perceive the magnitude of the impact of the processes of re-organization on the traditional categories of constitutionalism seem more open to revisit their analytical tools by including post-national legal orders in their constitutional investigations.⁶

The choice between either of the alternatives has crucial implications for another thorny issue concerning the nature of the interactions among national and post-national legal orders. Here, those who vindicate the integrity of traditional constitutionalism advocate that, even when post-national legal orders are empowered with broad and vital competences, the constitutions of the states remain the ultimate and exclusive sources of legitimacy and authority and, therefore, the relationships between the national and post-national legal orders should reflect a simple ‘principal-agent’ scheme.⁷ Hence, were the agents (post-national units) to stray from the desired results, they would be subject to the control and sanction by the principals (national authorities) overseeing their mandates. By contrast, to assume post-national legal orders as eligible to a constitutional status entails a more sophisticated theoretical framework. On the one hand, constitutional autonomy evokes for post-national units the possibility to evolve according to rationales different from and even colliding with the state benchmark; on the other hand, post-national constitutionalism remains inextricably entwined with the state paradigm.⁸ The acknowledgement of constitutional autonomy for post-national legal orders,⁹ thus, implies a significant deviation from the original principal-agent relationship. Arguably, with post-national units acquiring constitutional autonomy, the principal-agent scheme turns into a ‘settler-trustee’ relationship in which the power of control and sanction by states is remarkably marginalized. According to this template, the ultimate source of

⁵ These alternatives emerge for instance in the debate on the Charter of Nice and, namely, on the degree of protection of fundamental rights in Europe. See below III.B.

⁶ See below II.

⁷ I tentatively apply to the relationships between national and post-national legal orders the ‘principal-agent’ and ‘settler-trustee’ (see below in the text) models, as defined in respect to the relationship between political institutions and administrative bureaucracies by A. La Spina, G. Majone, *Lo stato regolatore*, Bologna, 2000, pp. 218-225.

⁸ See J. Shaw, *Postnational constitutionalism in the European Union*, in *JEPP*, 1999, 6, 4, p. 589, identifying the characters of post-nationalism as emerging and indissolubly linked to the states, but sustained by a separate logic.

⁹ As it will be discussed below (section II), the acknowledgment of constitutional status to post-national legal orders is conditioned to specific requirements.

legitimacy and authority is still located in national constitutions. Yet, apart from the somewhat exceptional cases in which such an ultimate authority is effectively exercised,¹⁰ post-national legal orders enjoy significant margins of constitutional autonomy to both develop their internal organization and compete externally with other legal orders (including national ones) for hegemony in the public space.

If this diagnosis is correct and, notably, if the monopoly on constitutions and constitutionalism by states undergoes the challenges by post-national units originally conceived for different and less ambitious purposes, it is not surprising that our time of abundance is rapidly turning into an age of constitutional uneasiness. The inclusion of post-national legal orders in constitutional investigations, indeed, obliges one not only to update the definition of constitution devised within the experience of state constitutionalism, but also to develop plausible guidelines for managing the frictions ensuing from the interactions among constitutional spheres of different nature.¹¹

However, because of the extreme variety of the re-organization formulas of public space experimented in different policy areas, it is very difficult to provide a comprehensive solution to the latest issue put forward. Tentative answers may be given by adopting a more modest, but also more promising, sector-based approach. In this study, for instance, the constitutional tensions occurring in the European constitutional space in the field of economic and social regulation will be investigated.¹² In this substantive area, the regulatory principles expressed by post-national units, namely by the EU and the WTO, have been grafted onto the body of the national constitutional orders of their members. Whereas doctrinal orthodoxy considers national spheres as the only genuinely constitutional, in fact the principles endorsed by these post-national legal orders are gaining increasing momentum as providing clearer and, often, concurrent constitutional guidelines. As a consequence, a debate on the plausibility and characters of post-national constitutionalism has taken over, though with different emphasis and outcomes, both among the EU and WTO legal scholars.¹³

¹⁰ This is particularly evident during the treaty-amending processes and in the controversial positions by those Constitutional and Supreme Courts which claim to have jurisdiction for reviewing EU law in case of breaches of the fundamental principles of the respective national constitutions.

¹¹ The same issue is similarly investigated, but rather in terms of identifying “tertiary rules” to determine the allocation of authority between constitutions, in J. P. Trachtman, *The WTO Constitution: Tertiary Rules for Intertwined Elephants*, (September 1, 2005). *ExpressO Preprint Series*, Working Paper 753, <http://law.bepress.com/expresso/eps/753>.

¹² In dealing with the EU and WTO constitutional sphere, the article will focus more in detail on the substantive area of free movement of goods. Hence, although the methodology employed could be helpful also in the understanding of the constitutional identities of other substantive areas, the conclusions put forward are to be considered as limited to this sector.

¹³ This paper has been conceived in months when the process of ratification of the “Treaty establishing a Constitution for Europe” was arduously taking place. In writing, I have decided not to deal explicitly with the solutions therein devised. Yet, the arguments proffered may be easily applied also to the economic constitutionalism enshrined in the constitutional treaty as far as it largely replicates the traditional regulatory principles of EC market integration (see articles III-42, III-43, III-65). A short comment on the Constitutional Treaty has been inserted in section IV (nt. 258) to express some critical remarks in the light of the conceptual framework developed in the paper.

This article intends to contribute constructively to this debate by arguing two quite provocative theses:

1) The monopoly of states on constitutions and constitutionalism may be considered as an historical contingency. Constitutionalism in the last two centuries has been subject to various translations, depending upon the objectives pursued by states. Even in the current situation, the ideal inherent in constitutionalism – to achieve fundamental objectives by enabling and limiting institutions endowed with political powers – is susceptible to further developments also in non-state dimensions where it can originate autonomous constitutional spheres and doctrinal categories. As a result, both the EU and the WTO can be addressed as constitutional as far as the understanding of their specific constitutional nature (as well as that of the states) is construed in close connection with their foundational objectives and the characteristics of their legal frameworks;

2) It is conceptually misleading to conceive of the interactions between the national, EU and WTO constitutional spheres on the basis of constitutional principles expressed within one of these legal regimes. It is argued that their relationships could be better managed by identifying guidelines for the behavior of judicial and political actors operating within these constitutional spheres. These criteria should be devised in order to profit from the diversity and the specific added value of each of the constitutional spheres and, at the same time, to promote among them a sufficient degree of substantive compatibility.

Such theses will be supported by arguments structured as follows. In section II, after questioning the exclusively state-centered approaches to constitutionalism, a core of constitutional elements shared by the Italian (as a sample of the EU member states), the WTO and EU legal orders will be singled out. On this basis, the concept of Economic Constitutional Identity (ECI) will be introduced as the most appropriate device to investigate, according to the methodology of comparative law, the attitudes towards economic issues by the legal orders considered. In section III, the ECIs of Italy, the WTO and the EU will be analyzed in detail by stressing in turn their divergent and convergent elements. Such understanding of the ECIs will be particularly helpful in section IV and V, where criteria for interpreting their interactions and, arguably, the relationship among the whole constitutional spheres at hand will be put forward in order to safeguard their diverse natures and to benefit from the uneasiness engendered by their interactions.

II. State-centered Constitutionalism and its Discontents – The Economic Constitutional Identity (ECI) as an Instrument for Comparative Investigation of Economic Constitutionalism(s)

According to a traditional definition, a constitution is a legal document containing the fundamental rules of a community organized within a state.¹⁴ Conversely, constitutionalism is the ideology advocating the constitution as the privileged means for the protection of individual freedoms from the abuses perpetrated in the exercise of

¹⁴ G. de Vergottini, *Diritto costituzionale comparato*, I, Padova, 2004, p. 115; G. Morbidelli, L. Pegoraro, A. Reposo, M. Volpi, *Diritto pubblico comparato*, Torino, 2004, p. 27.

public powers.¹⁵ Because of this moral commitment, constitutionalism has been (and continues to be) a mobilizing ideology for generations of activists struggling within their national communities for individual freedoms and, at a later stage, democracy. Therefore, whereas all constitutions, by empowering (or acknowledging the power of) public authorities, establish limits to the exercise of political powers, only those which are grounded on the principles of separation of powers and judicial protection of fundamental rights belong to the realm of constitutionalism.¹⁶ Nowadays, an ever increasing number of state constitutions fulfills these requirements and, thus, it can be argued that constitutionalism, at least within the western legal tradition, has attained a hegemonic position.

As a rule, when constitutionalism succeeds in national communities, constitutional activists turn into constitutional patriots. To their eyes, the stability of the values underpinning the constitution is normally equated with the stability of the constitution itself.¹⁷ The momentum gained in the society and in the intellectual debate by constitutionalism is reflected in the legal doctrine as well. In states where a constitutionalist setting is consolidated, official legal scholarships celebrate the constitutions as inextricably entwined with the values these latter serve. By contrast, legal orders which deviate from constitutionalism are considered not only as deserting its values but even as lacking a constitution at all.¹⁸ In the western legal tradition, indeed, constitutionalism dictates the mandatory requirements of legitimate government and, in this perspective, it is assumed as providing fundamental guidelines of civilization.

The processes of re-organization of public space challenge the monopoly of state constitutionalism on constitutions from an unusual standpoint. For a long while, the hegemony of constitutionalism has spread in the sole direction of the constitutional organization of states. It used to be within states, indeed, that the main functions of government were carried out and, therefore, it used to be from states that the most serious threats to fundamental rights could come. As mentioned, this reality undergoes considerable modifications. Public powers and important policy areas are allotted to non-state units where, in some cases, legal orders flourish to the extent that claims for emancipation from the sole paradigm of state constitutionalism arise.¹⁹

As a result, particularly in respect to the EU and the WTO, legal scholarships have engaged in debates on the plausibility and characters of post-national constitutionalism.

¹⁵ G. de Vergottini, *Diritto costituzionale comparato*, I, Padova, 2004, p. 117. On the evolution of constitutionalism see G. Rebuffa, *Costituzioni e costituzionalismi*, Torino, 1990.

¹⁶ It is common to identify the requirements of liberal constitutionalism in article 16 of the *Déclaration des droits de l'Homme et du citoyen* (1789) providing that: "toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée n'a point de Constitution".

¹⁷ In the approach of constitutional patriotism, therefore, the constitution acquires intrinsic value and loses its original instrumental role.

¹⁸ This approach is rejected by the scholarship of comparative law which, beside the "constitutionalist constitutions", admits the existence of other conceptions of constitutions (traditionalist, authoritarian, Marxist). See G. de Vergottini, *Diritto costituzionale comparato*, pp. 119-127.

¹⁹ See above section I.

The wide spectrum of opinions submitted in this regard oscillates between two opposed, yet equally threatening, dangers. On the one hand, the most orthodox positions, concerned with the need to preserve the integrity of state constitutionalism and the value of its traditional categories, refuse any constitutional status to post-national legal orders. Yet, by stressing its alleged integrity,²⁰ constitutionalism is likely to end up as restricted to state units and significantly impaired when the regulatory principles expressed by post-national entities prevail over some of the vital aspects of national constitutions. On the other hand, serious concerns arise also in respect to the most innovative opinions. As seen, there can be important and even compelling reasons to include (some of) the post-national legal orders in the realm of constitutionalism and to re-define its categories accordingly. Yet, by operating in this direction, the doctrine cannot dodge the demand of scientific rigor animating the official legal scholarship. Even in the most flexible positions, indeed, the attribution of constitutional status is to be conditioned to precise and persuasive legal requirements so as to prevent constitutionalism (and its heuristic value) from being emptied and, eventually, trivialized.

Predictably, the most common doctrinal responses to the stimuli determined by this new legal reality have been driven by conditioned reflexes. This is the case of authors who, although often inspired by opposite normative mindsets, assume or define constitutionalism in traditional state-like terms. In respect to the EU, for example, the use of the constitutional language is neglected in the works of those who stress the intergovernmental paradigm as the most adequate to explain the processes of transnational and international integration.²¹ Quite similarly, constitutional Euro-skeptics argue that a European demos and, more broadly, the preconditions of democracy should mature before venturing into the road of constitutionalization of the supranational sphere.²² Traditional constitutionalism is endorsed also by federalists as expressing the template the EU should comply with in order to gain full legitimacy.²³ Under this approach, indeed, constitutionalization arises out as a normative desideratum for its “inducing effect” in respect to the social prerequisites of democracy, and as the most adequate answer to the challenges posed by economic globalization.²⁴

The same arguments are employed also in respect to the WTO. Here, both the normative position favoring constitutionalization as enhancing the performances of the

²⁰ J. Shaw, *Postnational Constitutionalism in the EU*, p. 583, observes: “Constitutionalism is [...] as contested as it is closely studied. So, [...] it can be imbued with quite different meanings and functions depending upon the underlying world-view of the commentator”.

²¹ A. Moravcsik, *Preferences and Powers in the European Community: A Liberal Intergovernmentalist Approach*, in *JCMS*, 1993, 31, 4, p. 473.

²² D. Grimm, *Does Europe Need a Constitution?*, in *ELJ*, 1995, 3, 1, p. 282.

²³ Emblematic, in this regard, is the exchange between G. Ferrara, *La costituzione europea: un’ambizione frustrata*, in *Costituzionalismo.it*, fascicolo 2/2004 and G. Amato, *Il Trattato che istituisce la Costituzione dell’Unione Europea*, in *Costituzionalismo.it*, fascicolo 3/2004.

²⁴ J. Habermas, *Remarks on Dieter Grimm’s ‘Does Europe Need a Constitution?’*, in *ELJ*, 1995, 3, 1, p. 303.

WTO in the protection of economic freedom²⁵ and the opposite opinion of those who dismiss constitutionalization as the correct answer to the legitimacy problems of the WTO,²⁶ share the uncontested assumption whereby constitutionalism can be translated exclusively in traditional terms.²⁷

Other authors have elaborated these conditioned reflexes and admit that something called post-national constitutionalism may exist. These approaches acknowledge the existence of “unfamiliar circumstances” in post-national units which prevent the application of the categories developed in the national sphere.²⁸ Yet, rather than dismissing constitutional language or advocating the idea of their normalization, these freak elements are, at least to some extent, enhanced by arguing for new and equally legitimate forms of constitutionalism.²⁹ Nonetheless, also among the discontents of the exclusivism of state constitutionalism the very nature of post-national constitutionalism is openly debated. In some cases, indeed, constitutional discourse is adopted for instrumental reasons. This is the case of certain decisions by European Court of Justice in which constitutional language is used to reinforce the supremacy of supranational rules and obligations.³⁰ But instrumentality may be seen every time the constitutional frame is considered worth retaining as imparting legitimacy and some epistemological dividend.³¹

More interestingly, other works try to define post-national constitutionalism positively. For some, the specificity of European constitutionalism consists essentially in a conception of authority alternative to that of state federalism.³² But, apart from this, it seems that EU constitutionalism conforms (or ought to conform) to the requirements of state constitutionalism. Other authors, instead, dig much deeper and identify in the characteristics progressively assumed by the process of formation of the European

²⁵ E-U. Petersmann, *The Transformation of the World Trading System through the 1994 Agreement establishing the World Trade Organization*, in EJIL, 1995, 6, 1, p. 1.

²⁶ R. Howse, K. Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, in *Governance*, 2003, 16, 1, p. 73.

²⁷ Surprisingly enough, the debate on WTO constitutionalization adopts EU constitutionalism and, notably, the direct effect and supremacy doctrines, either as positive or negative normative benchmarks. This, arguably, strengthens the hypothesis here supported whereby the template of state constitutionalism is not exclusive.

²⁸ J. Shaw, *Postnational Constitutionalism in the EU*, p. 581.

²⁹ M. Poiares Maduro, *Europe and the constitution: what if this is as good as it gets?*, in J. H. H. Weiler, M. Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge, 2003, p. 74.

³⁰ Case 294/83, *Parti Ecologiste Les Verts v. European Parliament* [1986] ECR I-1339; *Opinion 1/91* [1993] ECR I-6079.

³¹ N. Walker, *Postnational Constitutionalism and the problem of translation*, in J. H. H. Weiler, M. Wind, *European Constitutionalism Beyond the State*, pp. 34-35.

³² J. H. H. Weiler, *In defence of the status quo: Europe's constitutional Sonderweg*, in J. H. H. Weiler, M. Wind, *European Constitutionalism Beyond the State*, p. 7. Quite similarly, F. Palermo, *La Forma di stato dell'Unione Europea*, Padova, 2005, pp. 127-201, argues the specificity of the EU consists in the circular relationship between the ideological and axiological premises of the EU and those of its member states.

polity³³ or in the complementary relationship between many constitutive aspects of the post-national and national legal orders³⁴ the elements which distinguish and justify post-national constitutionalism.

Nevertheless, in these latest works the nature and the rationale of the processes prompting the upsurge of non-state public powers appear too easily left behind. Particularly the relationship between the functional concerns of post-national units and the inherent nature of their legal/constitutional frameworks is neglected.³⁵ Yet, this latest profile seems promising in the attempt to both re-define constitutionalism in the light of post-national realities and re-organize the interactions among the constitutional spheres.³⁶ Moreover, a similar functional perspective may respond to the skepticism of the most orthodox positions by stressing some traits of structural continuity between the constitutionalism evolved within the states and that possibly emerging in post-national spheres.

It was stated above how, in the perspective of constitutionalism, a society is considered as having a constitution only if the guarantee of the rights is ensured and the separation of powers is worked out. Nevertheless, guarantee of the rights and separation of powers are not invoked as self-referential elements. More specifically, these principles were considered as the most efficient means to perform the objectives demanded of the state by a liberal society. In other words, in the essence of constitutionalism, constitutions are not blindly venerated totems but instruments by which the tasks historically conferred on the state are accomplished.³⁷ This argument seems strengthened if one looks also at the following evolution of constitutionalism. The profound re-definition of objectives that occurred in the transition from the liberal to the social state has entailed huge modifications in the categories of state constitutionalism.³⁸ Thus, not only the theories of

³³ J. Shaw, *Postnational Constitutionalism in the EU*, pp. 589-596, argues that the process of formation of the European polity departs from the assimilationist approach of traditional constitutionalism for its 'essentially contested' nature and commitment to intercultural dialogue.

³⁴ M. Poiares Maduro, *Europe and the constitution*, p. 98. This insight will be developed below in section V.

³⁵ Precious insights on the importance of a functional perspective in legal theory are provided by N. Bobbio, *Verso una concezione funzionalistica del diritto*, in N. Bobbio, *Dalla struttura alla funzione – Nuovi studi di teoria del diritto*, Milano, 1977, p. 63.

³⁶ Particular attention to the functional concerns in the comparative analysis of EU and national law is suggested in R. Dehousse, *Comparing National and EC Law: the Problem of the Level of Analysis*, in *AJCL*, 42, 4, pp. 778-780.

³⁷ The lost instrumental character of constitutionalism can be explained with the success of the structuralist approaches to law. Particularly in the theories of Kelsen, developed exclusively in respect to the state form of government, the functional perspective is mostly expunged from the legal analysis as contaminating the law with ideological or political elements. On the relationship between functional analysis and Kelsen's theories see N. Bobbio, *Verso una concezione funzionalistica del diritto*, pp. 63-71.

³⁸ In this regard, I feel particularly indebted to the approach followed in G. Bognetti, *Federalismo*, in *Digesto delle discipline pubblicistiche*, VI, Torino, 1991, pp. 275-276, where the abstract classification of federal states is substituted by a more convincing classification of the federal systems depending upon their functional concerns (*forme di stato*).

fundamental rights protection,³⁹ federalism⁴⁰ and form of government⁴¹ have been reformulated, but even the very concept of constitution has undergone critical re-thinking in the light of the new functional concerns of the state.⁴² As a result, a functional approach whereby constitutions serve (and are biased towards) the objectives inspiring their legal orders seems respectful of the historical role played by constitutionalism and, possibly, deserves consideration also in the debate on post-national constitutionalism.⁴³

There is indeed a lesson to be drawn from this short excursus. Despite the attempts to depict it as monolithic, constitutionalism comes out as the historical product of the stratification of institutional solutions devised to respond to the functional concerns of the state form of government. At this point, it might well be maintained that the processes of re-organization of the public sphere which generate post-national legal orders do not amount to ruptures or paradigm shifts in the current phase of (state) constitutionalism. Coherently with this premise, it is correct to adopt the traditional categories as the benchmark to test and, consequently, to deny the constitutional nature of the post-national legal orders. Nevertheless, it might also be the case that the processes currently occurring in the organization of the public space resist the usual classifications and integrate a new episode in the evolution of constitutionalism, namely the stage in which constitutionalism is a tool employed for special purposes in non-state dimensions. On this premise, traditional categories constitute just one of the possible manifestations of constitutionalism and, therefore, they can hardly be invoked as the benchmark. More correctly, the benchmark might be identified in the seminal ideal of constitutionalism: the achievement of objectives of good government by empowering and limiting political institutions.⁴⁴ Since it does not seem ontological reasons exist to confine this ideal within the sole state borders, it might be productively introduced in other habitats and give birth to different historical epiphanies of constitutionalism shaped in the light of the functional concerns inspiring post-national legal orders.

In this unprecedented reality, the critical understanding of constitutionalism may profit from and enhance the role of the comparative law methodology. Whereas the

³⁹ On the modifications that occurred in the forms of fundamental rights protection in the shift from liberal to social state, see A. Baldassarre, *Diritti inviolabili*, in *Enciclopedia Giuridica Treccani*, XI.

⁴⁰ G. Bognetti, *Federalismo*, p. 273.

⁴¹ The implications of the shift from liberal to social state for the institutional architecture are well captured in G. Amato, *Forme di stato e forme di governo*, in G. Amato, A. Barbera (eds.), *Manuale di diritto pubblico*, I, Bologna, 1997, pp. 41-61.

⁴² On the structural features of constitutional state, see A. Baldassarre, *Diritti sociali*, in *Enciclopedia Giuridica Treccani*, XI, 1989, pp. 7-9.

⁴³ This is not to say, against Kelsen, that the objectives underpinning the constitutions have automatically legal relevance. The analysis developed below (section III) will distinguish between the state constitutional sphere, where Kelsen's approach seems substantially adequate, and the legal orders of the EU and WTO, where functional elements may be acknowledged as having legal relevance.

⁴⁴ An alternative reconstruction of the core ideal of constitutionalism is submitted by N. Walker, *Constitutionalism and the problem of translation*, pp. 45-52, claiming that constitutionalism ought to develop "the great problem of modern political thought" consisting in "the reconciliation of the three virtues of economic and material well-being, social cohesion and effective freedom".

comparative methodology is normally employed to classify states constitutions according to their respective political and ideological background,⁴⁵ an unexplored field of investigation could be envisioned in respect to the diverse interpretations of the constitutionalist ideal within states and post-national legal orders.⁴⁶

A privileged field to test the validity of this functional and comparative approach to constitutionalism(s)⁴⁷ can be identified in the area of economic and social regulation within the European constitutional space. Legal orders operating in this field – namely, those of the member states, the EU and WTO – share a core of structural elements which articulate the above mentioned seminal ideal of constitutionalism. Influenced by the principle of rule of law,⁴⁸ their foundations lay in constitutive and legally binding documents establishing, *inter alia*, their respective fundamental objectives.⁴⁹ To accomplish these objectives, regulatory powers are allocated to political institutions.⁵⁰ Besides, the pursuit of fundamental objectives by political institutions must respect a plurality of constitutionally relevant interests. Finally, judicial or adjudicative bodies are empowered to enforce constitutional limits against the outcomes of the decision-making and, in this way, to prevent abuses by political institutions. From a functional perspective, the presence of these elements justifies the attribution of constitutional status to the considered post-national legal orders.⁵¹ Nevertheless, their concrete developments remarkably differ depending upon the characteristics of the respective legal framework and, as a consequence, become susceptible to comparative analysis.

According to traditional constitutionalism, a comparative analysis on the attitude by the constitutions towards the economic issues is normally undertaken by pointing to the concept of economic constitution as comparator.⁵² Despite of its rigorous theoretical and normative foundations,⁵³ economic constitution is commonly employed to describe the

⁴⁵ See the classification presented in G. de Vergottini, *Diritto costituzionale comparato*, pp. 93-115.

⁴⁶ Comparative constitutional law has so far been conceived as an almost exclusively state-centric discipline. As state constitutionalism, therefore, also comparative methodology is under stress because of the processes of re-organization of public space. Nevertheless, constructive and comprehensive theoretical efforts in this respect are at the moment absent.

⁴⁷ In respect to national and post-national constitutionalism.

⁴⁸ Or its national equivalents. In the case of Italy, the principle of *legalità costituzionale* performs indeed functions equivalent to the principle of rule of law in the constitutional state.

⁴⁹ In this perspective, the sovereign or original nature of legal orders is an element that is extraneous to the analysis.

⁵⁰ In this study, “regulatory autonomy” is used to address the forms of both legislative and secondary rule making.

⁵¹ Yet, even in the light of these requirements, the constitutional nature of the WTO remains considerably uncertain. See below section III.A.1.

⁵² Just to mention a few examples of the massive use of “economic constitution” as a label or a tool of analysis in the constitutional spheres at issue, consider respectively M. Poyares Maduro, *We the Court: the European Court of Justice and the European Economic Constitution*, Oxford, 1998, E-U. Petersmann, *The Transformation of the World Trading System*, p. 1, and G. Bognetti, *La costituzione economica italiana*, Milano, 1995.

⁵³ The historical origins of economic constitution are depicted by D. J. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus*, Oxford, 1998.

economic regimes of states as disciplined by their constitutional provisions. In this approach, its definition is often neglected and its inherent structure poorly articulated. Thus, when employed in descriptive terms, economic constitution appears a scarcely useful and quite confusing device of investigation. In other doctrinal contributions, referring explicitly to its ordo-liberal origins, the concept is employed in more precise terms. Here, the economic constitution alludes to a specific model of constitution stipulating specific and binding guidelines of economic and social regulation which the political institutions and adjudicative bodies are expected to implement.⁵⁴ Nonetheless, even in this perspective, economic constitution reveals difficulties for our comparative investigation. Firstly, the analysis of national constitutions shows that a considerable discrepancy exists between concrete legal reality and the model suggested by this theory.⁵⁵ Secondly, economic constitution remains a largely unstructured device. Thirdly, the concept is historically state-centered and, notably, it does not take into account the possibility of constitutional regimes responding to diverse functional concerns. Finally, the normative potential of economic constitution is sometimes misused for ideological purposes in order to promote specific economic models and objectives and to assimilate constitutional spheres which articulate different solutions.⁵⁶

Considering these difficulties, the analysis proposed in this study will reject the economic constitution as the device to compare the attitudes towards the economic issues by the Italian, WTO and EU constitutions. In the light of the functional approach previously suggested, the Economic Constitutional Identity (ECI) will be advocated as the alternative comparator to economic constitution. Its structure develops the general ideal of constitutionalism in the specific field of economic and social regulation. Moreover, such a device is capable of encompassing a broader range of solutions than those admitted by economic constitution, and permits their precise comparison through a grid of indicators concerning:

- the economic constitutional objectives of the legal orders and their scope/ramifications
- the nature of their legal frameworks
- the thickness of the constitutional constraints (i.e. standards of adjudication adopted in applying economic constitutional provisions)
- the characters of regulatory autonomy/political deliberation in the pursuit of economic objectives.

⁵⁴ D. J. Gerber, *Law and Competition*, p. 246, defines economic constitution according to the view of the ordo-liberals as “a comprehensive decision concerning the nature and form of the process of socio-economic cooperation”.

⁵⁵ In this regard, the criticism expressed by M. Luciani, *Economia nel diritto costituzionale*, in *Digesto delle discipline pubblicistiche*, V, Torino, 1990, pp. 374-375, in respect to the adoption of economic constitution in the analysis of the Italian constitution seems appropriate.

⁵⁶ This is the case when economic constitution is adopted as heuristic (in reality, normative) tool for analyzing the WTO and when the EU regulatory principles are considered as having molded the economic constitution of the member states (see below III.B).

The identity metaphor is successful particularly also in conveying a more complex image of the constitutional aspects of the legal orders under consideration. As observed in the most sophisticated analyses, identities, rather than remaining stable and univocal, evolve and, as a rule, assume a multi-faceted character.⁵⁷ Arguably, the same occurs with the identities of constitutional orders. In this study, for instance, ECIs will be presented as products of processes of incremental stratification in which distinctive and convergent elements coexist.⁵⁸ In the analysis of the former, emphasis will be placed on the original identity of constitutional spheres and, therefore, on the elements which are more likely to create conflict and tension among them.⁵⁹ In the following stage of the analysis, the bias of the distinctive elements, though not obliterated, will be nuanced. In dealing with converging elements, thus, the similarities among the ECIs will be underlined by considering both their autonomous evolution and mutual interactions. Eventually, by stressing the idea of accretion inherent in the concept of stratification,⁶⁰ the complete images of the ECIs will result in a more sophisticated and less caricatural light than in the portraits normally depicted through static analyses.

III. Investigating Stratification – Comparative Analysis of the Economic Constitutional Identities of Italy, the WTO and the EU

A. DISTINCTIVE ELEMENTS

1. Constitutional Objectives and Nature of the Legal Framework

Constitutionalism Serving Economic and Social Cohesion

Enacted in the aftermath of the Second World War (1947), the Italian constitution incorporates the typical elements of the continental model of social (or welfare) state.⁶¹ Like other constitutions of this generation,⁶² its adoption has followed a controversial process of constitutional transition. The new document, indeed, was expected to come to grips with a number of ticklish issues which, in the previous decade, had eventually

⁵⁷ An extraordinary example, in this regard, is provided by the novel *Il visconte dimezzato* by I. Calvino.

⁵⁸ The metaphor of stratification is borrowed from J. H. H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*.

⁵⁹ The emphasis on the distinctive elements seems coherent with the comparative approach by L. J. Constantinesco, *Introduzione al diritto comparato*, Torino, 1996 (Italian edition by A. Procida Mirabelli di Lauro and R. Favale), pp. 224-231, where these are defined as those elements with more profound ideological and teleological connotations and in strict connection with the system of values underpinning the legal order.

⁶⁰ J. H. H. Weiler, *The Geology of International Law*, p. 3, observes that “whereas the classical historical method tends to periodize, geology stratifies”.

⁶¹ A general description of the characters of social state is provided in G. Amato, *Forme di stato e forme di governo*, pp. 52-61. For a survey of the Italian model, see also A. Baldassarre, *Diritti sociali*, pp. 10-14.

⁶² We can include in this generation the German *Grundgesetz* (1949) and the French Constitution of the Fourth Republic (1946).

degenerated into the war.⁶³ In this regard, the economic profile of the constitution was one of the thorniest problems. Although the economic models of previous constitutional regimes (liberalism, corporatism) were largely unpopular, deep ideological divisions existed, at least in principle, among the positions of the main political actors engaged in the constitutional transition.⁶⁴ Nonetheless, the constituent assembly reached eventually a general compromise whereby the constitution had to strike an appropriate balance between economic development and social protection and, therefore, to ensure conditions of economic and social cohesion. Nowadays, a similar objective directs the majority of the constitutions of EU member states. Thus, economic and social cohesion arises as one of the crucial elements which characterize, both ideologically and structurally, the European postwar constitutional panorama.⁶⁵

As mentioned, in serving economic and social cohesion the Italian constitution embodies a compromise among the main political and social actors normally operating in a modern industrial society. Several constitutional provisions articulate that general objective by including a detailed list of social rights and, simultaneously, by ensuring the protection of economic freedom and the market.⁶⁶ Yet, because of the open-ended nature of the constitutional compromise, a precise hierarchy between economic development and social protection is not definitely struck.⁶⁷ Hence, the constitution is permeated by constant tension along the economic-social divide which surfaces quite clearly in the most conventional constitutional rhetoric. Traditionally, only the promotion of social objectives entails a proactive role for public authorities aimed at transforming social reality. By contrast, in dealing with economic objectives public powers are not expected to assume an equivalent attitude. The constitution, indeed, protects economic freedom against too intrusive pieces of legislation. Yet, the active pursuit of conditions of fair competition or economic efficiency does not come out as a positive constitutional obligation for public authorities.⁶⁸ As a result, it is difficult to deny that the constitution

⁶³ The intent of the new constitution, indeed, was not only to determine a break from the constitutional regime introduced during the Fascist period, but also to overcome the shortcomings of the previous liberal constitution (Statuto Albertino, 1848).

⁶⁴ For a survey of the main political and economic positions in the Italian postwar constitutional transition see G. Amato, *Il mercato nella costituzione*, in *QC*, 1992, 1, pp. 7-13.

⁶⁵ The principles inspiring the constitutions of social state are listed in G. Bognetti, *Costituzione economica e Corte costituzionale*, Milano, 1983, pp. 21-31.

⁶⁶ G. Amato, *Il mercato nella costituzione*, p. 12, observes that in the Italian constitutional language the concepts of market and economic freedom are normally matched.

⁶⁷ V. Onida, *Le Costituzioni. I principi fondamentali della costituzione italiana*, in G. Amato, A. Barbera (eds.), *Manuale di diritto pubblico*, p. 91.

⁶⁸ N. Irti, *L'ordine giuridico del mercato*, Roma-Bari, 1998, p. 18. In this regard, G. Amato, *Il mercato nella costituzione*, p. 10, has observed that in the ideological and cultural mindset of most of the members of the constituent assembly the protection of economic freedoms was conceived for its beneficial contribution in terms of political freedom. By contrast, its contribution to the overall efficiency of the economic system was mostly neglected. A different opinion, whereby the protection of economic freedom implied also the protection of fair conditions of competition for the constituent assembly, is supported by F. Galgano, *Commento all'art. 41 Cost.*, in G. Branca (ed.), *Commentario della Costituzione. Rapporti economici*, II, Bologna, 1982, p. 11.

performs poorly in defining a detailed and prescriptive substantive economic model.⁶⁹ Taken by itself, the objective of economic and social cohesion neither drives regulation nor originates immediate solutions in the adjudication of economic conflicts. Nevertheless, it would be wrong to dismiss the potential of the Italian ECI by simply lamenting the scarce penetration of its substantive principles. At a closer analysis, its procedural dimension and the nature of its legal framework are equally eloquent traits that deserve careful consideration in this respect.

In the social state constitutions, the fulfillment of fundamental objectives is mainly conferred on political institutions which enjoy broad legislative powers.⁷⁰ In this regard, the Italian constitution gives legislation a role which is remarkably different from that played in the context of liberal constitutions. In the tradition of liberalism, indeed, legislation is a product of a single-class Parliament and serves essentially the objective of limiting public authorities in order to safeguard individual rights and, notably, economic freedom. With the institution of a democratically elected Parliament and the shift from liberal to social state,⁷¹ the character and function of legislation vary.⁷² In the context of social state, the contents of legislative acts are determined by the competition (or the mediation) among political actors representing different parties and, often, different sectors of society. The legislation, therefore, abandons its original protective connotation and turns into an instrument of government of the economic and social reality. In conclusion, the constitutional compromise resonates in the inherent structures of the government by emphasizing representative democracy as the privileged means to achieve economic and social cohesion.

The protective role played in liberal constitutions by legislation is assumed in social state by the entrenched constitution.⁷³ Apart from allocating political powers, the constitution dictates also limits to the decision-making processes. Firstly, positive obligations are imposed on political institutions to pursue specific social objectives. Secondly, a number of constitutive principles are opposed to political institutions to avoid their possible abuses. In both of these dimensions, the binding and entrenched nature of the constitution is ensured by the Constitutional Court.⁷⁴ From its first decision,⁷⁵ the

⁶⁹ In this respect, the Italian constitution appears to provide the fundamental principles for a transaction economy, see D. J. Gerber, *Law and Competition*, p. 248.

⁷⁰ Because of the vertical division of powers disciplined by article 117 Cost., in the Italian constitution the legislative power belongs to the state and to the regions. Both levels of government, though with different limits, have legislative competences in several specific areas of economic regulation.

⁷¹ M. S. Giannini, *Diritto pubblico dell'economia*, Bologna, 1995, p. 31-32, has identified in these elements the major shift from the so-called *stato monoclasse* to the *stato pluriclasse*.

⁷² In this regard G. Zagrebelsky, *Il diritto mite*, Torino, 1992, p. 48, has observed that “la legge, un tempo misura esclusiva di tutte le cose nel campo del diritto, cede così il passo alla Costituzione e diventa essa stessa oggetto di misurazione. Viene detronizzata a vantaggio di un’istanza più alta. E quest’istanza più alta assume ora il compito immane di reggere in unità e in pace intere società divise al loro interno e concorrenziali”.

⁷³ The introduction of a double circuit of legality within the systems with entrenched constitution is described in A. Baldassarre, *Diritti sociali*, pp. 8-9.

⁷⁴ It must be stressed that the positive constitutional obligations are mostly assisted by political guarantees.

Court has enforced the constitutional provisions against the legislative acts submitted to its review. Nevertheless, substantive constitutional principles perform mostly as negative limits to legislation.⁷⁶ Once the essential content of fundamental rights is ensured, both the margins of economic freedom and the standards of protection of social rights remain largely in the hands of the political process.⁷⁷ As a result, depending on the outcomes of democratic deliberation, the market ends up being either an objective inspiring legislation or a generator of social exclusion to be constrained. The same applies to social objectives, either considered as goals for policy-making or obstacles to economic freedoms. In the backdrop of such divergent alternatives, the constitution establishes of course a minimum degree of substantive homogeneity. Nevertheless, its most visible contribution is its procedural frame. By delineating institutions and procedures for channeling political and social pluralism, the constitution contributes to the prevention of social conflicts and to the promotion of social integration. In this, it serves its ultimate objective of economic and social cohesion.⁷⁸

Legalism Serving Free Trade

The very objective of economic and social cohesion underlying domestic economic constitutionalism is reflected in the international dimension in a variety of distinct initiatives of cooperation among the states.⁷⁹ Against this background, the WTO, in its role as a special purpose organization,⁸⁰ plays a partial role. According to its preamble, economic and social welfare are pursued essentially by promoting economic growth through free trade.⁸¹ Having embraced the latter as the most immediate objective and

⁷⁵ Corte Cost., sent. 5 June 1956, n. 1, in *GC*, 1956, p. 1.

⁷⁶ R. Bin, *Capire la costituzione*, Roma-Bari, 2002, p. 97 has described the negative role played by constitutional provisions through the following metaphor: “A navigare è il ‘politico’, spesso nei panni del legislatore: è lui che decide da che parte si va e a quale velocità. La Corte costituzionale sta sulla nave per conto dell’armatore, nel cui interesse controlla come procede la navigazione, intervenendo quando ne vede infrante le regole”.

⁷⁷ In respect to economic freedom, see below section III.A.2.

⁷⁸ In this regard, V. Onida, *Le Costituzioni. I principi fondamentali della costituzione italiana*, p. 107, argues “... il conflitto sociale non è dunque ignorato né negato; nemmeno si ipotizza una sua soluzione o scomparsa per la sola via politica; lo si riconduce e in un certo senso lo si garantisce nel suo concreto svolgersi, mentre alla politica (allo Stato) si affida il compito di regolare le condizioni fondamentali di sviluppo dell’assetto economico [...] La meta ultima è una società in cui la giustizia sociale sia assicurata. Ma i termini di tale ‘giustizia’ restano largamente indeterminati, e affidati da un lato alla dinamica dei rapporti sociali, dall’altro alle scelte politiche. *L’esito del processo è lasciato aperto*, pur indicandosene in termini generali gli obiettivi” (Italic in the original).

⁷⁹ In this regard, J. P. Trachtman, *WTO Constitution*, p. 19, observes that one could identify “a kind of global functional federalism, in which the center is the general international legal system and the periphery is the functional organization.” A survey on the functional organizations operating in the international sphere is provided in B. Conforti, *Diritto internazionale*, Napoli, 2002, pp. 152-163.

⁸⁰ See article II.1 WTO, where the WTO is presented as providing “the common institutional framework for the conduct of trade relations among its Members ...”.

⁸¹ See R. Howse, K. Nicolaidis, *Constitutionalization or Global Subsidiarity*, pp. 76-77, addressing the GATT as an “Embedded Liberalism Bargain”.

comparative advantage as the economic and ideological driving principle,⁸² the WTO endorses an international trade regime unfettered by protectionist measures.⁸³ The fundamental objective of the WTO, therefore, consists in gradually reducing barriers and eliminating discriminations in international trade relations.⁸⁴

Nevertheless, the scope of international trade regulation, far from remaining within clear-cut boundaries, is inevitably blurred. Originally, the reach of the GATT obligations was mainly underestimated. Merely treated as technical issues, the matters arising out of negotiations and adjudication have been for a long time insulated by neglecting the policy externalities of free trade.⁸⁵ Only recently this original attitude has changed and the WTO has started to cope with the problems related to its ramifications. In both negotiations and adjudication, the scope of the international trade obligations is currently managed by addressing a number of “trade and ...” chapters.⁸⁶ Yet, although the legal protection of non trade interests affected by the WTO obligations has been increasingly ensured, the WTO maintains its exclusive constitutional commitment to the objective of free trade.

Beside comparative advantage, the other ideological landmark of the GATT-WTO consists in its legal nature. History can witness to what extent an international trade regime based on rules rather than on powers, apart from serving general economic convenience, coincides with a profound choice of value.⁸⁷ A multilateral set of rules fosters negotiations rather than commercial wars and, at least purposively, reduces the inequalities among states. On these premises, the principle of rule of law has been employed from the very beginning in the achievement of GATT constitutional objectives.⁸⁸ Yet, the legal nature of the GATT has gone through several seasons. For a long time, because of a dispute settlement framework devised for negotiating rather than for adjudicating legal controversies, the binding nature of GATT obligations has relied

⁸² A. Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, in *NJILB*, 1996, 2/3, pp. 781-784.

⁸³ In this perspective, protectionism is considered as a political and economic failure by the governments following the regulatory capture by national firms and workers at detriment of consumers, see A. Reich, *From Diplomacy to Law*, p. 781; E-U. Petersmann, *The Transformation of the World Trading System*, p. 4.

⁸⁴ In the language of the preamble, the parties “being desirous of contributing to these objectives [economic and social welfare] by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations”.

⁸⁵ J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, in *JWT*, 2001, 35, 2, p. 191.

⁸⁶ This is particularly evident in the border between trade and environment. Here, a WTO Committee on Trade and Environment has been created in order to identify and study the problems emerging in the relationship between the WTO obligations and the environmental treaties. In other ambits, such as trade and labor relations, the WTO simply defers to the ILO (or, in other fields, to the relevant international agencies) the adoption of core labor standards.

⁸⁷ The reasons motivating the shift to legalism are discussed in A. Reich, *From Diplomacy to Law*, p. 775.

⁸⁸ Nevertheless, ‘diplomacy v. legalism’ is constantly a hot issue in the debate on international trade regulation. See M. J. Trebilcock, R. Howse, *The Regulation of International Trade*, New York, 1999, pp. 54-56; A. Reich, *From Diplomacy to Law*, pp. 830-839.

largely on political guarantees.⁸⁹ Only with the entry into force of the Marrakech Agreement and the adoption of a new system of dispute settlement, the shift to legalism has been accomplished.⁹⁰ Like in the domestic sphere, also in the WTO the transformation of the constitutional framework has been certified by the judiciary.⁹¹ In this regard, the extreme textualism employed by the Appellate Body from its first pronouncement is revealing of a change in the inherent structure of the legal framework.⁹² The message sent by this decision is clear in stressing that the time when GATT obligations stood only as normative benchmarks for diplomacy is over. From now on, the treaties provides also compulsory yardsticks of adjudication and, arguably, constitutional constraints on members regulatory autonomy. The introduction of a judicial system of adjudication, indeed, strengthens the binding and supreme nature of the WTO. As a consequence, its regulatory principles receive sufficient force to compete against the constitutional principles of the members in the definition of the relevant strategies of trade regulation. By playing this role, the WTO appears as taking its first steps along the road to constitutionalization.⁹³

Yet, it would be misleading to affirm that the WTO, by employing the rule of law in the pursuit of its objectives, has deviated completely from its original legal roots. Despite the shift to legalism, the law of world trade still hinges on a legal framework which in many aspects reflects the ethos and the solutions of the purest international law. As a consequence, the injection in this context of the principle of rule of law originates a peculiar manifestation of constitutionalism which deviates remarkably from many of the distinctive elements of domestic constitutionalism. Arguably, the international law matrix of the WTO affects the scope of judicial review by its adjudicative bodies, the thickness of its constitutional principles and, eventually, the binding nature of its provisions.

⁸⁹ In this regard J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats*, p. 4, states that “it is not inappropriate to think of that ‘old’ dispute settlement process as *diplomacy through other means*” (Italic in the original).

⁹⁰ It is common to identify in the article 6 DSU (right to have a panel) and article 16.4 and 17.14 (right to have, respectively, a Panel or AB report adopted) the pillars of the juridification of the GATT. Arguably, even before the adoption of the DSU, the GATT was juridified, though its legal nature was considerably different.

⁹¹ In this, it seems the WTO adjudicative bodies have simply fulfilled the role conferred to them by the treaties. A different opinion, whereby the Appellate Body ought to be regarded as “the dynamic force behind constitution-building by virtue of its capacity to generate constitutional norms and structures during dispute resolution”, is advocated by D. Z. Cass, *The ‘Constitutionalization’ of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development of International Trade*, in *EJIL*, 2001, 12, 1, pp. 41-42.

⁹² See Report of the Appellate Body, *United States – Standards for Reformulated and Conventional*, WT/DS2/AB/R, 29 April 1996.

⁹³ Admittedly, this presentation shows the WTO does not fulfill all the elements indicated above (section II) as necessary to be acknowledged with full constitutional status. In particular, it seems that the WTO misses the requirement concerning the allocation of regulatory powers to political institutions for the pursuit of its fundamental objectives. Yet, in the analysis of the elements of the ECI of the WTO converging towards those of the EU (see below section III.B), embryonic substantial positive integration powers will be identified in the WTO sphere and, as a consequence, the acknowledgement of full constitutional status to the WTO will become plausible.

From a certain perspective, the combination between rule of law and international legal framework amplifies the pervasiveness of constitutional constraints on the regulatory measures of the members. In the WTO, indeed, the definition of the acts subject to judicial review does not follow the formal categories normally employed by domestic constitutions.⁹⁴ As an international treaty, the WTO addresses its members in the entirety of their legal manifestations. Consequently, since the international trade obligations encompass all trade-related measures adopted by or imputable to the members, their reach is broader than that of domestic constitutional provisions.⁹⁵

An increase in the degree of penetration of WTO obligations can be appreciated also from a different perspective. By ratifying this treaty, members have not simply declared their loyalty to a general economic model committed to economic growth through free trade. Members have indeed agreed also on a series of regulatory principles which articulate that general objective. Unlike the open-textured character of many provisions contained in domestic constitutions, the WTO enshrines more detailed regulatory principles which leave narrower room for interpretations based on alternative ideological options.⁹⁶

Although these aspects emphasize the role of the WTO as a source of legal and judicial constraints, other traits of its legal framework lead to an opposite conclusion. In this perspective, the version of rule of law adopted by the WTO appears lighter than that developed within domestic constitutions.

The system of remedies is a first evident element impairing the stringency of the WTO provisions. Whereas in the domestic sphere an act infringing upon the constitution is normally annulled or disapplied, in the WTO the pronouncements of adjudicative bodies do not have *per se* legal effect on members measures. In case of nullification of the benefits accruing to the members from the WTO obligations, the best solution is always the withdrawal of the inconsistent measure by the wrongdoer. Without the cooperation of the latter, the WTO provides only a disciplined system of retaliation allowing for the suspension of concessions or other obligations.⁹⁷

⁹⁴ In the Italian constitution, for instance, only legislative acts are reviewed by the Constitutional Court (article 134 Cost.). By contrast, in the German Constitution also administrative and judicial acts are subject to review by the *Bundesverfassungsgericht* (articles 1.3 and 19.4 GG).

⁹⁵ Article XVI.4 WTO stipulates that the obligations provided by the annexed agreements act as yardsticks of “conformity” in respect to the members’ “laws, regulations and administrative procedures.” Yet, in the adjudication the range of measures subject to review is often widened. A sophisticated test for identifying the minimal requirements for having a “measure” is at the core of the decision issued by the Panel in *Japan Semi-Conductors* (Report of the Panel adopted on 4 May 1988, L/6309 – 35S/116, recital 109).

⁹⁶ D. J. Gerber, *Law and Competition*, pp. 248-249, distinguishes between constitutive principles, whose function is to establish the basic form of the economy, and regulatory principles which are more specific and serve to maintain the effectiveness of constitutive principles.

⁹⁷ In this regard, see article 3.7, 19 and 22 DSU.

A further element influencing the reach of WTO provisions relates to the nature of its obligations. As demonstrated by the most accurate analyses,⁹⁸ the WTO is a multilateral treaty designed for purposes which do not transcend the individual interests of the contracting parties.⁹⁹ To be precise, the WTO consists of a compilation of state-to-state relations originating a bundle of detachable and bilateral obligations. A similar connotation entails a number of consequences that are particularly important for a proper understanding of the constitutional nature of the WTO.¹⁰⁰

Because of the bilateral nature of obligations, world trade law operates according to the most classic patterns of public international law.¹⁰¹ The WTO, indeed, rather than promoting autonomous and comprehensive strategies of economic regulation, is in the most modest business of setting a legal matrix for coexistence among its members in the field of trade relations.¹⁰² Accordingly, no WTO institution is entitled to represent and promote the collective interest of the community of the members. As a result, the effectiveness of the WTO obligations relies only upon the judicial initiatives brought by states.¹⁰³ Hence, serious concerns arise for all those cases in which members decide not to seek redress for the breaches suffered.¹⁰⁴

A further element threatening the effectiveness of the WTO can be identified under public international law rules of conflict. According to the law of the treaties, parties maintain broad margins to contract out their previous bilateral obligations. As a result, the WTO members not only can dilute the application of treaty provisions by profiting from the several forms of dispute settlement alternative to adjudication,¹⁰⁵ but are even entitled to set them aside by concluding subsequent alternative arrangements.¹⁰⁶

⁹⁸ J. Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, in *EJIL*, 2003, 14, 5, p. 907.

⁹⁹ For an analysis of the bilateral nature of the WTO obligations see J. Pauwelyn, *Are WTO Obligations Bilateral or Collective in Nature?*, pp. 930-941.

¹⁰⁰ The discipline of bilateral obligations under the law of the treaties and the law of state responsibility is summarized in J. Pauwelyn, *Are WTO Obligations Bilateral or Collective in Nature?*, pp. 923-924. In this respect, it is interesting to note that the AB, in *Japan – Taxes on Alcoholic Beverages* (Appellate Body Report, WT/DS8/AB/R, 4 October 1996, paragraph F), in defining the nature of WTO states that “The WTO is a treaty, the international equivalent of a contract” ... and not of a constitution!

¹⁰¹ A survey on the different ‘command’ modes coexisting in international law making is presented in J. H. H. Weiler, *The Geology of International Law*, pp. 8-19.

¹⁰² For this reason the WTO can be considered a “member-driven organization”, see J. P. Trachtman, *The WTO Constitution*, p. 23.

¹⁰³ The bilateral nature of the WTO obligations implies that only the member(s) detrimentally affected by a measure have standing to seek redress for this breach, J. Pauwelyn, *Are WTO Obligations Bilateral or Collective in Nature?*, p. 942.

¹⁰⁴ This possibility can occur especially in the case of infringements by big-consumer states which could not be challenged for fear of political consequences, but also in the case of breaches by small-consumer states which often are not challenged because of their scarce economic importance. Gaps in the application of the WTO regulatory principles occur also when states engage in collusive practices by omitting to react against their respective breaches.

¹⁰⁵ See article 4 (consultations), 5 (Good Offices, Conciliation and Mediation) and even 12.7 DSU (entitling the Panel to submit a report only if “the parties to the dispute have failed to develop a mutually satisfactory solution”). In all these cases the solution of the controversies only purposively complies

In conclusion, the bias of international law has profound effects on the ECI of the WTO. It has been shown that the stringency of constitutional provisions is intensified in the international legal framework. In the meantime, the same matrix also introduces a considerable degree of flexibility and, therefore, increases the uncertainty about the binding nature of WTO obligations. The paradoxical combination of these apparently opposite elements produces an original constitutional regime based on a flexible version of the principle of rule of law. A similar framework is coherent with the ambitions of the WTO undertaking. The existence of several safety nets is considered decisive in facilitating the achievement of consensus among the members on a comprehensive discipline of international trade. The flexibility of the regulatory principles, indeed, allows the tuning of trade arrangements to the diverse aspirations and priorities of members. In this, the legal framework seems to respond realistically to its functional concern of bringing international trade relations as close as possible to the objective of free trade.¹⁰⁷

Constitutional Law Serving Market Building

The EC pursues economic and social welfare by promoting economic integration among its member states and, namely, by establishing and ensuring the functioning of the common market.¹⁰⁸ In responding to this specific functional concern, the ECI of the EC diverges in many aspects from the templates provided by both the WTO and domestic constitutions.

There are of course many elements common to the EC and the WTO. Both of them are special purposes organizations, both of them support free trade and comparative advantage as means of fostering economic growth.¹⁰⁹ Despite these similarities, from its earlier stages the EC has served more ambitious objectives of economic integration than boosting free trade among its members. Market building, indeed, does not consist only in reducing (or dismantling) barriers to trade and phasing out discriminatory measures. In

with the WTO obligations (article 3.7 DSU). The flexible nature of the WTO obligations is evident also in the possibility of waiving an obligation according to article IX.3 WTO.

¹⁰⁶ According to article 34 of the Vienna Convention, later treaties among the WTO members must not affect the rights of other WTO members that are not party to this later treaty. In addition, later treaties derogating to WTO provisions are possible only if not prohibited by the WTO or a later treaty concluded among its members. See J. Pauwelyn, *Are WTO Obligations Bilateral or Collective in Nature?*, pp. 946-947.

¹⁰⁷ In this regard, J. Pauwelyn, *Are WTO Obligations Bilateral or Collective in Nature?* p. 949, has observed that “permitting these alternatives to full compliance or specific performance would not be to the advantage of private economic operators concerning predictability, in particular traders [...]. But this may be the price to pay for having legally enforceable WTO obligations in the first place, as well as a welcome democratic safety-net that may actually render WTO obligations more, rather than less, legitimate”.

¹⁰⁸ Eloquent in this regard is article 2 EEC, especially in its original version.

¹⁰⁹ These similarities emerge in the largely corresponding contents of their regulatory principles. For a comparative analysis of the regulatory principles of the GATT and EU see F. Ortino, *Basic Legal Instruments for the Liberalisation of Trade: a Comparative Analysis of the EC and WTO Law*, Oxford, 2003.

the design of the EC, the commitment to common market entails a more comprehensive regulatory strategy aiming at the establishment of an efficient framework of relations among economic and social actors belonging to different member states.

Meaningful discrepancies arise also in respect to the objectives pursued in the domestic sphere. In the language of the EC, indeed, the market is not only the pivotal means of integration, but springs up as the critical generator of economic and social welfare. Thus, in supporting the market as an implicit alternative to the state approach to economic and social cohesion, the EC constitutional strategy may easily sound like the conservative answer to the more socially-oriented national constitutions.¹¹⁰ Yet, the design of economic integration purported by the EC seems more sophisticated and, although unequivocally centered on the market, it inherently departs also from the classic foundations of liberalism.¹¹¹

In the tradition of liberal constitutionalism, the market is mostly conceived as synonym of economic freedom.¹¹² Such an approach, reminiscent of the theory of natural freedoms, is deeply rooted in the historical experience of liberalism. As widely known, the enfranchisement of economic actors from the constraints of the *ancien régime* has not been pursued through the law. More correctly, their emancipation has been essentially a result obtained by the national middle classes after fierce battles fought in the political arena. In this context, the law, by recognizing economic freedom and property rights as cornerstones of the liberal constitutions, has played the eminently defensive function of protecting these political achievements.

From this standpoint, the profile of the EC is totally different. In the EC treaty, indeed, one does not merely find the endorsement of liberal claims for a broader protection of economic freedom. Its provisions, rather than reaffirming, presuppose the principles already recognized and protected by the national constitutions, and go further by devising an efficiency-oriented program of transformation of the economic and social reality.¹¹³

Unlike the WTO, the EC has pursued its goal by constantly expanding its substantive scope. The EC, rather than anesthetizing the potential ramifications of economic integration, has profited from them and, eventually, stretched the reach of its competences. Nevertheless, such an expansion has not diluted the EC original

¹¹⁰ In considering economy, rather than politics, as the primary means for integrating society, the EC constitution appears coherent with the intellectual framework of ordoliberal thought (See D. J. Gerber, *Law and Competition*, p. 241). Arguably, this may have been one of the reasons which have brought some national Constitutional Courts to limit the pervasiveness of EC law in case of infringement of the fundamental principles of the national constitutions. On this issue see B. de Witte, *Community Law and National Constitutional Values*, in *LIEI*, 1991, 2, 1, p. 1; M. L. Fernandez Esteban, *Constitutional Values and Principles in the Community Legal Order*, in *MJECL*, 1995, 2, 2, p. 129.

¹¹¹ In this regard, it could be argued that whereas in the tradition of liberalism market is a *locus naturalis*, in the EC common market is conceived essentially as *locus artificialis*. On this distinction, see N. Irti, *L'ordine giuridico del mercato*, pp. 3-14.

¹¹² As seen above, this cultural approach is largely shared by the mixed-economy constitutions.

¹¹³ As a result, the economic integration pursued in the design of the common market encompasses a broader range of policy fields including, alongside the rules on free movement, competition law, state aids and approximation of laws.

commitment to market building.¹¹⁴ On the contrary, by expanding its scope, the common market has subsumed within its circuits a number of policy areas traditionally perceived as distinct or even conflicting with the achievement of purely economic goals. Therefore, the configuration of the substantive domain of the EC, in maintaining a strategic link with the market, does not amount to the general vocation which, by contrast, marks domestic constitutions.¹¹⁵

The very objective of economic integration has played a key role also in shaping the specific constitutional nature of the EC. In this regard, other important differences with both the domestic and WTO legal frameworks can be underlined. The constitution of the common market, indeed, embodies neither the (international law) contractual intergovernmental matrix nor the (domestic constitutional) compromise between political actors supporting alternative projects of society. Market building is a different business, consisting of the implementation and enforcement of a comprehensive and autonomous constitutional program made of clear-cut regulatory strategies. Arguably, the pursuit of these objectives cannot be performed only by building upon the flexible legal framework of international law. Therefore, already in their original versions, the treaties envisaged for the EC a legal framework which, in many vital aspects, deviates from the classic matrix of international law.

In this regard, a first innovation consists in the identification of a distinct interest of the community beside the individual interests of member states.¹¹⁶ Integration, indeed, entails a more profound effort of cooperation than striking a balance among the members' individual interests. Implementation and enforcement of the market building program, therefore, could not be left entirely in the hands of the member states. An independent organ, such as the Commission, has been inserted in the EC institutional architecture in order to embody and pursue the Community's autonomous aspiration to integration. As a consequence, the EC legal framework has been enriched with institutional and procedural devices essentially aimed at the systematic and precise implementation of the constitutional program.

A further innovative element introduced in the EC legal framework concerns the institutional architecture. The commitment to market integration could not rely on the sole application of treaty provisions by adjudicative or judicial bodies. As has been shown, market building is not simply about ensuring conditions for a peaceful coexistence among the member states in the field of trade. The limitation of the

¹¹⁴ This emerges particularly in the words of article 308 EC. In entitling the EC institutions to adopt measures beyond the EC competences, this provision stipulates that these measures are "necessary to attain, *in the course of the operation of the common market*, one of the objectives of the Community ..." (Italics added).

¹¹⁵ The limits to the EC domain determined by the persisting link with market integration are evident in the case *Kremzow* (Case 299/95, *Kremzow v. Austria* [1997] ECR I-269).

¹¹⁶ Therefore, it could be argued that EC obligations, by pursuing an interest that transcends the individual interests of the contracting parties, are collective in nature. The existence of an EC constitutional interest distinct from the interests of the member states emerges, *inter alia*, in the constitutional regime of the Commission: see, for example, article 211 EC, where also the strict link with the objective of the common market is evident.

regulatory measures of the members, indeed, is only part of the strategy purported by the treaties. The achievement of the common market requires also the implementation and the articulation of the regulatory strategies stipulated by the treaties. In the EC, thus, the pursuit of constitutional objectives implies the allocation of regulatory powers on political institutions and, eventually, the introduction of a fully-fledged system of government.

Finally, it is broadly known that the deepest alteration of the international law framework has taken place in the judiciary of the EC. Also in this regard the approach of the Court of Justice remarkably differs from that of the Appellate Body. Whereas the Appellate Body has diligently certified the legal nature of GATT obligations, the Court of Justice has bravely molded the constitutional framework of its legal system in the light of its ultimate objective.¹¹⁷ By adopting the doctrine of direct effect and, consequently, by empowering individuals as ‘private attorney-generals’,¹¹⁸ the Court of Justice has strengthened the principle of rule of law and its judicial guarantees and, finally, transformed the original EC legal framework.¹¹⁹ As a consequence, the effectiveness of EC law finds an additional and more efficient means of enforcement openly developed on the basis of the domestic models of judicial review of legislation.

Yet, it would be superficial to conclude that the legal framework of the EC coincides perfectly with its domestic equivalents. Important distinctions need to be drawn in this sphere too. A first difference has already been pointed out. The national constitutions are not endowed with institutions and procedures – such as the Commission and the infringement procedure – specifically directed to the implementation of their regulatory strategies. In the domestic sphere, the achievement of constitutional objectives is largely left to the political-majoritarian circuits and the protection of constitutional principles relies only on the enforcement by the Constitutional Court.

Other differences concern the reach of the EC provisions. Despite efforts by the Court of Justice to handle the treaties as functional equivalents of domestic constitutions, several traits of the EC legal framework echo its roots in international law. Like in the WTO, for instance, treaties obligations address all the measures imputable to member states.¹²⁰ Like in the WTO, or better, more than in the WTO, treaties provisions operate as regulatory (rather than constitutive) principles and originate detailed constitutional strategies.

¹¹⁷ Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] I-1. It is commonly acknowledged that in this case the Court of Justice, by adopting a radical teleological approach, has started to shape the constitutional nature of the EC.

¹¹⁸ P. Craig, *Once Upon a Time in the West: Direct Effect and federalization of the EEC Law*, in *OJLS*, 1992, 12, 4, p. 453.

¹¹⁹ Case 294/83, *Parti Ecologiste ‘Les Verts’ v. European Parliament*. In this regard, R. Toniatti, *Il principio di rule of law e la formazione giurisprudenziale del diritto costituzionale dell’Unione Europea*, in S. Gambino (ed.), *Costituzione italiana e diritto comunitario*, Milano, 2002, p. 503.

¹²⁰ The breadth of the concept of measure in the EC is well represented by cases such as *Huenermund* (C-292/92, [1993] ECR I-6787) and *Commission v. France* (C-265/95, [1997] I-6959). It must be remarked that the jurisdiction of the Court of Justice, differently from that of the WTO adjudicative bodies, is not confined to the measures of the member states but deals also with the legality of EC acts.

Finally, an important difference arises also in respect to the remedies for breaches of the treaties. In this regard, the sophisticated system of remedies elaborated by the Court of Justice is not even comparable with the primitive characters of its WTO equivalent. As seen, it is undeniable that national measures inconsistent with directly applicable EC law are to be set aside.¹²¹ Yet, differences exist also in respect to the features of the national systems of judicial review of legislation. The pronouncements by the Court of Justice, indeed, do not have *per se* the effect of phasing out the inconsistent national measures.¹²² More precisely, their effect (as for most of the EC acts) depends ultimately on the cooperation of national courts whose obedience draws upon their respective domestic constitutions.

In conclusion, the nature of constitutional objectives is decisive also for the connotation of the EC legal framework. By refining the classic framework of international law in the light of some of the typical traits of the state constitutions, the EC seems to have found the most appropriate instruments to serve the objective of market integration. Ultimately the very nature of supranational constitutionalism also consists of a such a complex combination.

2. Constitutional Constraints and Regulatory Autonomy

Judicial Review of Legislation Re-Enforcing Utilità Sociale

The pivotal provision of the Italian Constitution dealing with economic issues is article 41.¹²³ This article, by acknowledging both the liberal claims for economic freedom (“*l’iniziativa economica è libera*”) and the social demands for political regulation (“*non può svolgersi in contrasto con l’utilità sociale ...*”), perfectly embodies the political compromise and the quest for economic and social cohesion inherent in the constitution.

Because of its central position, article 41 has constantly animated fierce political disputes concerning its interpretation and, namely, the substantive contents of the economic model enshrined in the constitution. Quite predictably, supporters of *laissez-faire* ideals passionately advocate the first paragraph of article 41 as their manifesto for a pure liberal economic model. Their political opponents, conversely, stress the passage on *utilità sociale* as an icon of social justice and, in some cases, even as the promise for an alternative economic system.

¹²¹ It will be seen below (Section III.A.2) that national measures breaching the treaty provisions on free circulation of goods are not annulled but disapplied by national courts and administrations only in respect to imported products.

¹²² B. de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in P. Craig, G. de Bùrca (eds.), *The Evolution of the EU*, Oxford, 1999, p. 193.

¹²³ Article 41 Cost. reads as follows: “L’iniziativa economica privata è libera. Non può svolgersi in contrasto con l’utilità sociale o in modo da recare danno alla sicurezza, alla libertà, alla dignità umana. La legge determina i programmi e i controlli opportuni perchè l’attività economica pubblica e privata possa essere indirizzata e coordinata a fini sociali”.

Apart from single opinions utterly biased by ideology,¹²⁴ the scholarship on constitutional law has largely refused such simplistic alternatives. Nonetheless, highly divisive doctrinal debates have arisen in respect to the meaning and the function of article 41. A first level of discussion translates in the more secular language of constitutional law the classic dialectic between economic freedom and public intervention. Although the existence of a model of mixed economy is normally admitted, a number of scholars present article 41 either stressing the room of maneuver granted to public authorities for the pursuit of social objectives or defending the necessity to protect economic freedom from excessively intrusive pieces of legislation.¹²⁵ Yet, in most of the cases these opinions add little to the critical understanding of the Italian ECI since their emphasis either on freedom or on its limits reflects more the authors' political preferences than the results of a rigorous scientific investigation.

Article 41 has occasioned a more interesting debate concerning the relationship between constitutional constraints and political decision making in the field of economic regulation. In this regard, the doctrinal divide is subtler and the opinions offered in the discussion appear detached from the ideological divisions encountered in the political sphere.

The starting point of this debate is the entrenched nature of the constitution as assisted by a system of judicial review of legislation, landmark innovations which have strengthened the binding nature of the fundamental rules after a long period of oblivion and defiance by political institutions. Prominent scholars have interpreted this turn into legalism with a pure civil law spirit. Textualism and direct effect have been addressed as the most coherent doctrines for granting supremacy to the constitution. Accordingly, constitutional provisions have been handled with the same hermeneutic instruments adopted in respect to legislation. Thus, the textual choices by the framers have resulted as the crucial elements in the identification of the prescriptive contents of the constitution.¹²⁶ Besides, the legal impact of constitutional provisions has been affirmed without hesitation. Considered as sources of regulatory principles, they considerably narrow the scope for legislation. In this perspective, therefore, the role of legislation and administration consists in the correct implementation of clear constitutional obligations.

¹²⁴ C. Lavagna, *Costituzione e socialismo*, Bologna 1977, affirms the transitory character of the constitutional protection of economic freedom, to be overcome with the adoption of a more mature socialist regime.

¹²⁵ Broad margins of intervention for public authorities are acknowledged by C. Mortati, *Istituzioni di diritto pubblico*, II, Padova, 1976, p. 1114. A position more favorable to economic freedom is supported by M. Mazziotti, *Il diritto al lavoro*, Milano, 1956, p. 183 and, more recently, by A. Pace, *Problematica delle libertà costituzionali – parte speciale*, Padova, 1992, p. 487.

¹²⁶ For instance, M. Mazziotti, *Il diritto del lavoro*, pp. 158-159 has inferred from the use in article 41.3 of the plural form “programmi” the impossibility of a single binding economic program. The same Author (p. 154) has distinguished on mere textual bases the allegedly different intensity of the limits to economic freedom dictated in article 41.2. Whereas the contrast between economic freedom with *utilità sociale* is considered plainly unlawful, the conflict between economic freedom with the other explicit limits (“libertà”, “sicurezza” e “dignità umana”) would be banned only if amounting to a harmful event (“non deve recar danno ...”). Several other examples emerge also in A. Pace, *Problematica delle libertà costituzionali*, pp. 490-496.

Similarly, courts are requested to apply constitutional principles directly and to set aside, according to the preliminary ruling procedure, the statutes in conflict with them.¹²⁷

The outcomes of a similar approach to article 41 are quite disappointing. The morbid attention to its meager textual elements has not kept the promise of providing a comprehensive constitutional discipline for economic issues. Even the most elegant of these interpretations¹²⁸ fail in devising appropriate standards of constitutional adjudication and, more importantly, in capturing the effective role played by article 41 in the legal reality.¹²⁹ Textualism, indeed, induces many authors to over-emphasize the semantic potential of constitutional principles and to misinterpret the relationship between constitutional constraints and political decision-making. By contrast, their works neglect the profound significance of the open-textured character of article 41, with the consequence of diminishing the potential of integration of a constitutional framework essentially directed at the promotion of economic and social cohesion.

These latest considerations motivate an alternative approach to article 41. An important part of the scholarship on constitutional law rejects textualism as the most appropriate methodology to deal with constitutional provisions.¹³⁰ Their inherent nature, indeed, does not seem compatible with the hermeneutic tools usually employed in the exegesis of legislative acts. A provision such as article 41 is anything but stringent and, therefore, attempts at inferring regulatory principles from its text are likely to be arbitrary. As a consequence, the binding nature of the constitution must also be conceived in a different way. Article 41 can be realistically treated as a source of negative limits to the legislative acts affecting economic freedoms. Its binding nature, therefore, manifests itself essentially in the scrutiny by the Constitutional Court directed to test whether, in the pursuit of social objectives, economic freedom has been adequately taken into consideration.¹³¹

In the case-law by the Constitutional Court on article 41 examples of this more pragmatic approach abound. Despite the suggestions offered by the doctrinal debate, the Constitutional Court has discarded textualism together with the temptation of addressing (or opposing) to the legislation precise regulatory strategies. Constitutional adjudication,

¹²⁷ This approach is particularly evident in C. Esposito, *I tre commi dell'art. 41 Cost.*, in *Giur. Cost.*, 1962, p. 33 and in A. Pace, *Problematica delle libertà costituzionali*, pp. 481-489.

¹²⁸ A. Baldassarre, *Iniziativa economica privata*, in *Enciclopedia del diritto*, XXI, pp. 594-595 interprets article 41 in the light of the contemporary processes of production and organization of economic activities. Hence, article 41.1 is considered as the provision regulating the right to invest which could not be constrained with binding limits by public authorities. Article 41.2, instead, contains the discipline for the organization of economic activities and the limits imposed to private initiatives could amount to binding constraints. Finally, article 41.3 calls into question the legislative to regulate the overall economic process and direct it towards the pursuit of social objectives. A similar approach is shared by M. Luciani, *Economia nel diritto costituzionale*, p. 380 and criticized by A. Pace, *Problematica delle libertà costituzionali*, pp. 461-462.

¹²⁹ A. Baldassarre, *Iniziativa economica privata*, p. 604, states for instance the Constitutional Court could second-guess in the light of article 41 the policy objectives inspiring legislation.

¹³⁰ The following approach is suggested in R. Bin, *Diritti e argomenti*, Milano, 1992.

¹³¹ See G. Morbidelli, *Iniziativa economica privata*, in *Enciclopedia Giuridica Treccani*, XVII, p. 3; G. Bognetti, *La costituzione economica italiana*, pp. 43-44.

indeed, is not expected to devise autonomous political programs, but to test according to legal criteria the political choices enshrined in legislation. Under this dispassionate approach, article 41 expresses constitutive principles (rather than rules) whose balance the Court is called to test according to a series of standards of review.¹³²

A feature common to all the Constitutional Court decisions is the systematic acknowledgment of the policy objectives inspiring legislation. Coherently with the open-textured nature of article 41, the passage on *utilità sociale* has been construed on a case-by-case basis by admitting any goal of economic regulation.¹³³ After having identified the political objectives, in a first handful of cases the Court restrains from any sort of scrutiny and declares that a step further would determine the infringement of the constitutional prerogatives of the legislative power.¹³⁴ Yet, in the majority of the cases these further steps have been undertaken by testing the adequacy of the legislative means in respect to the objectives. Nonetheless, in many cases the Court appears still lenient in respect to legislation. Such deferential approach, normally justified in terms of respect of the autonomy of political decision-making, consists in a generic assessment of the instrumentality of the legislation to the achievement of the political objective. By contrast, any sort of analysis of the impact of the measures at issue, on their effective aptitude to achieve the prefixed goals and on the level of protection of the constitutional interests affected is avoided.¹³⁵ It comes as no surprise that most of the decisions end up in dismissing constitutional complaints. Only in a few cases, finally, the Court has

¹³² G. Zagrebelsky, *Il diritto mite*, pp. 147-173.

¹³³ As a consequence, in the language and practice of constitutional adjudication *utilità sociale* originates a quite picturesque list of meanings including, *inter alia*, the protection of the currency and the real value of salaries (Corte Cost., sent. 8 July 1957, n. 103, in *GC*, p. 976), the protection of plants against diseases (Corte Cost., sent. 9 March 1967, n. 24, in *GC*, p. 191), the defense of the balance between demand and offer in the peculiar market of bread (Corte Cost., sent. 28 January 1991, n. 63, in *GC*, p. 450), the necessary defense of the Italian production of hard wheat (Corte Cost., sent. 15 February 1980, n. 20), the support to the production of glassware in Murano (Corte cost., ord. 21 July 1988, n. 859, in *GC*, p. 4070).

¹³⁴ A clear example of this deferential approach emerges in Corte Cost., sent. 13 April 1957, n. 50, in *GC*, p. 621.

¹³⁵ The Constitutional Court has observed that “La Corte [...] nei casi in cui le leggi apportino limitazioni ai diritti di libertà economica, ha certamente il potere di giudicare in merito all’*utilità sociale* alla quale la Costituzione condiziona la possibilità di incidere su quei diritti. Ma tale potere concerne solo gli aspetti logici del problema e cioè la rilevabilità di un intento legislativo di perseguire quel fine e la generica idoneità dei mezzi predisposti per raggiungerlo”. For other cases in which a similar test has been adopted see Corte Cost., sent. 10 June 1969, n. 97, in *GC*, p. 1239; Corte Cost., sent. 14 April 1988, n. 446, in *GC*, p. 2049; Corte Cost., sent. 12 December 1990, n. 548, in *GC*, p. 3147.

scrutinized the legislation according to a less restrictive measure test.¹³⁶ But even here, the results have been mostly favorable to the legislative.¹³⁷

In conclusion, it does not seem that the Constitutional Court has complied with uniform standards of review in the scrutiny under article 41. Nor it seems that the Court has provided explanations for the adoption of such diverse tests. Nonetheless, constitutional adjudication in the field of economic regulation reveals a stable character due to the mostly deferential attitude by the Court. Certainly, the case-law on article 41 could be criticized for not clarifying the criteria which justify the adoption of different standards of adjudication or for being in certain cases too sympathetic with the outcomes of the political decision-making. Yet, it would be incorrect to blame the Court for its substantial self-restraint. Such a profile appears absolutely consistent with the ideological premises of a constitution conceived for serving the objectives of economic and social cohesion. On this premise, judicial review of legislation cannot be expected to drive the political decision-making towards defined objectives through thick constitutional guidelines.¹³⁸ The role of constitutional adjudication, indeed, is at most to correct the outcomes of the political process with the result, most of the time, of re-enforcing the decision-making.¹³⁹ As a consequence, the Italian ECI performs well in emphasizing the achievement of political objectives according to the patterns of representative democracy. At the same time, a decision-making shaped largely on the basis of political responsibility diminishes the scope for substantive constitutional judicial review and disregards the systematic pursuit of economic efficiency.

Judicial Review Enforcing National Treatment

The principle of national treatment (NT) is probably the most central of the GATT disciplines since it reflects the constitutional commitment by the members to preserve international trade from protectionism and discrimination. Consequently, the domain of

¹³⁶ In some cases the Court has denied the possibility of employing a less restrictive measure test. In *Corte Cost.*, sent. 6 June 2001, n. 190, in *GC*, p. 1462, for instance, it was stated: “Il legislatore regionale avrebbe certo potuto avvalersi di altri mezzi [...] ma esula dai poteri di questa Corte contrastare con una propria diversa valutazione la scelta discrezionale del legislatore circa il mezzo più adatto per conseguire un fine, dovendosi arrestare questo tipo di scrutinio alla verifica che il mezzo prescelto non sia palesemente sproporzionato”.

¹³⁷ *Corte Cost.*, sent. 8 July 1957, n. 103, in *GC*, p. 976; *Corte Cost.*, sent. 15 June 1960, n. 38, in *GC*, p. 629; *Corte Cost.*, sent. 5 July 1961, n. 55, in *GC*, p. 1069; *Corte Cost.*, sent. 12 July 2000, n. 379, in *GC*, p. 2708. In other cases, the application of the least restrictive test has helped identify breaches of article 41: see *Corte Cost.*, sent. 30 December 1958, n. 78, in *GC*, p. 979; *Corte Cost.*, sent. 26 July 1993, n. 356, in *GC*, p. 2801.

¹³⁸ See the considerations by G. Zagrebelsky, *La Corte in-politica*, in *QC*, 2005, 2, pp. 273-282, supporting the idea of a Constitutional Court mere custodian of the *pactum societatis* and, for this reason, not as part of the competition among political actors.

¹³⁹ R. Bin, *Diritti e argomenti*, p. 161 has observed that in these cases “si tratta di [...] opporre al legislatore più che la linea estrema di difesa dei diritti di libertà, quella ben più flessibile e spezzata della considerazione equilibrata di tutti gli interessi in gioco, per evitare, più che la lesione eccezionale dei valori fondamentali, lo strisciante sopruso degli interessi privilegiati su quelli più deboli, delle maggioranze sulle minoranze, della morale corrente sulle devianze o sulle innovazioni”.

NT emerges as a fertile ground for studying the relationship between constitutional constraints and members' regulatory autonomy in the context of the GATT and for catching further distinctive elements of the ECI of the WTO.

The underlying rationale of NT is that GATT members, though retaining the power to govern trade, cannot apply regulatory or fiscal measures to protect their internal economies. Accordingly, NT obliges the members to ensure equality of competitive conditions for imported products in relation to domestic products by sanctioning formal and material discriminations.¹⁴⁰ Imported products, therefore, do not receive a specific (absolute) level of treatment. Under NT their protection is relative, consisting in the guarantee against members affording to them less favorable treatment than that accorded to their domestic counterparts.¹⁴¹

Traditionally, the discipline of NT is construed upon the dichotomy between prohibition and justification. As mentioned, the main normative content of NT is to prohibit formal and material discriminations against imported products (article III GATT). Yet, the ban is not so straightforward, since those discriminatory measures which respond to compelling policy objectives can be covered under a list of general exceptions (article XX GATT).

In applying NT, the WTO adjudicative bodies mostly comply with this rule-exception scheme. The detection of nationality discriminations follows an 'objective approach' aimed at testing whether the complained measure is detrimental to imported products.¹⁴² As a rule, NT entails a preliminary scrutiny on the likeness of the products involved by the measure at issue in order to gauge the degree of their actual or potential competitive relationship. Under the objective approach, likeness is assessed in the marketplace through a careful factual investigation of a number of relevant criteria concerning the physical characteristics of products, their end-uses, consumers' tastes and habits, cross-price elasticity.¹⁴³ Only if the resulting competitive relationship is significant, there is ground for a further assessment on the adverse treatment of imported products. Also in this regard the scrutiny is eminently factual. In determining whether imported products receive less favorable treatment than domestic products, no consideration of the policy objective pursued by the measure at hand is involved. At this stage, the focus of the

¹⁴⁰ In respect to fiscal measures, the principle has been expressed by the AB in *Japan – Taxes on Alcoholic Beverages*, with the following words: "Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products [...] Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products" (Paragraph F).

¹⁴¹ The distinction between absolute and relative standard of treatment is explained in F. Ortino, *From 'non-discrimination' to 'reasonableness': a paradigm shift in international economic law?*, Jean Monnet Working Paper 1/05, <http://www.jeanmonnetprogram.org/papers/05/050101.html>, pp. 6-7.

¹⁴² The characteristics of the 'objective approach' are expounded in H. Horn, J. H. H. Weiler, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, in H. Horn, P. C. Mavroidis (eds.), *The WTO Case Law of 2001: The American Law Institute Reporters' Studies*, Cambridge, 2004, pp. 17-22.

¹⁴³ These criteria have been indicated for the first time in the Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, recital 18.

adjudicative bodies is totally on how the measure impacts on imported and domestic products. Objective approach, therefore, implies for the GATT constitutional constraints a more intrusive role than that played by national constitutional principles. Unlike article 41 Cost., Article III GATT is interpreted as addressing the members with specific rules of conduct, without any concession to the language and the practice of reasonableness. As a consequence, the role of the adjudicative bodies also ends up being remarkably different from that of their national equivalents. National measures are indeed tested in the light of more stringent standards of review in which their impact is privileged over their form, their discriminatory effect over their political intent.

The distance between the GATT patterns of adjudication and the deferential approach by the national Constitutional Court can be appreciated also when it comes to the justification of protectionist measures. As said, article XX and its list of general exceptions are the last resort for members' measures adversely affecting imported products. Nevertheless, precisely because the exceptions may be particularly appealing to members for sheltering camouflaged protectionist regulations, the adjudicative bodies have construed article XX strictly with the purpose of avoiding its abuse.¹⁴⁴ At a first glance, this interpretation of article XX consists apparently in an obsessive emphasis on its text. Textualism, indeed, is employed for establishing the exhaustiveness of the list of legitimate policy objectives justifying the exceptions. Textualism, in addition, is used for claiming that the intensity of the means-ends relationship differs depending upon the wording of the exception at issue.

Nonetheless, behind the rhetoric of interpretation, the adjudicative bodies have applied a quite stable standard of review of the measures under article XX. Accordingly, the legitimacy of the policy objective at hand is firstly ascertained. Also in this regard, the scrutiny is more rigorous than the domestic standards employed to review the *utilità sociale*. The formal and substantial legitimacy of the measure is assessed by testing, respectively, whether the measure falls under one of the article XX exceptions and whether there are real and scientifically grounded concerns motivating the adoption of a discriminatory measure.¹⁴⁵ Besides, the relationship between measure and policy objective is scrutinized. Here, despite the textual differences in the list of exceptions, the adjudicative bodies have derived from the chapeau of article XX a substantially uniform least trade-restrictive measure test.¹⁴⁶ As a consequence, the overall regime of NT permits the adoption of those of the discriminatory regulatory solutions which are genuinely inspired to legitimate policy objectives and which happen to have the least

¹⁴⁴ In *Reformulated and Conventional Gasoline*, the AB expounded the strict scrutiny on the article XX exceptions stating: "the chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned".

¹⁴⁵ F. Ortino, *From 'non-discrimination' to 'reasonableness'*, p. 34.

¹⁴⁶ See *Reformulated and Conventional Gasoline*, paragraph IV.

impact on trade. In the light of a similar regulatory principle, both the pursuit of certain non-trade objectives and their level of protection as established by the members remain unaffected.¹⁴⁷ Yet, the least restrictive measure standard endorsed by the GATT entails for national regulators a duty to privilege the most trade-friendly solutions, to detriment sometimes of other concurring interests which, under domestic constitutionalism, would deserve equivalent consideration.¹⁴⁸

More sound jurisprudential solutions have been suggested for tackling the legitimacy shortcomings inherent in the ‘objective approach’. The rule-exception scheme marking NT case-law does indeed give the impression that in the GATT sphere a hierarchy of values exists between trade liberalization, considered as the main value and default rule, and the pursuit of non-trade objectives, treated as ancillary values and exceptions.¹⁴⁹ Conscious of the symbolic distance between this approach and the more pluralistic one by domestic constitutionalism, many commentators have argued in favor of interpretations of NT that are more in tune with the value of political autonomy. These alternative methodologies do not advocate for a reversal of the regulatory strategies so far enforced, but rather a hermeneutic attitude that is more open to the instances and the legal reasoning purported in the domestic sphere. With these approaches, indeed, the policy objective of the measures at issue is taken into account already in the scrutiny on discrimination. More in detail, the ‘effect and purpose’ approach shares the tests on likeness and adverse effect undertaken under the objective approach. Yet, a finding of violation of article III would be conditioned to an additional requirement concerning the protectionist purpose of measure at hand. Quite similarly, the ‘alternative comparator’ approach suggests the policy objectives could be relevant in the test on the competitive relationship between the products at stake. Likeness, indeed, should not be assessed in the

¹⁴⁷ For an example, see *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (Appellate Body Report, WT/DS135/AB/R, 12 March 2001), where the measure of the “controlled use” of asbestos-containing products suggested by Canada has not been considered as an available alternative to the complete ban in force since it did not guarantee the level of health protection defined by France. It must be observed that, by preferring to safeguard the level of protection established by the members, the GATT, unlike the EC, does not adopt a principle of equivalence between members’ regulatory solutions and, as a result, accepts a considerable degree of market fragmentations.

¹⁴⁸ In respect to the endorsement by the GATT of least trade restrictive measures, F. Ortino, *From ‘non-discrimination’ to ‘reasonableness’*, pp. 34-35, observes: “an important issue in this type of inquiry deals with how costs are defined. In the light of their principal function, the main relevant cost is usually determined taking into account the level of trade- or investment-restrictiveness of the measure at hand [...] While the adverse effects on trade or investment flows may be the main relevant cost at issue under a cost effectiveness test, it is evident that other costs, incurred by both public and private parties, may be brought into equation [...]. Thus, the scope of the costs brought into the analysis over the necessity of a measure will influence the outcome of the analysis itself”.

¹⁴⁹ In this regard, G. de Búrca, J. Scott, *The Impact of the WTO on EU Decision-making*, in G. de Búrca, J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues*, Oxford, 2001, p. 4, have observed: “the centrality and the strength of the MFN, non-discrimination and other rules on trade effectively consign all other important policies [...] to the status of exceptions which must be argued for within relatively strict constraints, rather than important competing or even co-equal policies in their own right”.

marketplace but in the light of the alternative comparator construed upon the legitimate policy objective of the measure under scrutiny. On this same basis, also the test on adverse effect should be carried out.¹⁵⁰

Despite their remarkable doctrinal support,¹⁵¹ these alternative methodologies have been mostly rejected in the adjudication.¹⁵² Objective approach and textualism have been preferred as the most natural answers to the shift to legalism by WTO and as the most responsive instruments for facing the legitimacy concerns of the newly established adjudicative bodies.¹⁵³ As a consequence, also in this regard there are several elements of conflict between the WTO and Italian ECIs. Differently from the domestic approach to constitutional provisions, in the GATT the rhetoric of interpretation has mostly succeeded and it can be rightly addressed as a characteristic element of the WTO foundational stage. More frictions arise out of the relationship between constitutional constraints and regulatory autonomy. It has been shown that NT is currently interpreted as expressing thicker regulatory principles than article 41 Cost. This higher constraining potential stems from the standard of review employed by the adjudicative bodies. Both the stringent scrutiny inherent in the objective approach and the strict construction of the general exceptions appear as evident deviations from the deferential attitude marking the Constitutional Court case-law. On this ground lays also the most strident of the frictions. As seen, GATT obligations ad members' regulatory autonomy can be harmoniously accommodated. Yet, the prevalent conceptual approach adopted in the adjudication too often seems to impact with the democratic ethos of domestic constitutionalism. It comes as no surprise that this generates a considerable degree of constitutional tension.

Judicial Review Promoting Access to Market

In the EC, a constitutional discipline equivalent to article III:4 GATT is absent. The very text of the treaty is laconic in this regard: whereas rules on taxation are explicitly laid down in article 90 EC, trade regulation of goods is not addressed by any specific provision. Hence, it has been up to the Court of Justice to fill the gap. There were two available alternatives. First, the GATT regime could have been replicated by extending to trade regulation the NT discipline of article 90. Second, regulatory measures could have been brought under the obstacle-based regime provided by article 28 for quantitative

¹⁵⁰ On the 'effect and purpose' and 'alternative comparator' approaches see H. Horn, J.H.H. Weiler, *European Communities – Measures Affecting Asbestos*, pp. 22-26.

¹⁵¹ H. Horn, J.H.H. Weiler, *European Communities – Measures Affecting Asbestos*, p. 30. See also H. Horn, P. C. Mavroidis, *Still Hazy After All these Years: the Interpretation of National Treatment in GATT/WTO Case-Law on Tax Discrimination*, in *EJIL*, 2004, 15, p. 39.

¹⁵² Only in few cases, such as *Malted Beverages* (Report of the Panel adopted on 19 June 1992, DS23/R – 39S/206), the purpose inspiring the measure has been taken into account to deny the protectionist nature of the measure under scrutiny.

¹⁵³ A critical analysis of the implications of the different approaches to NT is proffered in H. Horn, J.H.H. Weiler, *European Communities – Measures Affecting Asbestos*, pp. 27-31.

restrictions. As widely known, the last alternative was opted for in order to pursue a more ambitious design of economic integration than that promoted in the GATT.¹⁵⁴

Coherently with the objective of building a common market, the Court of Justice has furthered a constitutional strategy centered on the idea of access to market. Its interest, indeed, was not simply about ensuring equality of competitive conditions for imported and domestic products. The common market design required the Court to tackle also the obstacles to trade resulting from the fragmentations of the market determined by the existence of different and non protectionist national regulatory regimes. The obstacle-based regime of article 28 EC seemed the most suitable to this goal and, in *Dassonville*,¹⁵⁵ the Court of Justice addressed it as the relevant provision in dealing with the regulatory measures concerning the trade of goods. In deviating from the GATT, the Court has developed an original constitutional discipline which, arguably, constitutes the most central of the strategies of supranational integration.

Differently from article III:4, article 28 stipulates an outright prohibition for member states to apply quantitative restrictions and measures having equivalent effect.¹⁵⁶ No space is left to the language of non discrimination and no immediate relevance is recognized to the possible policy objectives underlying the measures at hand.¹⁵⁷ Access to market needs to be promoted by targeting all those measures which have the effect of hindering the streams of intra-Community commerce. Article 28, therefore, not only tackles measures containing protectionist biases, but catches also the obstacles to trade engendered by the regulatory fragmentations of the market.

Although shaped according to the language of article 28, the EC discipline of national regulatory measures involving discriminations of imported products largely mirrors its GATT equivalent. The prohibition-justification structure is replicated and also the standard of review adopted attains those same outcomes. Direct¹⁵⁸ and indirect¹⁵⁹ discriminations are therefore carefully detected and also justifications are narrowly construed. Member states, indeed, can save their discriminatory measures only if they

¹⁵⁴ The rationale for equating regulatory measures and quantitative restrictions can be appreciated by considering that regulatory measures dictating the conditions for the manufacturing and marketing of products bar the access to the domestic market to imported products not complying with such requirements exactly like a zero quota. From a market access perspective, therefore, it is nugatory to distinguish between regulatory measures and quantitative restrictions.

¹⁵⁵ Case 8/74, *Procureur du Roi v. Benoit and Gustave Dassonville* [1974] ECR, p. 837.

¹⁵⁶ In this article 28 replicates the article XI GATT regime of quantitative restrictions.

¹⁵⁷ Yet, in *Dassonville* the Court established that, in the absence of a common community discipline, member states could adopt reasonable measures to prevent unfair practices (recitals 6, 7).

¹⁵⁸ Case 154/85, *Commission v. Italy* [1987] ECR 2717; Case 4/75, *Rewe-Zentralfinanz v. Landwirtschaftskammer* [1975] ECR 843.

¹⁵⁹ Case 82/77, *Openbaar Ministerie v. Van Tiggele* [1978] ECR 25; Case 45/87, *Commission v. Ireland* [1988] ECR 4929.

show that these measures fulfill one of the specific exceptions provided by article 30 EC¹⁶⁰ and result are the least trade restrictive.¹⁶¹

As anticipated, the core of the EC strategy of economic integration consists in tackling the application of different national regulatory regimes even where there is not a protectionist bias.¹⁶² In this regard, the interpretation of article 28 provided in *Dassonville* has been developed by the Court of Justice in order to limit the distorting effect on access to market by the regulatory measures which resist a pure NT test. In *Cassis de Dijon*,¹⁶³ the Court affirmed that member states retain the power to adopt rules on the production and marketing of goods which normally result in fragmentations of the market. But precisely for this reason, article 28 prohibits in principle their application to the imported products lawfully marketed in the exporting country.¹⁶⁴ Market fragmentations, indeed, can be tolerated only if the national measures fulfill certain mandatory requirements.¹⁶⁵ In the other cases, foreign rules on manufacturing and marketing have to be accepted as the most proportionate.¹⁶⁶

A similar regime, conventionally labeled as ‘functional parallelism’ or ‘mutual recognition’, critically departs from that of the GATT. According to the *Cassis* formula, foreign products have access to the domestic market even if manufactured according to rules which do not meet the domestic standards of protection. As a consequence, functional parallelism entails a shift from the usual standard of review based on the necessity test (least trade restrictive measure) to a more intrusive proportionality test which has the effect of questioning the level of protection autonomously decided by member states.¹⁶⁷

¹⁶⁰ The Court of Justice has always considered the list of article 30 as closed. In this regard, see Case 177/83, *Kohl v. Ringelhan* [1984] ECR 3651 and Case 21/88, *Du Pont de Nemours Italiana SpA v. Unità Sanitaria Locale 2 di Carrara* [1990] ECR I-889.

¹⁶¹ In the language of the treaty, the discriminatory measure must not amount to an “arbitrary discrimination” or a “disguised restriction on trade”. For an application of the least trade restrictive test see Case 124/81, *Commission v. United Kingdom* [1983] ECR 203; Case 272/80, *Frans-Nederlands Maatschappij voor Biologische Producten* [1981] ECR 3277.

¹⁶² Such a broad scope for the article 28 prohibition can be explained also by considering the substantial paralysis of the EC program of positive harmonization under the Luxembourg accord.

¹⁶³ Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

¹⁶⁴ Recital 14.

¹⁶⁵ Recital 8. In this respect, the *Cassis* decision can be seen as developing the rule of reason inherent in the *Dassonville* formula.

¹⁶⁶ For applications of the *Cassis* formula see Case 788/79, *Italian State v. Gilli and Andres* [1980] ECR 2071; Case 193/80, *Commission v. Italy* [1981] ECR 3019; Case 317/92, *Commission v. Germany* [1994] ECR I-2039.

¹⁶⁷ Yet, the difference between the standard of review introduced by the *Cassis* formula and that normally employed in the GATT is questioned by J. H. H. Weiler, *Epilogue: Towards a Common Law of International Trade*, in J. H. H. Weiler (ed.), *The EU, The WTO and the NAFTA – Towards a Common Law of International Trade*, Oxford, 2000, p. 231 who has addressed functional parallelism as a “banal doctrinal manifestation of the principle of necessity”. According to the Author, indeed, “for a member state to insist on a specific technical standard even if a different standard is functionally parallel in achieving the desired result, is to have adopted a measure which is not least restrictive possible” (p. 221).

As mentioned, the *Cassis* formula contains also derogation to this general discipline. In the cases national measures do satisfy mandatory requirements, their application is accepted also in respect to imported products. Nonetheless, also these measures are subject to stringent scrutiny. Although the open list of mandatory requirements makes it easier to prove their formal legitimacy,¹⁶⁸ the Court normally tests their substantial legitimacy by investigating the effective existence of the concerns claimed in their support by member states.¹⁶⁹ Besides, the relationship of the measures with the policy objectives is variously assessed in order to avoid arbitrary discriminations or disguised restrictions on trade. Behind the constant recourse to the indistinctly defined category of proportionality, the Court has employed all the available standards of review, shifting from suitability¹⁷⁰ to necessity¹⁷¹ and, even, to proportionality.¹⁷²

The strategy of harmonization endorsed by the Court of Justice in the application of article 28 does not stand isolated in the overall design of market building. In the EC treaty, the promotion of the access to market and the removal of regulatory fragmentations can be pursued also through instruments of positive harmonization.¹⁷³ For a long time article 94 EC has been the only legal basis for the approximation of national measures directly affecting the establishment or the functioning of the common market.¹⁷⁴ With this instrument, EC institutions have been empowered to remove the obstacles to trade through the enactment of measures for the harmonization of the national regulatory regimes. In this, arguably, the margins of trade regulation domestically constrained have been regained in a broader and different dimension.

Nevertheless, the characteristics of the EC and domestic regulatory devices differ in a number of crucial aspects. A first clear distinctive element concerns the effect of the regulatory measures. Unlike national legislation, the instruments of positive integration do not have direct effect. Article 94, indeed, confers on the EC institutions only the power to adopt directives which, even though detailed, need to be incorporated into pieces of national legislation. Besides, the procedures leading to the adoption of, respectively, legislative acts and directives are crucially different. Legislation as a

¹⁶⁸ The Court has indeed accepted under the umbrella of mandatory requirements a wide number of policy objectives such as environmental protection (Case 302/86, *Commission v. Denmark* [1988] ECR 4607), promotion of cinematographic works (Cases 60 & 61/84, *Cinéthèque v. Fédération Nationale des Cinémas Français* [1985] ECR 2605), maintenance of press diversity (Case 368/95, *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* [1997] ECR I-3689).

¹⁶⁹ See Case 178/84, *Commission v. Germany* [1987] ECR 1227, recital 42.

¹⁷⁰ See, for instance, the test adopted in *Commission v. Denmark* (recital 13), or in *Cinéthèque* (recital 24), where the proportionality requirement is accomplished by the mere adequacy of the measure at issue with the claimed policy objectives.

¹⁷¹ A least trade restrictive test is adopted in *Commission v. Germany* (recitals 44, 45, 53), *Familiapress* (recital 34).

¹⁷² Arguably, the domestic level of environmental protection is questioned in the solution given in *Commission v. Denmark* (recitals 20-22).

¹⁷³ J. H. H. Weiler, *Towards a Common Law*, pp. 214-215, argues that this is the most distinctive element between the EC and GATT strategies of economic integration.

¹⁷⁴ The legal basis provided by article 95 EC will be dealt below in section III.B.

product of democratic deliberation was argued above. Looking at the EC regulatory measures, this character is absolutely marginal. The procedure set out in article 94, by favoring through the unanimity voting the intergovernmental bargaining in the Council, leaves the European Parliament and, with it, the spaces for democratic deliberation in an unquestionably ancillary position.¹⁷⁵ Finally, the very reach of the regulatory powers conferred on EC decision-making markedly differs from that enjoyed by domestic legislation. Article 94, indeed, rather than entitling the adoption of whatever piece of economic legislation, has been devised to enact directives coupled with the strategies of negative market integration. By profiting from its monopoly on the legislative initiative, the Commission has endorsed through article 94 a selective program of measures strategically aimed at harmonizing the market fragmentations surviving the application of the *Cassis* formula.¹⁷⁶

In conclusion, also the ECI of the EC, at least if considered from the perspective of market integration, reveals a number of distinctive elements from both the WTO and domestic ECIs. The most evident divergence emerges at institutional level and, namely, in the role played by the Court of Justice. Unlike the deferential approach by the Italian Constitutional Court and the textualist attitude by the WTO adjudicative bodies, the Court has not only shaped the nature of the EC legal framework in the light of the constitutional objective of economic integration, but has embraced teleology for determining the very contents of that objective. Consequently, also the balance between constitutional constraints and regulatory autonomy has received from the activism of the Court of Justice a remarkable thrust. In the light of the EC regulatory principles, indeed, the margins of political regulation on trade by member states are considerably curtailed. Whereas the regime of discriminatory regulations replicates the GATT standard, it is in the area of indistinctly applicable rules that the Court of Justice has promoted its more intrusive interventions by both constantly broadening the reach of article 28¹⁷⁷ and questioning, in some cases, the level of protection of non-trade objectives decided on a domestic level. It may be argued that, in the EC, regulatory autonomy is regained in the supranational sphere through the instruments of positive harmonization. But, as explained, also in this respect regulatory autonomy and, notably, its promise of political participation appear sacrificed by the thickness of constitutional strategies aimed at market efficiency and by the substantial leadership of the institutions embodying the community interest.

B. CONVERGENT ELEMENTS

Accommodating Utilità Sociale and Market Efficiency

¹⁷⁵ Consider also that article 94 provides for the consultation of the European Parliament.

¹⁷⁶ Emblematic of this attitude is the constitutional strategy of regulation devised by the Commission in the Communication of 3 October 1980 [1980] OJ C256/2.

¹⁷⁷ The invasiveness of the article 28 jurisprudence on the jurisdiction of the member states must be considered also in the light of the strict connection between negative and positive harmonization. See below section III.B.

The successful development of the common market undertaking has strongly influenced the evolution and general understanding of Italian ECI. To many commentators, also in the domestic sphere the commitment to market building and economic efficiency, rather than remaining an option for the political circuit, has rapidly achieved constitutional rank.¹⁷⁸

Arguably, two interlinked key factors have contributed to this new economic constitutional sensitivity. The constitutionalization of the EC and, notably, the success of the direct effect and supremacy doctrines have played a major role in the process of re-definition of the Italian ECI. Because of their supposedly higher constitutional position, EC regulatory principles appear either as superseding¹⁷⁹ or as imparting a more definite meaning to the feeble substantive guidelines originally expressed by article 41 Cost.¹⁸⁰ Besides, the introduction of the EC principles of competition law within the national legislation on antitrust is commonly considered as emblematic of the absorption of the culture of market within the Italian ECI.¹⁸¹ In this regard, article 41 comes out as the crucial intersection between the domestic and supranational spheres. By stipulating that the antitrust regime must be considered as an implementation of article 41¹⁸² and by establishing that the domestic rules on competition law are to be interpreted in the light of the relevant EC principles,¹⁸³ this statute inevitably creates a sense of a progressive assimilation of the Italian ECI by that of the EU.¹⁸⁴

Such an approach, biased as it is by a superficial understanding of the supremacy doctrine,¹⁸⁵ suggests that an incorporation doctrine of sort regulates the relationship between the EU and the Italian ECIs.¹⁸⁶ Accordingly, the constitutionalization of the EU would have spillover effects in the domestic sphere of economic regulation and, at the end, would imply a comprehensive overhaul of the national constitutional framework. Hence, imbued with the economic spirit of supranational constitutionalism both the

¹⁷⁸ The influence of EU regulatory principles on the interpretation of the Italian economic constitution is described G. Amato, *Il mercato nella costituzione*, p. 16.

¹⁷⁹ N. Irti, *L'ordine giuridico del mercato*, pp. 95-103 argues that article 41.3 Cost., because of the EC economic principles, would have lost legal effect.

¹⁸⁰ G. Bognetti, *La costituzione economica italiana*, pp. 36-49, stresses the necessity to interpret the economic provisions of the Italian Constitution more coherently with the principles developed in the EC sphere.

¹⁸¹ Legge 10 Ottobre 1990, n. 287, *Norme per la tutela della concorrenza e del mercato*, in *Gazzetta Ufficiale*, 13 Ottobre 1990, n. 240.

¹⁸² Article 1, paragraph 1.

¹⁸³ Article 1, paragraph 4.

¹⁸⁴ Article 41 has therefore been susceptible to being interpreted consistently with the principles of fair competition, as already suggested by F. Galgano, *Commento all'art. 41*, p. 11, and G. Morbidelli, *Iniziativa economica privata*, p. 6.

¹⁸⁵ The supremacy doctrine, indeed, is arbitrarily considered as administering the relationship between the EU and the domestic constitutional spheres rather than as the criterion to solve conflicts between EU and national rules. See below section IV.

¹⁸⁶ This approach seems at the core of the considerations by S. Cassese, *La nuova costituzione economica*, pp. 287-293.

substantive contents and structural aspects of the Italian ECI would be put under discussion. By incorporating in the domestic sphere the EC regulatory principles, the Italian ECI would be certainly endowed with more precise constitutional guidelines for regulation and adjudication. By contrast, the open-ended nature of the constitution as well as the role of constitutive principles played so far by its provisions would be impaired. The success of supranational constitutionalism, therefore, would affect from the roots the domestic legal framework and, eventually, would reshape the very nature of domestic constitutionalism.

The most recent outcomes in the constitutional adjudication under article 41 are a useful standpoint for assessing whether such modifications are effectively occurring and to what extent the Italian ECI converges towards that of the EU. At a first glance, also in the case-law of the Constitutional Court the influence of the economic principles preached by the EU is unequivocal. The decisions on the regulatory regime of TV broadcasting are eloquent in this regard. Traditionally, the Italian legislation on TV broadcasting has been devised in order to guarantee pluralism of information. Correctly perceiving that in this delicate economic field a private monopoly is a serious threat to the quality of the democratic debate, the first pieces of legislation reserved for a single public economic actor the right to impart information on a national basis.¹⁸⁷ By contrast, the TV broadcasting market was opened to private actors only on a local level. Such a regime has lasted until the late '80s, supported by the Constitutional Court which, in line with its deferential approach towards legislation, justified the different treatment between national and local markets on the ground of their technological disparities and their different implications for the national political sphere.¹⁸⁸ Therefore, in the original spirit of the legislation on TV broadcasting, the relationship between pluralism and market freedom is one of antagonism.

In the early '90s a comprehensive reform allowed private economic actors entitled by governmental concession to broadcast on a national level. According to the new legislation, the Constitutional Court revised the constitutional guidelines for the information market. Quite predictably, in the new interpretation of article 41 market competition and freedom of information cease to be perceived as clashing values. On the opposite, market competition, though under the guise of a system of governmental concession, starts to be understood as serving the pluralism of information.¹⁸⁹ In a later judgment, the Court apparently even turns to brave judicial activism in enforcing against legislation the principles of free market and freedom of expression. Invested by claims

¹⁸⁷ This is one of the sectors where article 43 Cost., the constitutional provision allowing for the taking of public firms in the general interest, has been applied.

¹⁸⁸ This emerges clearly in *Corte Cost.*, sent. 21 July 1981, n. 148, in *GC*, p. 1379, where the Court affirms: “da tutto quanto testè ricordato emerge pertanto la consolidata opinione della Corte che il servizio pubblico essenziale di radioteletrasmissione, su scala nazionale, di preminente interesse generale, può essere riservato allo Stato in vista del fine di utilità generale costituito dalla necessità di evitare l’accentramento dell’emittenza radiotelevisiva in monopolio od oligopolio privato”.

¹⁸⁹ Emblematic of this shift is *Corte Cost.*, sent. 24 March 1993, n. 112, in *GC*, p. 939.

brought by economic actors excluded from the governmental system of concessions,¹⁹⁰ the Court has quashed the legislative limits to concentration as inappropriate for guaranteeing sufficient standards of media pluralism.¹⁹¹ Thus, also the outcomes of constitutional adjudication seem to witness a clear move by the domestic ECI towards the typical substantive contents of market building. And, of course, it is difficult to deny that the principles which often inspire domestic regulation and adjudication evoke the regulatory strategies devised in the EU sphere.

Nevertheless, the same decisions by the Constitutional Court also reveal deep traits of continuity with the distinctive elements of the Italian ECI. To a large extent, the shift towards the principles of an open market economy ensues from a political and cultural change occurred in the legislative. On a closer inspection, the Constitutional Court has not modified its standards of adjudication on economic legislation. The discovery of free competition as a constitutional objective, for instance, has plainly followed the usual pattern of adjudication whereby *utilità sociale* consists in the political objective pursued by the legislative act under scrutiny. The traditional standards of review are respected even when the Court redefines the limits to concentrations in the TV broadcasting market. In this decision, the Court does not second-guess the political choices of the legislative in the light of constitutional guidelines derived from article 41. More cautiously, the Court employs a scrutiny based on the comparison between the limits on concentration adopted in the TV broadcasting market with the more severe limits existing in the comparable press market. It is only by drawing upon these disparities that the Court decides to strike down the least stringent rules on TV broadcasting. As a consequence, it seems incorrect to conclude that the domestic ECI overlaps completely with that of the EU. More appropriately it could be argued that the domestic legal framework can also serve the promotion of efficiency-driven regulatory strategies devised by legislation. But in this, the balance between constitutional constraints and political decision-making and, more broadly, the nature of the legal framework remain unaffected.

A further ground of convergence between the EU and Italian ECIs concerns the political decision-making process. Whereas the pivotal role of Parliament as the privileged seat of representative democracy is constantly celebrated in the constitutional rhetoric, there are clear signs that a large chunk of rule-making powers is progressively shifting to the Government.¹⁹² As in other industrialized democracies and in the EU,¹⁹³ legislation is increasingly conceived as a source of rules which necessitate further articulation by additional instruments of delegated legislation or by subordinate

¹⁹⁰ Of course, through the preliminary ruling procedure.

¹⁹¹ Corte Cost., sent. 5 December 1994, n. 420, in *GC*, p. 3716.

¹⁹² Eloquent in this respect the figures published in Camera dei Deputati, *Osservatorio sulla legislazione. Rapporto 2004-2005 sullo stato della legislazione*, 11 luglio 2005, http://testo.camera.it/files/servizi_cittadini/Rapporto_2004_5.pdf, p. 293.

¹⁹³ S. Smismans, *Functional Participation in EU Delegated Regulation: Lessons from the United States at the EU's "Constitutional Moment"*, in *IJGLS*, 2005, 12, 2, p. 599.

regulations.¹⁹⁴ Such a process, determined by the diminishing capacity of the Parliament to integrate through the traditional channels of representative democracy the plurality of interests emerging in society,¹⁹⁵ accentuates the Government as the most apt institution in dealing with social demands of regulation.¹⁹⁶ The broader sources of expertise of the executive as well as its capacity to negotiate directly with social and territorial actors are increasingly addressed as justifications for its predominance and for suggesting reforms of the institutional architecture more responsive to this modified reality. Such changes, although tempered by parliamentary control on the processes of delegation,¹⁹⁷ radically questions the Italian ECI from its foundations. As seen, representative democracy and its aptitude for political integration are distinctive elements of a constitutional model aimed at the pursuit of economic and social cohesion. Hence, the constant ascent of the Government rule-making powers is in perspective a subversive element which cannot be ignored.

In conclusion, the most visible element of convergence by the domestic ECI towards the EU consists in the pursuit by legislation of objectives of market efficiency. Despite this convergent move, the balance between constitutional constraints and legislation and, more broadly, the nature of domestic legal framework have remained unaffected. Deeper changes are occurring instead in political decision-making and in the channels employed to represent and govern the economic and social interests. The privileged role of legislation (together with the centrality of representative democracy) is being challenged by sources of law stemming from technocratic or neo-corporatist decision-making procedures hinging upon the apparatus of the executive. The stratification of the Italian ECI, therefore, is being enriched by a layer of convergence towards some of the distinctive elements of the ECI of the EU. Not only the substantive principles of market efficiency are being incorporated in the strategies of political regulation, but also some patterns of governance typical of the administrative state are mirrored. Yet, significant elements of distinction prevent convergence from resulting in assimilation. Both the incorporation of market efficiency objectives and the re-formulation of decision-making develop in a constitutional framework in which there are no precise constitutional strategies to pursue but, more modestly, constitutive principles to respect in order to safeguard the value of democratic pluralism.

¹⁹⁴ The Constitution confers to the Government primary rule-making powers in the form *decreto legislativo* (art. 76) and *decreto-legge* (art. 77), and secondary rule-making powers in the form of subordinate regulations (*regolamento*, art. 117).

¹⁹⁵ F. Cortese, M. Dani, F. Palermo, *Back to Government? The Pluralistic Deficit in the Legislation, Administration and before the Courts*, in *IJGLS*, 12, 2, p. 409.

¹⁹⁶ A comprehensive analysis of the confused evolution of the Italian system of sources of law and, notably, of the increasing role played by the Government in the decision-making is provided in the essays contained in P. Caretti, A. Ruggeri (eds.), *Le deleghe legislative. Riflessioni sulla recente esperienza normativa e giurisprudenziale*, Milano, 2003.

¹⁹⁷ On the role of the Parliament in respect to the implementation of delegated legislation see G. Tarli Barbieri, *La grande espansione della delegazione legislativa*, in P. Caretti, A. Ruggeri, *Le deleghe legislative*, pp. 78-84.

Accommodating National Treatment and Market Efficiency

Arguably, also in the ECI of the WTO there are significant aspects witnessing a convergence towards the ECI of the EU. Whereas in the domestic sphere the most evident similarity concerns the teleology of economic regulation (incorporation of the objective of market efficiency in the political decision-making and, *per relationem*, in constitutional adjudication), in the WTO the analogies emerge directly in the contents and language of the regulatory strategies experimented within the common market. Although the WTO substantially upholds and unfolds the design of economic integration inherent in the GATT, fragmentations of the marketplace determined by indistinctly applicable rules have become a matter of concern also in international trade relations. On these grounds, at least to a certain extent, the ECI of the WTO can be seen as converging towards the distinctive elements of the ECI of the EU.

The clearest positions regarding market fragmentations arise out of the SPS and TBT agreements. Such agreements stand in the backdrop of the general exceptions provided by article XX GATT. SPS deals with the protection of human, animal or plant life or health in the field of sanitary and phytosanitary measures. Likewise, TBT, in dealing with technical regulations and standards concerning products and methods of productions, covers a broader range of policy objectives concerning, *inter alia*, national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, environment. In providing more detailed disciplines in these particularly problematic areas, these agreements aim at improving the members' standards of protection and, at the same time, at minimizing the negative impact of members' measures on trade.¹⁹⁸ The regulatory principles introduced by both the agreements in order to accomplish this twofold objective have nurtured the idea of a critical paradigm shift.¹⁹⁹ SPS and TBT, indeed, launch explicitly in the WTO sphere the language of reasonableness and harmonization and, meanwhile, downplay the traditional anti-discrimination ethos of the GATT.

As said, the epicenter of this convergent move is located in the indistinctly applicable measures interfering with the stream of commerce. In this regard, SPS and TBT introduce an absolute standard of treatment for imported products by stipulating the principle that members' measures must not be more trade-restrictive than necessary to fulfill their legitimate objectives.²⁰⁰ Thus, an obstacle-based test enters the stage and even the language of equivalence (as synonym of mutual recognition and functional parallelism) finds its way into the realm of international trade.²⁰¹ Nevertheless, the major challenge to

¹⁹⁸ See the preambles of both the treaties.

¹⁹⁹ See, for instance, H. Horn, J. H. H. Weiler, *European Communities – Trade Description of Sardines: Textualism and its Discontents*, in H. Horn, P. C. Mavroidis (eds.), *The WTO Case Law of 2002: The American Law Institute Reporters' Studies*, Cambridge, 2003. The shift has been emphasized in the first SPS decision *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Panel, WT/DS26/R/USA, 18 August 1997, recitals 8.39-8.41.

²⁰⁰ Article 2.2 SPS, 2.2 TBT.

²⁰¹ Article 4 SPS, article 2.7 TBT.

the GATT discrimination-based orthodoxy consists in complementing these regulatory principles with forms of positive integration. In both the agreements, the standards devised by competent international agencies are recognized as fulfilling the necessity requirements and, therefore, as complying with the GATT general obligations.²⁰² Hence, in adopting their measures, members are expected to rely on international standards,²⁰³ even though they retain the power to decide autonomously the level of protection. Provided that their assessment is genuinely grounded on scientific evidence²⁰⁴ and respects stringent requirements of necessity,²⁰⁵ members are still entitled to establish higher standards of protection. Eventually, in SPS and TBT the NT matrix is superseded by a new science- and efficiency-driven legal frame. The most visible example of this irruption can be appreciated in the incorporation of the international standards in their regulatory measures by members. Here, it may be argued the bias of science on regulatory autonomy is internal. Quite similarly to the EC positive harmonization,²⁰⁶ the political decision-making circuit is *de facto* pre-empted by sources of (soft) law stemming from institutions and procedures formally structured on an intergovernmental basis but substantially reflecting the technocratic paradigm.²⁰⁷ In other cases, namely when the level of protection decided by members deviates from the international standard, science acts as an external constraint to regulatory autonomy. Here, political decision-making still enjoys important leeway of discretion in deciding among the several scientific options submitted by experts to regulators.²⁰⁸ Nonetheless, the genuine

²⁰² See article 3.2 SPS and 2.5 TBT, where a presumption of consistency with, respectively, the SPS and TBT agreement and, in both cases, the GATT assists the measures conforming to the international standards.

²⁰³ Article 3.1 SPS and 2.4 TBT.

²⁰⁴ In the case of SPS, see article 3.3 and 5. In the TBT, see article 2.4 providing that members can depart from the international standards when these are ineffective or inappropriate means for fulfilling the legitimate objectives pursued.

²⁰⁵ This is particularly evident in the SPS agreement. Whereas a classic least restrictive measure test is encapsulated in article 5.4 and 5.6, article 5.5 requires the members departing from the international standards to respect also a certain degree of consistency in the levels of protection afforded in different situations. The issue of consistency is crucial in the *Hormones* case (See Panel report, recital 8.174; AB report, WT/DS48/AB/R, 16 January 1998, recitals 214-245).

²⁰⁶ See below in the next sub-section.

²⁰⁷ See article 3.4 SPS and 2.6 TBT, where the members are expected “to play a full part, within the limit of their resources, in the preparation of the appropriate international standardizing bodies of international standards for products ...” The issue of what can be correctly considered as an international standard is dealt in the *Sardines* case (*EC Measures – Trade Description of Sardines*, Report of the Appellate Body, WT/DS231/AB/R, 26 September 2002). Here, on the basis of the explanatory note to Annex 1.2 of the TBT agreement, it was found that, as a rule, standards are adopted by consensus, though also documents not adopted by consensus can be considered as such (recital 222).

²⁰⁸ Important in this regard what the AB stated in *Hormones*: “we do not believe that a risk assessment has to come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure. The risk assessment could set out both the prevailing view representing the ‘mainstream’ of scientific opinion, as well as the opinions of scientists taking a divergent view. Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community ...”(recital 194).

pursuit of a higher level of protection is rigorously scrutinized in the light of constitutional yardsticks requiring scientifically grounded justifications.²⁰⁹

Also in the case of the WTO, it would be misleading to interpret the elements so far described as symptoms of a broader assimilation by the ECI of the EU. Beside unequivocal traits of convergence, the ECI of the WTO reveals a substantial continuity with its own distinctive elements. It is not just a matter concerning the teleology and nature of the legal framework, which assist without noticeable upgrading the newly introduced regulatory strategies. A complete analysis of the SPS and TBT agreements, indeed, shows that not only the language and the practice of NT have not been completely abandoned,²¹⁰ but that even the shift to reasonableness can hardly be considered revolutionary.²¹¹ In defining the principle of equivalence, indeed, both the SPS and TBT provide only ‘lighter versions’ of functional parallelism. Here, unlike in the *Cassis* test, imported products are not admitted as merely complying with the parallel rules of the exporting country. The acceptance of other members’ measures as equivalent is subject to a more stringent requirement consisting in the objective proof that the level of protection established by the exporting country meets the domestic standards.²¹² Therefore, since the SPS and TBT obligations do not affect the level of risk decided by members,²¹³ the WTO constitutional strategy of negative harmonization does not promote the same degree of integration reached by the common market. In the choice between economic interpenetration and safeguard of the levels of protection established by members, the WTO continues to opt for the latter. With the result of confirming, notwithstanding the ‘revolutionary’ turn into reasonableness, the GATT approach to indistinctly applicable rules and market fragmentations.²¹⁴

Elements of continuity can be identified also in the application of the GATT provisions. Also in this regard, the regulatory strategy underpinning the constitution of

²⁰⁹ The Panel in *Hormones* declared that the SPS obligation to base the measures on a risk assessment should have been interpreted both in procedural and substantive terms (recitals 8.114 and 8.117). This approach was somehow downplayed by the AB which established that the SPS agreement required only a substantive “objective relationship” between the measure and the risk assessment (recital 189).

²¹⁰ See article 2.3 SPS and article 2.1 TBT.

²¹¹ F. Ortino, *From ‘non-discrimination’ to ‘reasonableness’*, p. 49, observes that “despite the apparent widespread belief that the two norms under consideration – NT and reasonableness – represent two completely different legal paradigms, it is argued here that the overlap between non-discrimination and reasonableness is quite broad and may even be total. This is especially true with regard to the level of intrusiveness into national regulatory prerogatives of the two instruments at hand”.

²¹² See article 4 SPS, article 2.7 TBT.

²¹³ M. Matsushita, T. J. Schoenbaum, P.C. Mavroidis, *The World Trade Organization – Law, Practice, and Policy*, 2002, Oxford, p. 496.

²¹⁴ As mentioned in section III.A.2 this point is controversial (see above note 167). In maintaining the validity of the distinction – only WTO equivalence seems to me as conforming with a pure necessity or least trade-restrictive test, while EC mutual recognition reflects a proportionality test in so far as it questions the level of protection of the importing state – it can be observed with F. Ortino, *From ‘non-discrimination’ to ‘reasonableness’*, p. 43, that the determination of the level of protection of a measure is often a difficult task. As a consequence, it can be made the case of substantial modifications of the level of protection under the guise of the application of the necessity test.

the common market has not been replicated by the WTO adjudicative bodies. The adoption of an obstacle-based approach *à la Dassonville* in article XI has been prevented by the strict textual margins of article III:4 and the Note Ad article III.²¹⁵ Hints of a more determined attitude towards the fragmentations of the market have emerged in the administration of the general exceptions by the adjudicative bodies. In *Korean Beef*,²¹⁶ the Appellate Body seemed to modify the consolidated interpretation of article XX consisting in the application of a least restrictive measure test. A more sophisticated “weighing and balancing test” was experimented evoking a shift in the standard of review from necessity to proportionality.²¹⁷ Such an outcome has however been denied in *Asbestos*. Here, the same “weighing and balancing” test turned out in the classic application of the necessity test, without any alteration of the level of protection established by the defendant state.²¹⁸

In sum, it may be argued also for the WTO that its ECI is enriched by a layer of convergence towards the ECI of the EU. The principles of reasonableness and equivalence, though with peculiar characteristics, have become part of the WTO vocabulary and, in the perspective of legitimacy, they smoothen the symbolic frictions encountered in the analysis of the NT paradigm. Moreover, positive integration, though not vested with an institutional architecture and a political emphasis comparable to that of the EC, constitutes a crucial upgrading of the regulatory strategies and a further important step in the attainment of full constitutional status by the WTO.²¹⁹ Differently from the common market experience, these new elements have been only marginally devised in the adjudication. Convergence, indeed, results mostly from innovations in the treaties and, predictably, is simply acknowledged by the diligent adjudicative bodies.²²⁰ The regulatory strategies of the WTO, therefore, and, underneath them, the most significant traits of its ECI appear as firmly belonging to the community of its members, with scarce chances of evolving autonomously within the institutional framework established by the treaties.

²¹⁵ In *Asbestos*, Canada argued that the EC measure banning the importation of asbestos and asbestos containing products should have been scrutinized according to the obstacle-based regime of quantitative restrictions (article XI GATT). Quite predictably, on the basis of the Note Ad article III this argument was rejected by the AB. Nevertheless, a different and potentially ground-breaking approach seems to emerge under the GATS where the AB considered a domestic regulation banning the remote supply of gambling services as a *per se* prohibited market access restriction “in the form of numerical quotas”. See Appellate Body Report on *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005.

²¹⁶ *Korean Beef*, Report of the Appellate Body, WT/DS161/AB/R, 11 December 2000.

²¹⁷ Although camouflaged with the language of respect of the level for protection decided by the member, the AB obliged Korea to adopt alternative measures whose performances in achieving the policy objective of article XX(d) were arguably inferior to those of the measure under scrutiny (see recitals 178-179).

²¹⁸ See *Asbestos*, recitals 168, 172 and 174.

²¹⁹ At least in respect to the requirements of our definition. See above section II.

²²⁰ In this regard, a consolidated distinctive element in the ECI of the WTO consists in the Appellate Body hermeneutic preference for textualism. Criticism, motivated by the legitimacy shortcomings of a similar approach, is expressed in this respect by H. Horn, J. H. H. Weiler, *Textualism and its Discontents*.

Re-Formulating Access to Market in the light of National Treatment and Utilità Sociale

Compared with the ECIs previously dealt with, the EU appears as the constitutional sphere which is experiencing the deepest evolution as well as the most incisive convergence towards both the national and WTO constitutional tenets.²²¹

The clearest ground of convergence consists in the expansion of the constitutional objectives and, notably, in their emancipation from the almost exclusive paradigm of market integration. It has been noted above that the ambition of widening its substantive domain is inbuilt in the original design of market building. Moreover, it has been stressed that in the EC the policy externalities of economic integration have been profited from in order to stretch the reach of the competences expressly attributed by the treaties. Yet, precisely because of this spillover evolution, the approach by the EC to certain non economic – or, at least, non immediately economic – constitutional objectives has been characterized by the filter of market integration.

In this regard, a remarkable convergent move has occurred ever since the entry into force of the Single European Act (SEA). With this treaty, a number of policy areas included in the process of supranational integration on the basis of far reaching interpretations of articles 94 and 308 EC have found autonomous discipline and enriched the list of the EC tasks. Yet, the most incisive changes have been brought about by the treaty of Maastricht. Here, the challenge to the consolidated pattern of evolution of the EC has been twofold. Not only the introduction of the pillar structure has utterly subverted the incremental expansion through the community method, but, even within the EC, the newly established constitutional objectives have been conceived of as fully-fledged goals and policies rather than mere side-effects of market building. Economic integration, therefore, has ceased to be considered as the sole mean to promote economic and social progress, since further constitutional objectives and legal bases converging towards that same horizon were introduced.²²² Hence, the overall economic and social profile of the EC has undergone profound reconsideration.²²³ By acknowledging that there are several elements and policy initiatives which concur in producing economic and social welfare, the exclusiveness of the market integration paradigm has been questioned. Although Maastricht has not overturned the original commitment to open economy and free competition,²²⁴ the overall jurisdiction of the EU has become closer to that of the

²²¹ This is mostly due to the several amendments to the treaties ever since the Single European Act. See B. de Witte, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and Divergence in European Public Law*, p. 39.

²²² As usual, article 2 EC is emblematic in capturing this evolution when it states that the general objectives of the Community will be promoted “by establishing a common market *and* an economic and monetary union *and* by implementing common policies or activities referred to in Articles 3 and 4” (Italic added).

²²³ This trend has been strengthened by the Treaty of Amsterdam in which more social objectives and policies have been introduced.

²²⁴ See article 4 EC which stipulates “for the purposes set out in article 2, the activities of the member States and the Community shall include [...] the adoption of an economic policy which is based on the

member states and to their commitment to economic and social cohesion, with the result of blurring the EC original functional nature.

In this process, elements of convergence with the ECI of the WTO can also be identified. On a closer inspection, the emancipation of economic and social cohesion from the market integration filter permits a more genuine approach to the regulation of the market itself. Relieved of the stress of its more distant ramifications, the regulation of the market, similarly to the WTO commitment to free trade, has returned to its core business, leaving to other and more attuned legal bases and procedures (as, in the international sphere, to more competent international agencies) the task of developing the respective policies.²²⁵

Nevertheless, also in the case of the EU, convergence is limited by significant aspects of continuity with the distinctive elements of the ECI. The EU approach to constitutional objectives and, notably, the intersection between the protection of fundamental rights and the distribution of powers between the EU and member states are clear examples in this regard. Surely, fundamental rights protection can be advocated as an example of the increasing convergence and even of the assimilation of the EU by domestic constitutionalism.²²⁶ Such a position is largely acceptable in so far as it refers to the increasing convergence and compatibility between the axiological assumptions of both the EU and member states. It is indeed a trite to address the upsurge of sensibility for fundamental rights in the supranational sphere culminating in the adoption of article 6 EU and, later, in the Charter of Nice as well as to remember that the Court of Justice has developed a considerable jurisprudence in this regard in the attempt to silence the perplexities expressed by some Constitutional Courts in respect to the EU standards of fundamental rights protection.²²⁷ Yet, it seems incorrect to identify in these elements a major change in the EU constitutional nature and, namely, to argue that the objective of fundamental rights protection has replaced the original commitment to market efficiency with a domestic-like attitude towards economic and social cohesion. Despite the abundant doses of rhetoric, it may be contended that the interpretation of article 6 and the contents of the Charter of Nice do not depart from the traditional understanding of the relationship between fundamental rights and EU competences as proffered by the Court of Justice in

close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and *conducted in accordance with the principle of an open market economy with free competition*" (Italics added).

²²⁵ It must be stressed that the most recent policies have been equipped with patterns of governance partially or totally alternative to the traditional 'community method' in order to graduate the level of intensity of integration and to benefit from the involvement of different economic and social actors. See J. Scott, D. M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, in *ELJ*, 2002, 8, 1, p. 1.

²²⁶ A. Manzella, *Dal mercato ai diritti*, in A. Manzella, P. Melograni, E. Paciotti, S. Rodotà (eds.), *Riscrivere i diritti in Europa*, 2001, Bologna, p. 29 and S. Rodotà, *La Carta come atto politico e come documento giuridico*, ibidem, p. 57.

²²⁷ On this regard see the essays contained in R. Toniatti (ed.), *Diritto, diritti, giurisdizione – La Carta dei diritti fondamentali dell'Unione Europea*, Padova, 2002. See also F. Palermo, *La forma di stato dell'Unione Europea*, pp. 85-99.

the *Opinion 2/94* on the accession by the EU to the ECHR.²²⁸ Here, the Court defended a consolidated selective approach whereby fundamental rights do not influence the allocation of powers between the EU and member states.²²⁹ As a consequence, the Court observed that fundamental rights could not be indiscriminately elevated to the level of objectives for the EU decision-making. In the EU sphere, fundamental rights play the defensive function of external limits to the exercise of EU powers. Therefore, only if coincident with the EU constitutional objectives they can be considered as sources of positive obligations for the EU institutions.²³⁰ A similar view is endorsed also by the Charter of Nice in which a list of rights absolutely coherent with the tenets of national welfare state is accompanied by provisions such as articles 51.2 and 52.2 which totally exclude revolutionary consequence in this regard.²³¹ As a consequence, the functional commitment by the EU, though profoundly revisited in the light of the objective of economic and social cohesion, does not match completely with the domestic benchmark. As witnessed by the characters of fundamental rights protection, the EU approach is still partial, entwined as it is with the attributions of powers and regulatory strategies which constitute the very backbone of the EU legal framework.

The strategies of market integration may be considered as a further ground where the ECI of the EU converges towards the domestic and WTO benchmarks. In this regard, it may be argued that the discipline of NT has played as a model for a general relaxation of the constitutional constraints of article 28 and, as a consequence, for a more respectful attitude vis-à-vis the regulatory autonomy of member states. As mentioned above, the *Dassonville* and *Cassis* formulas proved to be far reaching in catching all trade-related national regulatory measures. Under their application, not only obstacles to the stream of commerce were targeted but, more broadly, all measures potentially restricting the volume of trade were in principle considered as triggering article 28. A similar approach, largely determined by a certain conceptual confusion between access to market and economic freedom, revealed a number of regulatory as well as institutional shortcomings. Considering both the intrusiveness of the scrutiny of the Court of Justice and its implications in terms of positive harmonization, concern was expressed particularly for the impact of article 28 on the distribution of competences between the EC and the member states.²³² An attempt to redress this potentially disruptive situation was made in

²²⁸ *Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94, [1996] ECR I-1759.

²²⁹ See recital 27 of the Opinion where the Court states “no treaty provision confers on the Community institutions any general power to enact rules on human rights”.

²³⁰ O. de Schutter, *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*, Jean Monnet Working Paper 7/04, <http://www.jeanmonnetprogram.org/papers/04/040701.html>, pp. 4-5.

²³¹ Article 51.2 stresses that no provision of the Charter modifies the framework of the EU competences. Article 52.2 stipulates that the protection of the rights already established in the treaties is not affected by the Charter.

²³² These concerns have become particularly serious with the approval of the SEA and, notably, of article 95 EC which determined the shift to qualified majority vote in respect to the approximation of laws. Other difficulties emerged in respect to the application of the principle of proportionality in respect to

Keck.²³³ In this pronouncement the Court employed a more selective standard of review of national regulatory measures in order to target the real obstacles to trade and, thus, to promote effectively the access to market of foreign products. According to *Keck*, trade rules concerning selling arrangements are subject to the article 28 regime only if discriminatory against imported products.²³⁴ As a result selling arrangements, at least in principle, fall outside of article 28 and, therefore, do not require justification and harmonization, since their disparities are not considered as determining fragmentations of the market and as hindering the stream of commerce. By introducing a similar discipline, the Court of Justice mirrored in respect to selling arrangements the general NT regime of the GATT: for the law of prohibition to be triggered, a finding of discrimination of the measure at hand was preliminarily requested.

The *Keck* doctrine has considerably influenced the adjudication by the Court of Justice under article 28. Although the definition of selling arrangements sounds rather formalistic, its adoption in cases concerning static selling arrangements has not been particularly controversial.²³⁵ By contrast, significant difficulties and disputes arise out of controversies concerning dynamic selling arrangements. In these cases, indeed, the category of selling arrangements is particularly inapt at dealing with restrictions on advertising or other forms of sales promotion which result in a double burden for the imported products and, therefore, in obstacles to their access to the domestic market.²³⁶ For this reason, many commentators have suggested the *Keck* formula ought to be re-defined by switching from the formalism of selling arrangements to a more flexible solution directly centered on the idea of access to the market.²³⁷ The wide doctrinal debate in this regard has also influenced to some extent the behavior of the Court of

the increasing number of mandatory requirements recognized by the Court and, last but not least, for the judicial workload connected with a broad interpretation of article 28.

²³³ Cases 267/91 and 268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

²³⁴ Recitals 16, 17.

²³⁵ Plain applications of the *Keck* formula can be appreciated in Cases 401 and 402/92, *Tankstation 't Heukste vof and J.B. E. Boermans* [1994] ECR I-2199; Cases 69 and 258/93, *Punto Casa SpA v. Sindaco del Comune di Capena* [1994] ECR I-2355; Cases 418-421, 460-462 & 464/93, 9-11, 14-15, 23-24 & 322/94, *Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco* [1996] ECR I-2975.

²³⁶ As observed in C. Barnard, *Fitting the remaining pieces into the goods and persons jigsaw?*, in *ELR*, 2001, 26, p. 43, this occurs notably in the case of new foreign products which need to gain foothold in the market and are prevented by domestic restrictions on advertising. In this regard see Case 412/93, *Société d'Importation Edouard Leclerc-Siplec v. TFI Publicité SA and M6 Publicité* [1995] ECR I-179; Cases 34, 35 and 36/95, *Konsumentombudsmannen v. De Agostini Forlag AB and TV-Shop i Sverige AB* [1997] ECR I-3843; Case-254/98, *Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH* [2000] ECR I-151; Case C-405/98, *Konsumentombudsmannen v. Gourmet International Products AB (GIP)* [2001] ECR I-1795.

²³⁷ See S. Weatherill, *After Keck: Some Thoughts on how to Clarify the Clarification*, in *CMLRev*, 1996, 33, pp. 896-897, defining the following more attuned test: "measures introduced by authorities in a Member State which apply equally in law and in fact to all goods or services without reference to origin and which impose no direct or substantial hindrance to the access of imported goods or services to the market of that Member State escape the scope of application of Articles 30 and 59." A similar global test is suggested and critically discussed in C. Barnard, *Fitting the remaining pieces*, pp. 52-59.

Justice. Although the reference to selling arrangements has not been abandoned, in cases such as *De Agostini*, *Gourmet* and *Heimdienst* the Court has considerably refined its scrutiny on discrimination thereby re-vitalizing the potential of article 28 in respect to measures that in fact hinder the access to the domestic market. Hence, the *Keck* formula has substantially met the need to re-target the obstacle-based test introduced with *Dassonville* for national regulatory measures.²³⁸ In the application of the NT regime to selling arrangements one may identify a less stringent attitude in respect to national regulatory autonomy and a remarkable convergence towards the general GATT regime.²³⁹ Yet, also in this case convergence does not go as far as to achieve assimilation. Notwithstanding *Keck*, in the EC national regulatory measures obey in principle to the *Dassonville* and *Cassis* formulas which, once relieved of the excessive stress of the pre-*Keck* legal practice, proffer the main regulatory principles for challenging the illegitimate partitions of market.²⁴⁰

More profound developments have occurred in the field of positive harmonization. In this regard, the introduction of article 95 EC beside article 94 is probably the most important innovation. Like article 94, this additional legal basis has been devised as a means of phasing out the market fragmentations engendered by regulatory measures unilaterally adopted by member states in defense of non trade interests. Yet, this new provision contains a number of elements which come closer to the forms of exercise of regulatory powers encountered in the domestic and, to some extent, even in the WTO constitutional spheres. Article 95, indeed, by entitling the Council to adopt regulatory measures by qualified majority, has mobilized EC decision-making and fueled the programs of positive harmonization which had so far languished under the Luxembourg accord. In addition, the shift to qualified majority voting has opened the door to alternative forms of political deliberation to the mere intergovernmental bargaining of article 94. In particular the amendments to article 95 introduced in turn by the treaties of Maastricht and Amsterdam have constantly strengthened the role of the European Parliament beside the Council, thereby conferring full political nature on EC decision-making.²⁴¹ The magnitude of these constitutional innovations, combined with further modifications intervened in the EU institutional architecture,²⁴² has gone as far as to

²³⁸ C. Barnard, *Fitting the remaining pieces*, p. 42, observes that “*Keck* has refocused the emphasis of the enquiry away from ‘has there been an impact on trade in general’ to whether there has been a sufficient impact on *cross-border* trade” (Italics in the original).

²³⁹ At the same time, it must be remembered that, as seen in the previous sub-section, the WTO is experiencing an analogous convergent move towards an obstacle-based regime for the regulatory measures falling under the SPS and TBT agreements.

²⁴⁰ Case 470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln v. Mars GmbH* [1995] ECR I-1923.

²⁴¹ The political nature of the EU decision-making on the basis of article 95 is acknowledged in the Case 491/01, *R v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, recital 80.

²⁴² Significant in this regard is the introduction of a right for the Parliament to request the Commission to submit a legislative proposal (article 192 EC) as well as the powers of the Parliament to participate in the appointment of the Commission (article 214 EC), to censure it and to require its resignation (article 201 EC).

suggest that the EU constitutional configuration is coming closer to that of the state forms of federalism and parliamentary government.²⁴³

Moreover, article 95 does not only nourish federal and state-like suggestions. A closer analysis of the provision reveals, for instance, many traits in common also with the SPS and TBT patterns of integration.²⁴⁴ Also in this context, indeed, science plays a considerable role both as a source of inspiration for the regulatory initiatives and as a yardstick of control of the national measures maintained or adopted to pursue higher levels of protection of non trade objectives.²⁴⁵

These latter considerations lead to a more cautious assessment of the alleged reconciliation of the ECI of the EU with the standards of domestic constitutionalism. The layer of convergence developed in respect to article 95 contains indeed a number of aspects that are absolutely coherent with the original functional concerns of the EC. There are elements, for instance, to argue that the fate of article 95 is going to be different from that of the similar far reaching provisions existing in state federal systems. Recent case-law shows that the Court of Justice, unlike many deferential Constitutional Courts and contrary to its traditional attitude, interprets rigorously its role of policing the excesses of the legislative.²⁴⁶ In dealing with measures adopted on the basis of article 95, the Court has refused to pander to the centripetal dynamics which characterize many of the experiences of state federalism. By contrast, its constitutional leadership in market building has been maintained by promoting a more selective approach to positive harmonization which replicates the *Keck* rationale. The Court, indeed, has established that article 95 is not triggered by any discrepancy occurring between the national rules, but, more correctly, it serves essentially the objective of genuinely improving the conditions and functioning of the internal market.²⁴⁷

But also in respect to the contents and procedures employed in the adoption of EC regulatory measures, traces of the persisting commitment towards market efficiency are evident. The constitutional innovations introduced ever since the SEA have been accompanied by a parallel re-thinking of the techniques of harmonization which, in fact, downplay the turn to politicization of legislative decision-making. Particularly in the New Approach to Harmonization,²⁴⁸ it has been made clear that political deliberation is limited to the adoption of legislative measures laying down essential requirements in the general

²⁴³ The elements of the EU institutional architecture coherent with a parliamentary model are described in R. Dehousse, *European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?*, in *CMLRev*, 1998, 35, pp. 603-612.

²⁴⁴ See in particular paragraph 3 to 8 of article 95.

²⁴⁵ Illuminating in this regard the decision of Case 3/00, *Denmark v. Commission* [2003] ECR I-2643.

²⁴⁶ See Case 376/98, *Germany v. European Parliament and Council of the European Union* [2000] ECR I-8419, and the already quoted *British American Tobacco*.

²⁴⁷ See recitals 83, 84 and 95. The same approach has been confirmed in the subsequent decision *British American Tobacco*, recitals 64, 65 and 75.

²⁴⁸ See Council Resolution of 27 May 1985 on a New Approach to technical harmonization and standards [1985] OJ C136/1 and White paper from the Commission to the European Council "Completing the Internal Market", 14 June 1985, COM (85) 310 final.

interest. By contrast, the task of drawing up technical specifications and, therefore, of coping often with the most problematic issues is delegated to circuits of political administration, organized according to a technocratic and intergovernmental structure and operating through procedures remarkably different from the traditional patterns of representative democracy.²⁴⁹ Here, both the Commission and the standardization bodies are engaged in efficiency-driven (rather than democracy-driven) processes of deliberation which, for the lack of transparency and for the difficulties in involving a balanced set of interests and actors, are at continuous risk of being captured.²⁵⁰ From this standpoint and considering the increasing importance assumed by secondary rule-making,²⁵¹ the answers to the quest for legitimacy and democratic accountability inherent in the processes of convergence appear often misplaced or unsatisfactory and call for a radical effort of construing efficiency through alternative patterns of governance conceived in the light of the traditional values of openness and participation.²⁵²

Put together, all the elements of which the layer of convergence of the ECI of the EU consists reveal how the incorporation of solutions adopted in the domestic sphere and in the WTO is firmly grafted on the still prevalent, though refined, paradigm of market integration. Of course, market integration does not occupy the pivotal position it used to have when it was the undisputed scenario of supranational integration. Yet, the most distinctive traits of the ECI of the EU have not been upset or impaired during their often tumultuous evolution. In particular, the pushes towards politicization have been skillfully embedded in a comprehensively efficiency-oriented decision-making. Not only the leadership of the Court of Justice in establishing and renovating the constitutional strategies which ought to guide market integration has remained unaffected. Even when important spaces for regulatory autonomy have been recognized, legislation and representative democracy increasingly have left broad scope for forms of political administration marked again by the search of efficient solutions.

IV. Interpreting Stratification – A Comparative Survey on the ECIs

After having analyzed in detail the characteristics of the ECIs, it is now worth to summarize their main traits and to articulate some critical remarks on how economic

²⁴⁹ C. Joerges, J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology*, in *ELJ*, 1997, 3, 3, p. 273.

²⁵⁰ The risks of regulatory capture of the standardization bodies are signaled in A. McGee, S. Weatherill, *The Evolution of the Single Market – Harmonisation or Liberalisation*, in *MLR*, 1990, 53, p. 585.

²⁵¹ In this respect, see the figures reported in R. Dehousse, *Beyond representative democracy: constitutionalism in a polycentric polity*, in J. H. H. Weiler, M. Wind (eds.), *European Constitutionalism Beyond the State*, pp. 141-142.

²⁵² In this regard, R. Dehousse, *Beyond Representative Democracy*, p. 156, argues “the input-oriented approach which has so far dominated discussions on the legitimacy of European institutions needs to be supplemented by a *process-oriented* one, in which interested citizens would be given a say in the post-legislative, bureaucratic phase”.

constitutionalism(s) is developing alongside the processes of re-organization of public space also in post-national dimensions.²⁵³

The idea is often been advocated that each of the ECIs consists in a two layers-structure comprising, respectively, distinctive and convergent elements. The most profound layer is made of the distinctive elements and points directly at the functional concerns of the constitutional spheres at issue. In this regard, it may be argued the ECIs serve different objectives which entail different approaches to the concept of integration. Economic constitutionalism of social state, for example, hinges upon a general idea of economic and social cohesion whereby the constitution establishes the principles and instruments to integrate through politics and representative democracy the interests of economic and social actors.²⁵⁴ By contrast, in the WTO-GATT integration is conceived in pure intergovernmental terms and relies on a contractual matrix directed at bringing international trade relations as close as possible to a free trade oriented regime. In the EC, finally, a comprehensive idea of market plays as the pivotal factor of intergovernmental as well as social integration.²⁵⁵

In each of the ECIs, these teleological premises originate extremely different legal frameworks in nature. In the state dimension, economic constitutional provisions perform mostly as constitutive principles of a transaction economy which, on the one hand, leaves large room for political deliberation but, on the other, does not contain sufficient constitutional guarantees for market efficiency. In the GATT, constitutional provisions express more articulate regulatory principles, even though the bilateral nature of obligations accords still important margins of political-diplomatic maneuver for the members to accommodate their diversities in a comprehensive flexible scheme. It is in the EC, therefore, that constitutional provisions reveal their most aggressive profile. The regulatory principles which articulate the objective of market integration are indeed equipped with a double system of enforcement which, although crucially hinging upon the ultimate authority of member states, allows them to reduce significantly their scope for political decision-making. Here, it is important to underline that the nature of the legal framework appears as the only element in each of the ECIs which has not undergone alterations in the processes of convergence. Therefore, it seems that before venturing into any debate on the characters of economic constitutionalism(s), these elements of distinction should be adequately taken into consideration.

The functional concerns of the constitutional spheres and the nature of the legal frameworks resonate also in the remnant elements of the ECIs, namely the standards of review adopted by the adjudicative bodies and the characters of decision-making. In this regard, in the state dimension the emphasis on political decision-making matches with the deference by the Constitutional Court. By contrast, in the GATT/WTO adjudicative bodies enforce NT regime against members' measures by employing a more intrusive

²⁵³ A summary of the main traits of the ECIs is displayed in the table on stratification annexed to this paper.

²⁵⁴ In this regard, it may be argued that state economic constitutionalism is mostly input-oriented.

²⁵⁵ Supranational economic constitutionalism, therefore, may be considered as mostly output-oriented.

pattern of decision made of ‘objective approach’ and textualism. In the EC, instead, access to market, as the key-concept of market integration, is promoted by the Court of Justice through incisive strategies of regulation resulting in an obstacle-based test and in the doctrine of functional parallelism. As seen, a similar regime is coupled by a legal basis of positive harmonization (article 94 EC) where regulatory autonomy, though under mostly intergovernmental guises, is to some extent regained. This latter element is critically absent in the distinctive layer of the ECI of the WTO and, for this reason, it constitutes a significant obstacle for the WTO to attain full constitutional status.

It has been argued, then, that the divergences between the distinctive elements of the ECIs may explain the generalized and mostly hidden uneasiness which is troubling the interactions among the legal orders operating in the European constitutional space. The frictions so determined are being faced in each of the constitutional spheres by alternating episodic moments of blunt conflict and prevalent processes of convergence whose achievements integrate the second layer of the ECIs. In the national (Italian) sphere, for instance, the objectives of market building and economic efficiency have entered in the constitutional discourse and inspired both legislative initiatives and constitutional adjudication. In the WTO, the SPS and TBT agreements have adopted the language of reasonableness and equivalence in dealing with market fragmentations. Moreover, minimal forms of intergovernmental decision-making have taken their first steps under these agreements replicating – although in a considerably different institutional background – the EC patterns of positive harmonization.

In the meantime the distinctive elements of the ECI of the EU are perceived as benchmarks for the WTO and national ones, the EU itself starts to incorporate in its ECI some of the national and WTO tenets. Firstly, the expansion of constitutional objectives has been progressively enfranchised from the original and exclusive market frame. Thus, fully-fledged constitutional objectives have been conferred on the EU institutions and market building itself has been relieved of the stress of coping with issues which, as a rule, are not dealt with from the economic standpoint. Secondly, NT and the language of anti-discrimination have been employed in the jurisprudence of the Court of Justice in order to promote a more selective approach to market access. Finally, the patterns of positive harmonization have been remarkably enriched by strengthening the role of political institutions according to the parliamentary model and by enhancing the contribution to decision-making by scientific expertise.

Although the processes of convergence appear in certain cases impressive, it must not be concluded that they automatically ensue from interactions among the ECIs. There are of course cases – such as the parliamentarization of the EU or the incorporation of the objective of market efficiency in the national spheres – in which there may be causation among the distinctive elements of an ECI and those convergent of another. Yet, this is not at all the rule, since in a number of other cases the adoption of regulatory solutions

already developed in a different sphere is more the result of endogenous processes rather than of external influences.²⁵⁶

Furthermore, at many stages in the analysis of the convergent layer it has been alerted that convergence does not mean assimilation. For each convergent element, it has been repeatedly stressed, crucial traits of continuity with the original ECI exist and, hence, a proper understanding of the specificities of the ECIs requires them to be taken into account, even after (or during) their convergence. The ECIs, therefore, do not evolve simply by switching from one model to another. Inherent in the metaphor of stratification, indeed, is the idea that convergence does not mean dismissal of the original diversities but, more sophisticatedly, incorporation and re-elaboration of the principles or solutions devised in other ECIs within the original and unaltered legal frameworks.²⁵⁷

Precisely for this reason, it would be wrong to argue that convergence removes all the factors of uneasiness in the European constitutional space. Frictions may well be silenced and the sharpest elements may be rendered more palatable but the wheels of the ECIs appear to constantly require greasing. Most of the time, the usual shortcut to these problems is to advocate the rhetoric of assimilation and to neglect the instances of its discontents. An alternative and more radical approach, instead, is to try to devise a conceptual framework for the interactions among the ECIs in which, possibly, uneasiness is perceived more as a value generating stability rather than a matter to be concerned with.²⁵⁸

V. The Value of Uneasiness – A Conceptual Framework for the Interactions among the ECIs

The most common responses to the frictions among the ECIs are normally conceived with the aim of stifling uneasiness by concentrating constitutional authority. In this respect, the theoretical framework of state constitutionalism appears particularly suitable in so far as it draws upon the authoritative dividend of traditional concepts such as

²⁵⁶ Consider, for example, the adoption by the Court of Justice of the language of NT in *Keck*. As previously mentioned, this more selective approach to access to market goes back to the problems engendered by the too broad *Dassonville* formula rather than to an impact of the WTO on the EU.

²⁵⁷ Just to remind of some examples from the above analysis, this has emerged quite clearly in the incorporation of the objective of market efficiency by the national ECI or in the ‘lighter’ version of functional parallelism developed in the SPS and TBT.

²⁵⁸ The perils inherent in the rhetoric of assimilation have overtly emerged in process of ratification of the “Treaty establishing a Constitution for Europe”. Arguably, this document has been devised to profit from the legitimacy dividend of state constitutionalism by camouflaging with its language and categories a legal framework and regulatory solutions mostly replicating – although with important innovations – the current EU legal framework. The discrepancy between the symbols invoked and the contents supplied was too strident not to be heard. Therefore, it is not surprising that the answers of the French and Dutch referenda to a similar offer were negative. Nowadays, when this kind of constitutional efforts seem chilled, the superficial enthusiasm at vesting the EU legal framework with the paraphernalia of state constitutionalism can also be considered more critically. It seems, indeed, that the current political circumstances suggest a more cautious and realistic attitude if European integration is to be re-vitalized. In this new stage, a more conscious and analytical approach to the constitutional identities involved in this process might be helpful.

sovereignty or its corollaries (*pouvoir constituant*, *kompetenz-kompetenz* and so forth). Accordingly, in the most orthodox positions the interactions between states and post-national units are understood in terms of delegation of (quasi) sovereign rights by the states whose constitutions however retain ultimate authority and legitimacy. Nevertheless, a similar approach, although formally unquestionable, fails in capturing the more complex reality of the interactions among the ECIs. The emphasis on the ultimate authority of states evokes normally pathological or exceptional circumstances, such as serious infringements of the core principles of national constitutions or treaty amendments (with subsequent ratifications), which do not seem the most eloquent or interesting factors for interpreting the legal reality of interactions. Moreover, the above analysis has shown not only that legal orders flourished in post-national dimensions maintain several traits of discrepancy and even of collision in respect to national constitutional tenets, but also that processes of convergence follow trends which are very much more articulated than the unilateral principal-agent relationships underlying the traditional doctrinal categories.

Even more fallacious seem the conceptual frameworks embraced by those who, by drawing upon the doctrines of direct effect and supremacy, suggest that the ultimate authority (or the *Grundnorm*) has shifted to the EU or, even, WTO spheres. Unlike formalists, supporters of this approach capture the fact that in these post-national units there is more than obedient agents. Yet, in their approach, constitutional elements are superficially understood and, hence, over-emphasized forgetting, at the end, that no “federal big-bang” has yet occurred.²⁵⁹ Nonetheless, doctrines such as direct effect and supremacy, originally conceived to solve specific conflicts of norms, are (mis)used to nurture the perception of an incorporation of the constitutional spheres of the states by the EU (or the WTO) constitution.²⁶⁰

The shortcomings of these positions emerge even more clearly if one considers their implications in terms of understanding the single ECIs. The most orthodox positions, for example, by emphasizing the sovereign rights of the principals, stress the importance of delegations and, therefore, are likely to privilege the distinctive (over the convergent) elements of the ECIs. Yet, it is common experience that when orthodoxy and integrity are taken too seriously they rapidly turn in caricatures.

By contrast, the emphasis on supremacy unavoidably brings about assimilation. It has been repeated *ad nauseam* that this is not the most appropriate pattern of relations for identifying the nature of the interactions among the ECIs. Besides, it can be advocated

²⁵⁹ R. Toniatti, *Federalismo e potere costituente*, in *Regionalismo e Federalismo in Europa*, Trento, 1997, p. 170.

²⁶⁰ To appreciate the hegemony of such mindset, consider the following excerpt (taken from a genuinely pluralist writer such as J. Shaw, *Postnational constitutionalism in the EU*, p. 588): “if legal orders can be overlapping and *do not stand in a hierarchy* or an arrangement which is either strict or fixed, it is possible to see the *EU as an entity of ‘interlocking normative spheres’*; what is significant is that *no particular sphere is seen as privileged or predominant*” (Italics added). On a close reading, this is only apparently a pluralist image of the European constitutional space since the EU is not considered as one of the “interlocking normative spheres” but, crucially, as “an entity of interlocking normative spheres” and, therefore, is “privileged and predominant”.

that it is not even a desirable pattern: think only of the disasters which would follow institutional solutions such as a domestic Constitutional Court reviewing legislation according to Court of Justice-like standards of adjudication, a common market based on a legal framework made of bilateral obligations, a *Dassonville* formula introduced in the GATT ... Assimilation is not only legally unfounded, but also normatively dangerous as far as it entails an unacceptable impairment of the functional rationale underpinning the processes of re-organization of public space.

A more sound response to the conundrums arising out of the interactions among the ECIs could be envisaged by criticizing the assumption underlying state constitutionalism approaches. In these latter, indeed, the constant search for ultimate authorities seems motivated by deep concerns for the allegedly disruptive effects of uneasiness. Yet, the answers provided by the custodians of orthodoxy or by the supporters of assimilation do not seem to meet the theoretical and social expectations for an order in such a controversial context. It may be argued, therefore, that a more promising conceptual framework could be devised by focusing more on the physiognomy of interactions rather than on their pathology. In this perspective, uneasiness may be treated in more constructive terms. As noted, frictions among the ECIs have generated more convergence than conflict and, in some cases, more convergence through conflict. The diverse ECIs, indeed, respond to diverse and equally legitimate functional concerns²⁶¹ and, accordingly, their nature is essentially partial.²⁶² As a result, each ECI may be seen as producing assets as well as shortcomings which, at least in principle, compensate for (or are compensated by) the shortcomings and assets of the other ECIs.²⁶³

This is not to depict an idyllic and reconciled reality. Again, uneasiness is inherent in European constitutional space and, therefore, even the complementary nature of the ECIs is more an objective to pursue than an outcome attainable once and for all. More appropriately, uneasiness may be seen as the factor of equilibrium which engenders forms of mutual accommodation among constitutional spheres animated in principle by disparate and sometimes even colliding goals. It is clear now why all the conceptual frameworks which try to suppress uneasiness by concentrating an ordering principle for interactions within one of the ECIs appear legally and normatively inadequate.²⁶⁴ If

²⁶¹ R. Dehousse, *Comparing National and EC law*, p. 779.

²⁶² N. Walker, *Constitutionalism and the problem of translation*, p. 54 observes: "In terms of constitutional discourse, this development points to the increasing significance of the relational dimension generally within the post-Westphalian configuration. In this plural configuration, unlike the one-dimensional Westphalian configuration, the 'units' are no longer isolated, constitutionally self-sufficient monads. They do not purport to be comprehensive and exclusive polities [...] Indeed, it is artificial even to conceive of such sites as having separate internal and external dimensions, since their very identity and *raison d'être* as polities or putative polities rests at least in some measure on their orientation towards other sites".

²⁶³ In this respect particularly interesting is the concept of "counter-punctual law" suggested, although not in functional perspective, by M. Poiares Maduro, *Europe and the constitution*, p. 98.

²⁶⁴ Observes M. Poiares Maduro, *Europe and the constitution*, p. 98, that "in a world where problems and interests have no boundaries, it is a mistake to concentrate the ultimate authority and normative monopoly in a single source. Legal pluralism constitutes a form of checks and balances in the

properly managed, uneasiness, rather than being a matter of concern, could be an answer to the concerns for the stability of the European constitutional space.

In this respect, a provocative (but also more realistic) conceptual framework for the interactions among the ECIs could be devised in the form of a ‘code of conduct for managing uneasiness’ directed at the judicial and political actors operating within them. Its contents might consist of two premises:

- I. ECIs respond to different and equally legitimate functional concerns. These consist in distinctive elements which are to be preserved in order to prevent disruptive phenomena of assimilation;
 - II. The distinctive elements of the ECIs can be a source of conflicts among them. As a consequence, a sufficient degree of substantive compatibility ought to be pursued in order to facilitate their interactions;
- and in a general recommendation:

Within each ECI, convergent interpretative and normative solutions should be endorsed as those which, while preserving diversity among the ECIs, achieve sufficient conditions of compatibility.

If assimilated, a similar recommendation might deliver more balance and order than those solutions devised by insisting on sovereignty and its substitutes. It seems, indeed, that after having endorsed for centuries the top-down authoritative (dis)order of the ‘sovereigns’ – being them alternatively the king, the state, the people, the constitution – in a time of constitutionalism(s) a bottom-up approach to stability, grounded on the legal consciousness and moral commitment by those who daily handle constitutions, could be attempted.

organization of power in the European and national polities and, in this sense, it is an expression of constitutionalism and its paradoxes”.

Stratification in the ECIs

(In white bands, distinctive elements – in gray bands, convergent elements)

	<i>Italy</i>		<i>EU</i>			<i>WTO</i>	
<i>Constitutional Objectives and Ramifications</i>	Economic and social cohesion	Market and Economic Efficiency	Expansion of constitutional objectives and emancipation from sole market paradigm	Common market and spillover expansion through the market integration paradigm	Market integration returns to its core business; other policies left to specific legal bases		Free trade and insulation/deference to other international agencies (GATT)
<i>Nature of the Legal Framework</i>	Constitutive principles (open-ended constitutional compromise)			Regulatory principles with public and private systems of enforcement (existence of an autonomous community interest)			Regulatory principles and bilateral nature of the obligations (members-driven organization)
<i>Standards of Adjudication</i>	Deference to re-enforce <i>utilità sociale</i>	Constitutional Court enforcing market efficiency		Obstacle-based regime and functional parallelism (proportionality) to promote access to market	NT applied to selling arrangements (<i>Keck</i>)	Obstacle-based and equivalence (necessity) in SPS, TBT	'Objective approach' and textualism to enforce NT obligation
<i>Characters of Decision-Making</i>	Democratic parliamentary decision-making	Legislation and efficiency-oriented secondary rule-making	Article 95 and politicization of harmonization	Article 94, positive harmonization coupling strategies of negative harmonization	Article 95 and irruption of science (as external constraint and in political administration)	Positive Integration through international standards in SPS, TBT	