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Amedeo Arena

How European Law Became Supreme:
The Making of *Costa v. ENEL*

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How European Law Became Supreme: the making of *Costa v. ENEL*

Amedeo Arena*, **

Abstract:

Virtually everyone associates *Costa v ENEL* with the establishment of the principle of supremacy of European law, yet the story of that lawsuit is still known but to a few. What drove Flaminio Costa to sue his electricity provider over a bill of as little as £1925 (about €22 in 2018)? Why did the small-claims court of Milan decide to involve both the Italian Constitutional Court and the European Court of Justice in such a ‘minor’ lawsuit? Why did those two courts hand down judgments going in opposite directions? How did the lawsuit end when it came back to Milan small-claims court? Relying upon previously undisclosed court documents and interviews with some of the actors involved, this paper seeks to shed some light on the less-known aspects of the *Costa v ENEL* lawsuit, against the background of electricity nationalization in Italy at the height of the Cold War, and to assess the contribution of the ‘architect’ of that lawsuit, Gian Galeazzo Stendardi, to the development of the doctrine of supremacy of European law.

* Associate Professor of European Union Law, University of Naples ‘Federico II’ Department of Law. Comments and critique are welcome and may be provided at: a.arena@unina.it

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1. Setting the scene: the nationalisation of electricity in Italy

The nationalisation of electricity production and distribution in Italy was ‘possibly the most far-reaching and earth-shattering initiative of the Post-World War II era’.¹ By all accounts, electricity nationalisation was the *quid pro quo* that the left-wing Italian Socialist Party sought in return for its external support to the centrist cabinet chaired by the Christian Democrat Amintore Fanfani in 1962-1963,² which paved the way to a centre-left alliance that would dominate the Italian political landscape for several years.³

This political alliance played a key role at the height of the Cold War, as it enabled the Christian Democrats to remain in power in spite of declining electoral support⁴ and to consolidate their pro-American foreign policy, which resulted in the establishment in Southern Italy of a number of installations equipped with US “Jupiter” nuclear missiles.⁵ Not only those missile installations provided Italy with nuclear deterrence, thus obviating the need to develop an indigenous nuclear weapons program, but the dismantlement of those installations was possibly one of the bargaining chips that enabled the resolution of the Cuban missile crisis of October 1962.⁶

At the beginning of the 1960s, when the Italian ‘economic miracle’ was in full swing,⁷ electricity production and distribution in Italy was a profitable oligopoly in the hands of two public and six private corporate groups (the so-called ‘electric barons’),⁸ each

¹ Italian House of Representatives, Special Committee on Electricity Nationalisation, Minority Report of 27 July 1962 by G. Alpino and M. Trombetta (Italian Liberal Party), 3.

² See G. Mori, ‘La nazionalizzazione in Italia: il dibattito politico ed economico’, in P. Baldini, P. Hertner (eds) *La nazionalizzazione dell'energia elettrica. L'esperienza italiana e di altri paesi europei* (1989) 91-115.

³ See G. Tamburrano, *Storia e cronaca del centro-sinistra* (1990); Y. Voulgaris, *L'Italia del centro-sinistra: 1960-1968* (1998).

⁴ Electoral support for the Christian Democrats declined from 42,35% in the 1958 general election for the Italian house of representatives to 38,28% in 1963. Conversely, votes for the main opposition party, the Italian Communist Party, increased from 22,68% in 1958 to 25,26% in 1963.

⁵ See L. Nuti, *Italy and the Nuclear Choices of the Atlantic Alliance, 1955–63*, in B. Heuser and B. Thomas (eds), *Securing Peace in Europe, 1945–62: Thoughts for the post-Cold War Era* (New York: St. Martin's Press, 1992) p. 222–245.

⁶ See M. Anastasi, *Il quarto governo Fanfani e la crisi di Cuba del 1962*, in *Diacronie: Studi di Storia Contemporanea*, 2014, p. 11, at: http://www.studistorici.com/2014/12/29/anastasi_numero_20

⁷ See G. Nardozi, ‘The Italian ‘Economic Miracle’’, 19 *Rivista di storia economica* (2003) 139-180.

⁸ The term was possibly coined by Ernesto Rossi, one of the drafters of the Ventotene Manifesto. See E. Rossi, *Elettricità senza baroni* (1962).

operating as a *de facto* monopolist over a part of the national territory.⁹ This gave rise to significant price differences between Northern and Southern Italy, which prompted the introduction of nation-wide electricity tariffs in August 1961.¹⁰ However, the Fanfani Cabinet claimed that government regulation alone could not ensure that Italy's electricity production would keep up with the expansion of demand,¹¹ which was expected to double every ten years as per Ailleret's law.¹²

The Fanfani Cabinet thus submitted a bill to introduce centralised management of electricity production and distribution,¹³ which would enable the implementation of a planned capacity expansion policy as well as the full exploitation of existing interconnection opportunities and economies of scale.¹⁴ This was to be achieved through the establishment a state-owned company, the National Electricity Board (ENEL), that would take over the electricity-related assets of over 1300 private electricity companies and would operate a nation-wide monopoly on the production, transport, transformation, and distribution of electricity from all sources.¹⁵ The companies affected by the nationalisation – which were allowed to carry on their activities outside the electricity sector – would receive a monetary compensation based on their stock exchange prices.¹⁶ The final version of the ENEL Statute, however, gave the shareholders of those companies

⁹ See L. Bufarale, 'Riccardo Lombardi e la nazionalizzazione dell'energia elettrica', *Studi Storici* (2014) 646-647.

¹⁰ See Italian Council of Ministers, Interministerial Prices Committee, decision of 29 August 1961, no. 941, *Official Journal of the Italian Republic ('OJIR')*, 30 August 1961, no. 214. See also F. Silari, 'La nazionalizzazione elettrica in Italia: conflitti di interessi e progetti legislative 1945-1962', 177 *Italia contemporanea* (1989) 56-61.

¹¹ Italian Council of Ministers, Explanatory Memorandum of Bill no. 3906, of 26 June 1962, for the establishment of the National Electricity Board (ENEL), 12.

¹² See Ailleret, *Énergétique, les besoins d'énergie* (1963).

¹³ Italian Council of Ministers, Bill no. 3906, of 26 June 1962, for the establishment of the National Electricity Board (ENEL).

¹⁴ See Italian House of Representatives, Special Committee on Electricity Nationalisation, Majority Report of 23 July 1962 by D. De' Cocci (Christian Democrats), 25-26.

¹⁵ Italian Council of Ministers, Explanatory Memorandum of Bill no. 3906, of 26 June 1962, for the establishment of the National Electricity Board (ENEL), 15-18.

¹⁶ *Ibid.*, 19-20. The monetary compensation would be paid in cash over a period of ten years at a 5,5% annual interest rate. See also G. Carli, *Cinquant'anni di vita italiana* (1993), 291-297 (reporting that, as Governor of the Bank of Italy, he supported monetary compensation as an alternative to the issuance of ENEL bonds, in order to preserve the stability of Italy's financial markets).

the option to exchange their shareholdings for State-guaranteed bonds issued by the newly-established ENEL.¹⁷

The minority parties strongly opposed the electricity nationalisation bill. The centre-right Italian Liberal Party, the right-wing Italian Democratic Party of Monarchist Unity, and the extreme-right Italian Social Movement claimed that the monetary compensation envisaged by the bill was lower than the market value of the nationalised assets,¹⁸ thus harming the interests of the shareholders of the companies affected by the nationalisation¹⁹ and undermining public confidence in the stock market.²⁰ The minority parties also argued that electricity nationalisation was a dangerous concession by the Christian Democrats to the Italian Socialist Party,²¹ as it would trigger calls for the nationalisation of other economic sectors, thus paving the way for the transition to planned economy,²² or even the establishment of a full-fledged communist regime.²³ Last but not least, some members of the Italian Parliament claimed that the nationalisation bill was inconsistent with Italy's commitments under the Treaty of Rome of 1957 establishing the European Economic Community (the 'EEC Treaty').²⁴

In spite of those claims, on 6 December 1962, the Italian Parliament enacted the electricity nationalisation statute as Law no. 1643/62 (the 'ENEL Statute').²⁵

2. Enter the hero: Gian Galeazzo Stendardi

¹⁷ See Articles 7 and 10 of Law 6 December 1962, no. 1643, *OJIR* 12 December 1962, no. 316.

¹⁸ See Italian House of Representatives, Special Committee on Electricity Nationalisation, Minority Report of 27 July 1962 by G. Alpino and M. Trombetta (Italian Liberal Party), 27-29.

¹⁹ See Italian House of Representatives Special Committee on Electricity Nationalisation, Minority Report of 27 July 1962 by A. Covelli, A. Casalnuovo and O. Preziosi (Italian Democratic Party of Monarchist Unity), 15.

²⁰ See Italian House of Representatives, Special Committee on Electricity Nationalisation, Minority Report of 27 July 1962 by G. Alpino and M. Trombetta (Italian Liberal Party), 19, 22-23.

²¹ *Ibid.*, 8-10.

²² *Ibid.*, 57.

²³ See Italian House of Representatives Special Committee on Electricity Nationalisation, Minority Report of 27 July 1962 by A. Covelli, A. Casalnuovo and O. Preziosi (Italian Democratic Party of Monarchist Unity), 15. See also 17: 'The State arising from this undertaking will not be a socialist state proper, but a hybrid, shapeless, and contradictory entity that, to survive, will call for a full-fledged socialist regime'.

²⁴ See Italian House of Representatives Special Committee on Electricity Nationalisation, Minority Report of 27 July 1962 by E. De Marzio (Italian Social Movement), 32; Italian House of Representatives, Plenary Session of 31 July 1962, Speech by G. Angioy (Italian Social Movement), 32127-32134.

²⁵ Law 6 December 1962, no. 1643 establishing the National Electricity Board (ENEL) (the 'ENEL Statute'), *OJIR* 12 December 1962, no. 316.

One of the most outspoken critics of the ENEL Statute was Gian Galeazzo Stendardi, a middle-aged lawyer at the Milan bar and an assistant lecturer of constitutional law at the University of Milan.²⁶ Descended from the 16th century military leader Goro Stendardi da Montebenichi, he was a man of legendary resolve: during the student protests of 1968, he would carry on teaching his classes until the end, regardless of the demonstrations taking place on campus and even in his own lecture hall.²⁷ He was a known monarchist sympathiser with a good measure of political pragmatism,²⁸ as shown by his choice to run for the Milan City Council with the influential Italian Liberal Party rather than with the marginal monarchist parties.²⁹

Raised under the Gentilean ideal of the ‘ethical state’, Stendardi was deeply concerned about the status of representative democracy in Italy.³⁰ He complained that the Italian Parliament had been hijacked by minority parties and interest groups.³¹ The only remedy, in Stendardi’s view, was an ‘activist conception of the rule of law’:³² just as Rudolf von Jhering had theorised in *Der Kampf ums Recht*, Stendardi believed that every individual’s struggle to assert his or her rights through judicial proceedings contributed to the progress of the legal order as a whole.³³ The author of one of the first scholarly treatments

²⁶ For an account of Stendardi’s relationship with his mentor, Egidio Tosato, see G. Stendardi, ‘Egidio Tosato nel ricordo di un suo assistente volontario’, in M. Galizia (ed), *Egidio Tosato: costituzionalista e costituente* (2010) 43-48.

²⁷ Interview with Bruna Vanoli Gabardi (Gian Galeazzo Stendardi’s former legal associate), Milan, 27 October 2017.

²⁸ Interview with Luca Stendardi (Gian Galeazzo Stendardi’s son), Milan, 27 October 2017.

²⁹ See M. Emanuelli, *Accade a Milano 1945-2002* (2002). In the 1964 Milan City Council Elections, the two monarchist parties reached less than 1%, whereas the Italian Liberal Party was the third-largest party, with over 21% of the votes.

³⁰ Interview with Luca Stendardi, Milan, 27 October 2017.

³¹ Ibid.

³² A. Vauchez, ‘Integration-through-Law Contribution to a Socio-history of EU Political Commonsense’, *EUI Working Papers*, RSCAS 10 (2008), 17.

³³ See R. von Jhering, *The Struggle for Law* (1872, John J. Lalor trans., 1915), 73-74 (‘each of us, in his own place, is called upon to defend the law, to guard and enforce it in his own sphere. . . In defending his legal rights he asserts and defends the whole body of law, within the narrow space which his own legal rights occupy’). Cf. G. Stendardi, *Il soggetto privato nell’ordinamento comunitario europeo* (1967) 13 (‘the private individual becomes, at a certain stage, not only the defender of himself or herself, but also the defender of the legal order’); Ibid., 109-110, fn 4 (‘The best guardian and defender of the Community legal order (as well as of any other legal order) is the individual when his or her rights are violated’).

on judicial review of legislation by the Italian Constitutional Court ('ICC'),³⁴ in the mid-1950s Stendardi brought, albeit unsuccessfully, one of the earliest constitutionality challenges against the strict liability regime for newspapers' editors set out in the Italian Criminal Code and in the Italian Press Law.³⁵

Moreover, following the 1957 Stresa Conference on the European Coal and Steel Community ('ECSC'), which marked the schism of the 'supranationalists' from international law scholarship,³⁶ Stendardi wrote one of the earliest monographs devoted entirely to the relationship between the Community legal order and the Italian one.³⁷ In that book, published in 1958, he took the view that the Community Treaties included certain 'constitutional provisions'³⁸ – such as the EEC common market freedoms³⁹ – that should be applied *regardless of any contrary domestic statute*, even if adopted subsequently.⁴⁰ The enactment of incompatible Italian statutes constituted a *violation of Community law*, which any individual could request the Community executive⁴¹ or, ultimately, the European Court of Justice (the 'ECJ')⁴² to establish. Moreover, in Stendardi's opinion, subsequent Italian statutes at variance with the Community Treaties were *unconstitutional under Italian law*, insofar as their adoption constituted, on the part of the Italian Government, a re-appropriation of the sovereign powers transferred to

³⁴ See G. Stendardi, *La Corte costituzionale: il giudizio di legittimità costituzionale delle leggi* (1957); G. Stendardi, 'L'eccezione ai sensi art. 23 L. 11 marzo 1953 n. 87 e l'ordinanza del giudice ordinario', *Foro padano* (1956), IV, 90-92.

³⁵ See ICC, Case 39/56 (Reg. ord.), *Criminal proceedings against Elio Barucco*, Judgment no. 3 of 1956 (dismissing the constitutionality challenge). It is worth emphasising that that was the third ruling ever handed down by the ICC.

³⁶ See J. Bailleux, 'Comment l'Europe vint au droit', 60 *Revue française de science politique* (2010) 295-318 (noting that, as most international law professors attending the 1957 Stresa Conference refused to recognize the *sui generis* character of the European Communities, a group of dissidents assembled around Maurice Lagrange heralding a 'supranational' understanding of Community law). On Stendardi's participation in the Stresa Conference see B. Davies, 'Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and Solange in its Intellectual Context', 21 *European Law Journal* (2015) 448.

³⁷ G. Stendardi, *I rapporti fra ordinamenti giuridici italiano e delle Comunità europee* (1958).

³⁸ *Ibid.*, 39 ('all the provisions [of the Community Treaties] that concern the goals of the Communities, the means to achieve them and the Community organs should be regarded [...] as constitutional norms').

³⁹ *Ibid.* 103 (referring, by way of example, to the right of establishment and the free movement of capital).

⁴⁰ G. Stendardi, *I rapporti fra ordinamenti giuridici italiano e delle Comunità europee* (1958) 50 ('in the context of the assessment of those conflicts, the Community constitutional norms should always be regarded as applicable').

⁴¹ *Ibid.*, 51 (arguing that 'every natural or legal person, belonging to one of the Member States, is entitled to request the High Authority or the Commission to establish the existence of a national norm contrary to the Treaties').

⁴² *Ibid.*, 107 (arguing that 'it would be necessary to plead judicially such an illegality, in order to obtain a decision, for example of by the Court of Justice of the European Communities').

the Communities under Article 11 of the Italian Constitution ('IC')⁴³ upon the ratification of the Community Treaties.⁴⁴

It is thus hardly surprising that Stendardi planned to challenge the ENEL Statute on the basis both of Italian constitutional law and Community law. As a matter of fact, in a law review article published in 1962, Stendardi clearly spelled out the legal consequences of a statute carrying out the expropriation of private companies: the violation of several articles of the IC, to be established by the ICC, as well as the infringement of a number of provisions of the EEC Treaty, to be ascertained by the ECJ.⁴⁵

However, individuals could not challenge Italian statutes directly before the ICC or the ECJ: they could only do so incidentally, i.e. in the context of a lawsuit over the validity an act based upon that statute. That is where Flaminio Nicolino Costa came in: a small-time lawyer at the Milan bar of Monarchist leanings and a fervent admirer of Stendardi, Costa happened to be both a shareholder and a customer of Edisonvolta, one of the companies involved in the nationalisation process.⁴⁶ At Stendardi's suggestion, Costa did not allow ENEL employees to read his meter and refused to pay the £1925 bill⁴⁷ ENEL sent him for the March-April 1963 billing period.⁴⁸

In the context of the ensuing lawsuit before the *Giudice Conciliatore* (small-claims court) of Milan, Stendardi, on behalf of Costa, argued that ENEL had not validly taken over the electricity supply contract that Costa had entered into with Edisonvolta, as the ENEL Statute was both unconstitutional and incompatible with the EEC Treaty.⁴⁹ Stendardi

⁴³ 'Italy [...] consents, on conditions of reciprocity with other States, to such limitations of its sovereignty as may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and supports international organisations pursuing that goal'.

⁴⁴ G. Stendardi, *I rapporti fra ordinamenti giuridici italiano e delle Comunità europee* (1958), 106 (noting that 'The [EEC] Treaty is an act that entails a limitation of the sovereignty of the Italian State in certain matters, as per Article 11 IC. Each statute that seeks to restore the State's former sovereignty in an area where a limitation had been accepted thus constitutes the violation of a principle laid down in the Constitution').

⁴⁵ See G. Stendardi, 'Problemi in materia di leggi di legittimità di espropriazione d'impresa', 5 *Foro Padano* (1962), 52-60.

⁴⁶ Interview with Bruna Vanoli Gabardi, Milan, 27 October 2017.

⁴⁷ Equivalent to approximately €22 in 2018 euros.

⁴⁸ See ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Reply on behalf of Edisonvolta, 23 January 1964, p. 2 (noting that the sum of £1925 was only the fixed charge for the March-April 1963 billing period, as Costa had prevented the ENEL inspector from reading his meter and from charging him for his actual electricity consumption).

⁴⁹ See B. Vanoli Gabardi, 'La "storia" della causa', in B. Nascimbene (ed), *Costa-Enel : Corte costituzionale e Corte di giustizia a confronto, cinquant'anni dopo* (2015) 82.

thus requested the *Giudice Conciliatore* to refer the matter to the ICC to obtain a ruling on the constitutionality of the ENEL Statute and added that, since there was no right to appeal for claims worth less than £2000,⁵⁰ the *Giudice Conciliatore* was also required to seek a preliminary ruling from the ECJ under Article 177(3) EEC.⁵¹ However, by its order of 10 September 1963, the *Giudice Conciliatore* only referred the case to the ICC, noting that it was for the latter to refer the case to the ECJ.⁵²

3. Chronicle of a defeat foretold: the Italian Constitutional Court proceedings

Stendardi opened the written procedure stage before the ICC with an 89-page brief that contained no statement of facts, but a barrage of constitutional challenges.⁵³ He claimed that the ENEL Statute infringed: Article 67 IC,⁵⁴ as it had been approved by the majority in pursuance of an imperative mandate given by certain stakeholders, rather than in the interest of the whole nation; Article 43 IC,⁵⁵ because the ENEL Statute was not in the general interest, because it unduly delegated to the executive essential aspects of the nationalisation process, and because the monetary compensation it provided was inadequate relative to the value of the nationalised assets; Article 41 IC,⁵⁶ because the ENEL Statute established a monopoly on electricity production and distribution thus limiting the freedom of enterprise; Article 3 IC,⁵⁷ because the ENEL Statute discriminated

⁵⁰ See Article 339(4) of Royal Decree 28 October 1940, no. 1443, OJIR no. 253 of 28 October 1940, as amended by Article 35 of Law 14 July 1950, no. 581, OJIR 186 of 16 August 1950.

⁵¹ See Advocate General Lagrange, Case 6/64, *Costa v ENEL*, Opinion of 25 June 1964, EU:C:1964:51, [1964] ECR [French version] 1171 (noting that the Milan *Giudice Conciliatore* was ‘competent en premier et dernier ressort à raison du chiffre de la demande’).

⁵² *Giudice Conciliatore* of Milan (Carones), Case 1350/63 (R.G.), *Costa v ENEL*, Order of 10 September 1963, in OJIR of 2 November 1966, no. 287.

⁵³ ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Brief on behalf of Flaminio Costa, 8 October 1963.

⁵⁴ ‘Each Member of Parliament represents the Nation and carries out his or her duties with no imperative mandate.’

⁵⁵ ‘For purposes of general interest, specific enterprises or categories of enterprises related to essential public services, energy sources or monopolistic situations and which have a primary public interest, may be reserved from the outset to the State, public entities or communities of workers or users, or may be transferred to them by means of expropriation and payment of compensation’.

⁵⁶ ‘Private-sector economic initiative shall be free’.

⁵⁷ ‘All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions’.

between large and small electricity companies (by exempting the latter from nationalisation) as well as between listed and non-listed companies (by laying down different criteria for the determination of the monetary compensation).

Most importantly, Stendardi argued that the ENEL Statute was unconstitutional because it infringed the EEC Treaty: as Article 11 IC had enabled the transfer of sovereign rights to the EEC, any subsequent statute seeking to re-expand national powers contrary to the EEC Treaty should be deemed as incompatible with Article 11 IC itself.⁵⁸ In Stendardi's view, the ENEL Statute infringed Articles 102 and 93 EEC, because the Italian Government had failed to inform the Commission in advance of a measure liable, respectively, to distort competition within the common market and to favour certain undertakings; Article 53 EEC, because the ENEL Statute introduced new limitations on the right of establishment by entrusting exclusively to ENEL the production and distribution of electricity in Italy; Article 37(2) EEC, insofar as the ENEL Statute established a new national monopoly. However, Stendardi added that, as contended by several legal scholars,⁵⁹ it was exclusively for the ECJ to interpret the provisions of the EEC Treaty and, accordingly, he requested the ICC to refer the matter to Luxembourg for a preliminary ruling.⁶⁰

The Italian Council of Ministers, represented by State Deputy Attorney General Luciano Tracanna, objected that the only normative conflict at issue was the one arising between the ENEL Statute and the (earlier) Italian statute ratifying the EEC Treaty (the 'EEC Statute'),⁶¹ which enjoyed no privileged status in the Italian hierarchy of legal sources by virtue of Article 11 IC and which could thus be amended, departed from, or even repealed by subsequent statutes.⁶² Citing one of the earliest Community law

⁵⁸ ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Brief on behalf of Flaminio Costa, 8 October 1963, 79.

⁵⁹ ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Reply on behalf of Flaminio Costa, 18 January 1964, 23 (citing: A. Migliazza, 'La Corte di giustizia delle Comunità europee e I diritti degli Stati membri', *Foro Padano* (1963) V, 57-62; P. Gori, 'Alcuni problemi d'interpretazione degli articoli 177 e 85 del Trattato della Comunità economica europea', *Il Foro padano* (1962), V, 45-48; W. Zanini, 'Dell'uniformità nell'interpretazione dei sistemi di diritto delle Comunità europee', *Rivista di diritto internazionale* (1961) 26-43; N. Catalano, 'L'inserimento diretto delle disposizioni contenute nel Trattato istitutivo della CEE negli ordinamenti giuridici degli Stati membri', *Foro Padano* (1963) V, 33-42).

⁶⁰ *Ibid.*, 28-29.

⁶¹ Law 14 October 1957, no. 1203, in OJIR of 23 December 1957, no. 317.

⁶² ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Reply on behalf of the Italian Council of Ministers, 23 January 1964, 37-38.

textbooks published in Italy,⁶³ the Council of Ministers further argued that any possible infringement of the EEC Treaty, whilst liable to trigger the enforcement mechanisms laid down in the EEC Treaty, was irrelevant from the perspective of the Italian legal order.⁶⁴

In its Judgment no. 14 of 24 February 1964, the ICC dismissed all the constitutionality challenges brought against the ENEL Statute.⁶⁵ As to the violation of the EEC Treaty, the Italian *juge des lois* took the view that Article 11 IC was merely a 'permissive' provision: it enabled the Italian Parliament to ratify treaties implying a limitation of Italy's sovereign powers through ordinary statutes, but did not grant those statutes a higher rank relative to other statutes enacted by the Italian legislature.⁶⁶ Thus, although the infringement of the EEC Treaty could trigger Italy's international liability, it could neither deprive the ENEL Statute of its effects in the Italian legal order nor render it unconstitutional.⁶⁷ As the conflict between the (earlier) EEC Statute and the (later) ENEL Statute had to be solved on the basis of the *lex posterior derogat priori* rule,⁶⁸ there was no need to seek a preliminary ruling from the ECJ as to the interpretation of the EEC Treaty.⁶⁹

The ICC proceedings in *Costa v ENEL* were, for Stendardi, the chronicle of a defeat foretold. From a legal perspective, the ICC embraced a dualist conception of the relationship between EEC and Italian law, in line with the largely predominant opinion of Italian international law scholars,⁷⁰ and affirmed the precedence of subsequent domestic statutes, an outcome that even former ECJ judge Nicola Catalano had anticipated in his scholarly writings.⁷¹ From a political perspective, the stakes of striking

⁶³ N. Catalano, *Manuale di diritto delle Comunità europee* (1962) 144-146 (arguing that subsequent Italian statutes would repeal earlier provisions of the EEC Treaty within the Italian legal order and that, although such conflict implied a violation of the EEC Treaty within the Community legal order, it would have been completely irrelevant within the Italian legal order).

⁶⁴ ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Reply on behalf of the Italian Council of Ministers, 23 January 1964, 38.

⁶⁵ ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Judgment no. 14 of 24 February 1964, OJIR no. 67 of 14 March 1964, paras 1-5.

⁶⁶ *Ibid.*, para 6.

⁶⁷ *Ibid.*

⁶⁸ 'A later statute shall take precedence over an earlier one.'

⁶⁹ ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Judgment no. 14 of 24 February 1964, OJIR no. 67 of 14 March 1964, para 6.

⁷⁰ See D. Anzilotti, *Corso di diritto internazionale* (1955) 56-61; G. Morelli, *Nozioni di diritto internazionale* (1958), 66-88; R. Monaco, *Manuale di diritto internazionale pubblico* (1960) 126-143; but see R. Quadri, *Diritto internazionale pubblico* (1963), 41-68 (supporting a monist approach).

⁷¹ See N. Catalano, *La Comunità economica europea e l'Euratom* (1957), 63-64 (arguing that the *lex posterior* principle warranted the application of subsequent domestic statutes regardless of conflicting provisions of the Community Treaties); N. Catalano, *Manuale di diritto delle comunità europee* (1962) 145-

down the ENEL Statute – the item of legislation upon which the Italian Socialist Party’s support to the Fanfani Cabinet was conditional – were simply too high for the ICC, a court established only a few years earlier,⁷² operating in an ‘inhospitable environment’,⁷³ and that had hitherto focused on cleansing the Italian legal system from Fascist-era legislation rather than engaging in true counter-majoritarian judicial review.⁷⁴

Yet, the ICC did not declare the reference of the *Giudice Conciliatore* inadmissible, as some of the parties had requested.⁷⁵ Rather, the Italian justices took advantage of the *Costa v ENEL* lawsuit to pursue their own agenda, namely to assert their authority to review nationalisation statutes under the general interest criterion laid down in Article 41 IC.⁷⁶ Also, the ICC took the opportunity to take a stand on the controversial issue of the constitutionality of the EEC Statute,⁷⁷ by embracing the ‘permissive’ reading of Article 11

146; N. Catalano, ‘L’inserimento diretto delle disposizioni contenute nel trattato istitutivo della Comunità Economica Europea negli ordinamenti giuridici degli Stati membri’, *Foro Padano* (1963), V, 35-36. Remarkably enough, although ICC judgment no. 14 of 1964 largely reflected Catalano’s scholarly writings, he strongly criticized that judgment and espoused the thesis of the unconstitutionality of Italian statutes contrary to Community law: see N. Catalano, ‘Portata dell’art. 11 della Costituzione in relazione ai trattati istitutivi delle Comunità europee’, *Foro Italiano* (1964), 465-478.

⁷² Although the ICC was expressly foreseen by the IC, it was not until 1955 that the Italian Parliament appointed the final five justices needed to complete the membership of the ICC, thus effectively enabling it to carry out its judicial review of legislation functions.

⁷³ M. Cartabia, ‘Of Bridges and Walls: the “Italian style” of Constitutional Adjudication’, *Italian Journal of Public Law* (2016) 38-39 (adding that during the early years of the ICC ‘the major political parties in parliament were hostile; the judiciary was suspicious; and the majority of legal scholars were wary’ to judicial review of legislation). See also A. Simoncini, ‘The Success of a Constitutional Experiment: when History Matters. The Italian Constitutional Court in Global Context’, *Italian Journal of Public Law* (2016) 81-86 (analyzing the initial political and judicial hostility to the ICC).

⁷⁴ See ICC, *Statistiche relative alle dichiarazioni di incostituzionalità di leggi statali: Tomo I*, (2014), available at: www.cortecostituzionale.it/documenti/convegna_seminari/stu261_a.pdf

⁷⁵ See ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Reply on behalf of Edisonvolta, 23 January 1964, 3-4 (arguing that the *Giudice Conciliatore* reference was inadmissible, as the lawsuit could have been decided on the basis of Article 1189 of the Italian Civil Code, whereby Costa’s payment to the apparent creditor – ENEL – would have relieved him of his obligation towards the true creditor – Edisonvolta); ICC, Case 192/63 (Reg. Ord.), *Costa v ENEL*, Brief on behalf of the Italian Council of Ministers, 12 October 1963, 4-5 (outlining the same ‘apparent creditor’ argument, but not raising a formal plea of inadmissibility).

⁷⁶ See E. Cheli, ‘Corte costituzionale e iniziativa economica privata’, in N. Occhiocupo (ed) *La Corte costituzionale tra norma giuridica e realtà sociale* (1978), 306 (noting that the price of upholding the ENEL Statute was a further extension of the ICC powers).

⁷⁷ See G. Itzcovich, *Teorie e ideologie del diritto comunitario* (2006), 213 (noting that the ICC ruled on the constitutionality of the EEC Statute without being expressly asked to do so by the parties and the referring court). On the debate of Article 11 IC as Italy’s ‘European Clause’ see M. Cartabia, L. Chieffi, ‘Art. 11’, in R. Bifulco, A. Celotto, M. Olivetti (eds), *Commentario alla Costituzione* (2006) 266-267.

IC that the ICC Chief Justice Gaspare Ambrosini had put forward twelve years earlier during the parliamentary proceedings on the ratification of the ECSC Treaty.⁷⁸

The ICC ruling in *Costa v ENEL* caused significant dismay in Community circles:⁷⁹ for the Commission legal service, it constituted an existential threat to the EEC, as it entailed a permanent imbalance between the Member States that had accepted internal supremacy and the ones that had not.⁸⁰ In addition, the ICC judgment seemingly deprived the preliminary ruling procedure of its purpose, at least for Italian courts: if the latter were required to apply domestic law regardless of conflicting Community law, what use could they possibly have for a ruling on the interpretation or validity of the latter?⁸¹ It is possibly for that reason that even the ECJ President Andreas Matthias Donner took the liberty of criticising the ‘ancient theory’ upheld by the ICC judgment at a conference in March 1964,⁸² i.e. while the *Costa v ENEL* lawsuit was still pending before the ECJ.

4. Stendardi goes all-in: the European Court of Justice proceedings

Stendardi had another card up his sleeve. As soon as he learnt that the *Giudice Conciliatore* would not request a preliminary ruling from the ECJ, he lodged a complaint with another *Giudice Conciliatore* challenging the subsequent electricity bill that ENEL

⁷⁸ Italian House of Representatives, Industry and Foreign Affairs Committees, Majority Report by G. Ambrosini and G. Quarello (Christian Democrats) on Bill of 15 March 1952, no. 1822, for the ratification and execution of the Paris Treaties of 18 April 1951, 6-7 (arguing that Article 11 IC enabled the Italian Parliament to transfer part of its sovereignty to the ECSC via an ordinary statute, thus obviating the need for a constitutional statute under Article 138 IC).

⁷⁹ See A. Vauchez, ‘Integration-through-Law: Contribution to a Socio-history of EU Political Commonsense’, *EUI Working Papers*, RSCAS 2008/10 (2008), 18 (Examining the pre-Costa ‘dramatization strategies’)

⁸⁰ See M. Rasmussen, ‘From Costa v ENEL to the Treaties of Rome: A Brief History of a Legal Revolution’ in Miguel Poiars Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law*, (2010) 71-72 (recalling that the Director of the European Commission’s Legal Service, Michel Gaudet, recommended pressuring the ICC ‘to revise its position with all means available, both at the political level and through legal contacts’).

⁸¹ See B. de Witte, ‘Retour à Costa: La primauté du droit communautaire à la lumière du droit international’, *Revue trimestrielle de droit européen* (1984), 434.

⁸² A. M. Donner, *Le rôle de la cour de justice dans l’élaboration du droit européen* (1964), 14 (calling upon domestic courts to recognize the supremacy of EEC law and criticizing ‘certain judgments of national courts’ supporting the ‘ancient theory that subsequent national legislation takes precedence over treaties’).

sent Costa.⁸³ In his brief of 15 November 1963, Stendardi reiterated his arguments that the ENEL Statute was unconstitutional and contrary to the EEC Treaty, but hinted at a new possible outcome: that the inconsistency with Community law would render the ENEL Statute inapplicable even in the absence of a prior finding of unconstitutionality by the ICC.⁸⁴ The *Giudice Conciliatore*, this time, was Vittorio Emanuele Fabbri, a former lawyer at the Milan Bar and a Monarchist sympathiser, possibly acquainted with Stendardi.⁸⁵ By his order of 16 January 1964, Fabbri noted that, as there would have been no judicial remedy under Italian law against his decisions,⁸⁶ he was legally required to refer the case not only to the ICC, but also to the ECJ.⁸⁷

The ICC proceedings are of little interest to this account, as they did not deal with the EEC Treaty: suffice it to say that, by its judgment no. 66 of 23 June 1965, the ICC dismissed all the constitutionality challenges brought against the ENEL Statute.⁸⁸ Turning to the ECJ proceedings, Stendardi reiterated his claim that the ENEL Statute was incompatible with Articles 102, 93, 53, and 37 EEC.⁸⁹ Unlike the balanced and measured tone of his written submissions to the ICC, this time Stendardi had no qualms about defining the ENEL Statute ‘a terrible, prejudicial, and nefarious precedent for the future of Community integration’,⁹⁰ a ‘measure worthy of the Late Middle Ages, when tyrants sought to tear up Europe’,⁹¹ and ‘an attempt to undermine Italy’s free market economy ... to pave the way to the implementation of the doctrines of Marx, Engels, and Lenin’.⁹²

⁸³ *Giudice Conciliatore* of Milan (Fabbri), Case 1907/63 (R.G.), Complaint on behalf of Flaminio Costa, 7 October 1963 (claiming that Costa wished it to be established that he did not owe £1925 to ENEL, ‘with which he had never entered into any contract’).

⁸⁴ *Giudice Conciliatore* of Milan (Fabbri), Case 1907/63 (R.G.), *Costa v ENEL*, Brief on behalf of Flaminio Costa, 15 November 1963, 8.

⁸⁵ Interview with Bruna Vanoli Gabardi, Milan, 27 October 2017 (suggesting that Stendardi and Fabbri might have met through the Milanese Monarchist circles).

⁸⁶ *Giudice Conciliatore* of Milan (Fabbri), Case 1907/63 (R.G.), *Costa v ENEL*, Order of 16 January 1963, 12 (expressly noting that he was legally required to refer the matter to the ECJ, as he acted as court of last instance in that particular lawsuit).

⁸⁷ *Ibid.*, 15-16.

⁸⁸ ICC, Case 122/64 (Reg. Ord.), *Costa v ENEL*, Judgment no. 66 of 23 June 1965, OJIR no. 178 of 17 July 1965.

⁸⁹ ECJ, Case 6/64, *Costa v ENEL*, Brief on behalf of Flaminio Costa, 15 May 1964.

⁹⁰ *Ibid.*, 38.

⁹¹ *Ibid.*, 36.

⁹² *Ibid.*

Stendardi went all-in also as regards the legal consequences of the conflict between the ENEL Statute and the EEC Treaty: in addition to a violation of Article 11 IC, which the ICC had expressly ruled out in its judgment no. 14 of 1964, Stendardi argued that, by encroaching upon an area where sovereign powers had been surrendered to the EEC, the Italian legislature had acted *ultra vires*; a preliminary ruling by the ECJ was thus necessary because it would have enabled Italian courts to disapply the ENEL Statute.⁹³

The Italian Government, represented by Tracanna and the eminent international law professor Riccardo Monaco, claimed that the request for a preliminary ruling was 'absolutely inadmissible', insofar as the ENEL Statute had to be applied regardless of any conflicting EEC Treaty provision, hence the referring court had no use for the interpretation of the latter.⁹⁴ The Italian Government added that the order for reference in fact sought a ruling on the consistency between the ENEL Statute and the EEC Treaty, a result that could only be obtained, at the request of the Commission or of another Member State, through the infringement procedure laid down in Articles 169 and 170 EEC.⁹⁵

The European Commission, represented by its legal counsel Giuseppe Marchesini, shared the reservations expressed by the Italian Government as to the referring court's 'alternative use' of the preliminary ruling procedure,⁹⁶ but deemed it appropriate to submit its observations to the ECJ in the light of the 'troubling' findings set out in ICC Judgment of 24 February 1964, no. 14.⁹⁷ The Commission took the view that the ICC's refusal to recognize the internal supremacy of the EEC Treaty *vis-à-vis* subsequent domestic statutes was not only liable to undermine the functioning of the common market in Italy, but could have inevitable repercussions in other Member States and in the whole Community legal order.⁹⁸ It also expressed the wish that the ICC jurisprudence should

⁹³ *Ibid.*, 8-9 and 14-15. Stendardi attached to his brief Catalano's Case note on ICC Judgment of 24 February 1964, 87 *Foro Italiano* (1964), I, 474.

⁹⁴ ECJ, Case 6/64, *Costa v ENEL*, Brief on behalf of the Italian Government, 20 May 1964, 5.

⁹⁵ *Ibid.*, 5-6.

⁹⁶ The 'alternative use' of the preliminary ruling procedure is seeking a ruling on the compatibility of a national norm with EU law. See A. Tizzano, '*Foglia-Novello* atto II, ovvero la crisi dell' "uso alternativo" dell'art. 177 CEE', *Foro Italiano* (1982), IV, 308-31; D. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (2011) 82-83.

⁹⁷ ECJ, Case 6/64, *Costa v ENEL*, Brief on behalf of the European Commission, 22 May 1964, 4-5.

⁹⁸ *Ibid.*, 5.

not be regarded as final until the ECJ had had the opportunity to rule on the scope of the commitments undertaken by the Member States under the EEC Treaty.⁹⁹

At the hearing of 11 June 1964, both Costa and Stendardi took the floor, but only the former addressed the issue of supremacy.¹⁰⁰ After a bombastic salute to the ‘supreme magistracy of the Community, our new great motherland’,¹⁰¹ Costa challenged the Italian government’s contention that the referring court was obliged to apply only the ENEL Statute and insisted on the admissibility of the request for a preliminary ruling.¹⁰² He also added that the Commission’s concerns about the ICC ruling were well-founded, albeit he noted that the ICC might change its mind in the light of the ECJ jurisprudence.¹⁰³ Finally, he noted that it would be absurd for the Italian government to insist in applying the EEC Treaty only insofar as it was advantageous, but not to the extent it was inconvenient, further to the principle *qui habet commoda, ferre debet onera*.¹⁰⁴

ENEL’s attorney Professor Massimo Severo Giannini, one of the most eminent scholars of post-World War II administrative law in Italy,¹⁰⁵ downplayed the importance of the ICC judgment.¹⁰⁶ He claimed that the ICC had refused to rule on a conflict between Community law and Italian legislation because its jurisdiction was very limited relative to other Constitutional Courts: the ICC, indeed, could only resolve conflicts between the IC and Italian legislation. The lawyer for the Italian government, Tracanna, in a somewhat convoluted oral argument, reiterated the claim that the preliminary ruling procedure did not enable individuals to request a ruling as to the infringement of the EEC Treaty¹⁰⁷ and

⁹⁹ Ibid.

¹⁰⁰ ECJ, Case 6/64, *Costa v ENEL*, Transcript of the public hearing of 11 June 1964.

¹⁰¹ Ibid., I/1.

¹⁰² Ibid., III/2.

¹⁰³ Ibid., III/5.

¹⁰⁴ Ibid., III/6 (‘He who takes the benefits must [also] bear the burdens’). This principle is related to the prohibition of retaliatory self-help, a topic that one of the ECJ judges of the *Costa v ENEL* ruling, Robert Lecourt, had previously investigated in his scholarly writings. See W. Phelan, ‘The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt’, 28 *European Journal of International Law* (2017) at 953 (highlighting Lecourt’s own connection between supremacy and the prohibition of retaliatory self-help).

¹⁰⁵ See A. Sandulli, ‘Administrative Law Scholarship in Italy (1800-2010)’, *Rivista Trimestrale di Diritto Pubblico* (2010) 1089-1090.

¹⁰⁶ ECJ, Case 6/64, *Costa v ENEL*, Transcript of the public hearing of 11 June 1964, VI/4.

¹⁰⁷ Ibid., VII/6.

that, in any case, national courts were not entitled to suspend the application of Italian laws.¹⁰⁸

In his opinion in the *Costa v ENEL*, Advocate General Lagrange, who had replaced Advocate General Roemer in that case on 9 June 1964,¹⁰⁹ took the view that the resolution of a conflict between the EEC Treaty and subsequent domestic legislation was ‘a constitutional problem’.¹¹⁰ Whilst some Member States, such as the Netherlands, had solved it ‘in a most satisfactory manner’, there were still ‘difficulties of principle’ in Italy.¹¹¹ In particular, the ICC Judgment of 24 February 1964 no. 14, which had granted precedence to an Italian subsequent statute inconsistent with the EEC Treaty, could have ‘disastrous consequences’ for the functioning of the common market.¹¹² Nonetheless, Advocate General Lagrange hoped that Italy could ‘find a constitutional means of allowing the Community to live in full accordance with the rules created under its common charter’.¹¹³ Advocate General Lagrange also invited the ECJ to dismiss the plea of inadmissibility. ‘The only problem which could possibly arise’, he added, was whether Italian courts could autonomously refuse to apply national statutes that the ECJ considers at variance with the EEC Treaty or they were bound to refer the matter to the ICC first.¹¹⁴ The Advocate General noted that this was a matter of division of internal jurisdiction between Italian courts and that the ECJ should provide a preliminary ruling anyway, as, ‘even if premature as regards domestic procedure’, it ‘will have effect also as regards the Constitutional Court’ and thus ‘will even have saved time’.¹¹⁵

The contents of the ECJ’s landmark judgment of 15 July 1964 in *Costa v ENEL* are well-known.¹¹⁶ In line with *Van Gen en Loos*, the ECJ distinguished the EEC Treaty from ‘ordinary international treaties’ and averred that the Community legal order, to the benefit of which the Member States had ‘limited their sovereign rights’, had become an

¹⁰⁸ Ibid. IX/6.

¹⁰⁹ ECJ, Case 6/64, *Costa v ENEL*, Order of the President of Court, 9 June 1964 (based on a joint request by M. Lagrange and K. Roemer).

¹¹⁰ Advocate General Lagrange, Case 6/64, *Costa v ENEL*, Opinion of 25 June 1964, EU:C:1964:51, [1964] ECR 600, at 604.

¹¹¹ Ibid.

¹¹² Ibid., 605.

¹¹³ Ibid., 606.

¹¹⁴ Ibid., 607.

¹¹⁵ Ibid.

¹¹⁶ ECJ, Case 6/64, *Costa v ENEL*, Judgment of 15 July 1964, EU:C:1964:66, [1964] ECR 585.

'integral part' of national legal systems, that Community provisions bound Member States and their nationals alike, and that also domestic courts were 'bound to apply' Community norms.¹¹⁷ From such 'integration into the laws of each Member State' and from the 'terms and the spirit of the Treaty', the ECJ inferred that it was 'impossible' for Member States' organs to accord precedence to domestic measures over Community law,¹¹⁸ as doing so would jeopardise the attainment of the objectives of the Treaty contrary to the principle of loyal cooperation, give rise to discrimination on the basis of nationality prohibited by the Treaty, undermine the 'direct applicability' of regulations, and call into question no less than the 'legal basis' and the 'character' of the EEC.¹¹⁹ Thus, the ECJ dismissed the plea of inadmissibility, and ruled that Article 177 EEC, on the preliminary ruling procedure, had 'to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise'.¹²⁰ Member States' courts were thus entrusted with a European 'mandate',¹²¹ to 'disapply' domestic law at variance with Community provisions having direct effect.¹²²

On the merits, however, the ECJ essentially upheld the ENEL Statute. The Community judges took the view that Articles 102 and 93 EEC, requiring Member States to inform the Commission of prospective measures favouring certain undertakings or liable to distort competition, had no direct effect and thus could not be relied upon by individuals;¹²³ that Article 53 EEC was satisfied, as long as domestic measures entailed no discrimination as regards the exercise of the right establishment between the citizens of that Member State and those of other Member States;¹²⁴ that Article 37 EEC was not infringed, as long as domestic monopolies did not introduce any new discrimination regarding the conditions

¹¹⁷ *Ibid.*, 593.

¹¹⁸ *Ibid.*, 593.

¹¹⁹ *Ibid.*, 594.

¹²⁰ *Ibid.*

¹²¹ This apt expression belongs to Monica Claes, *The National Courts' Mandate in the European Constitution* (2006).

¹²² This duty would be clarified by the ECJ in Case 106/77, *Simmenthal*, EU:C:1978:49, para 21.

¹²³ ECJ, Case 6/64, *Costa v ENEL*, Judgment of 15 July 1964, EU:C:1964:66, [1964] ECR 585, at 595-596. The ECJ, however, did recognize the direct effect of Article 93(3) EEC. See also ECJ, Case 120/73, *Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz*, EU:C:1973:152, para 8.

¹²⁴ ECJ, Case 6/64, *Costa v ENEL*, Judgment of 15 July 1964, EU:C:1964:66, [1964] ECR 585, at 596-597.

under which goods are procured and marketed, an issue the ECJ left to the referring court to determine.¹²⁵

Again, this outcome comes as no surprise. Establishing that nationalisations and monopolies in the utilities sector were contrary to EEC law would have alienated not only Italy, but also other Member States that had implemented or planned to introduce similar measures, such as France.¹²⁶ Also, the ECJ would have been unable to enforce a ruling to that effect, considering that, at the time, it could not impose sanctions on Member States via the infringement procedure.¹²⁷ By opting for a politically low-profile ruling,¹²⁸ the ECJ could thus affirm a key legal doctrine such as internal supremacy and safeguard the *effet utile* of the preliminary ruling procedure without triggering any significant opposition from Member States' governments.¹²⁹

Remarkably enough, when the case was referred back to the *Giudice Conciliatore*, the latter turned out to be 'more Catholic than the Pope': in its judgment of 4 May 1966, he found that that the ENEL Statute introduced a new monopoly entailing discrimination between Italian citizens and citizens of other Member States in the market of electricity supply contrary to Article 37 EEC and, accordingly, he ruled that the ENEL Statute and its implementing decrees had 'no effects in the case at issue'¹³⁰ and that Costa did not owe ENEL the sum of £1925 as requested in the impugned electricity bill.¹³¹ Although that ruling was reported by a handful of legal commentators, it did not set a legal precedent for subsequent lawsuits.¹³² The ENEL Statute, thus, remained firmly in place, prompting Stendardi's bitter remark that, all in all, the ECJ ruling in *Costa v ENEL* had limited the

¹²⁵ *Ibid.*, at 597-598.

¹²⁶ See C. Vuillermot, 'La nationalisation de l'électricité en France en 1946: le problème de l'indemnisation', *Annales historiques de l'électricité* (2003) 53-69; M. Einaudi, Nationalisation in France and Italy, *Social Research* (1948) 22-43.

¹²⁷ Lump sums and penalty payments would only be introduced by the Treaty of Maastricht in 1992.

¹²⁸ See A. Vauchez, 'Integration-through-Law Contribution to a Socio-history of EU Political Commonsense', *EUI Working Papers*, RSCAS 10 (2008), (noting that the ECJ judgment in *Costa v ENEL* was in fact 'quite moderate, if not protective of States' interests').

¹²⁹ K. Alter, *Establishing the Supremacy of European Law* (2001) 186-192; A. Mangold, 'Costa v ENEL (1964), On the Importance of Contemporary Legal History', in E. Augusti, N. Domeier, F. von Graevenitz, M. Prutsch (eds), *Inter-Trans-Supra? Legal Relations and Power Structures in History* (2011) 229-230.

¹³⁰ Milan *Giudice Conciliatore*, Case 1907/63 (R.G.), *Costa v ENEL*, Judgment of 1 May 1966, 12.

¹³¹ *Ibid.*, 17-18. £1925 from 1963 is equal to about €22,41 in 2018.

¹³² L. Ferrari Bravo, 'L'issue de l'affaire Costa c. E.N.E.L. devant le Conciliatore de Milan', *Cahiers de droit européen* (1967) 200-228 ('It is to be excluded that it [the *Giudice Conciliatore* judgment of 1966] may set a legal precedent'). See also L. Persico, 'Giudizio d'equità, contrasto tra legge interna e norme comunitarie e poteri del giudice nazionale', *Rivista trimestrale di diritto e procedura civile* (1967) 1650-1651.

cases in which individuals can claim the violation of the Community Treaties by domestic statutes, thus denying the central role that individuals were meant to have in the protection and development of the Community legal order.¹³³

5. Epilogue: the contribution of the *Costa v ENEL* saga to the *approfondissement* of Community supremacy

*Tout va par degrés dans la nature, et rien par saut.*¹³⁴ Likewise, Community supremacy did not emerge all at once with the ECJ ruling in *Costa v ENEL*, but it did so gradually and through a number of small steps.¹³⁵ In the early 1960s, the ‘international supremacy’ of treaties, i.e. prevalence of treaty provisions over domestic legislation in the relations *between* the contracting parties, was already well-established.¹³⁶ In contrast, the ‘internal supremacy’ of treaties, i.e. the prevalence of treaty provisions over domestic law *within* the municipal legal orders, was far from settled, at least in countries of long-standing dualist tradition such as Italy.¹³⁷ Turning to Community law, although the ECJ had ruled in *Humblet* (1960) that the provisions of the ECSC Treaty ‘have the force of law in the Member States following their ratification and [...] take precedence over national law’,¹³⁸

¹³³ G. Stendardi, *Il soggetto privato nell'ordinamento comunitario europeo* (1967) 120-121 (noting that the ECJ judgment in *Costa v ENEL* marked ‘a dangerous turning point for the Community legal order: indeed, the Community is based on the principle that the protection of the legal order takes place through the initiative of private individuals who are part of that legal order’).

¹³⁴ G. Leibniz, *Nouveaux essais sur l'entendement humain* (1765), IV, 16.

¹³⁵ See A. Arena, ‘*Curia non facit saltus*: origini ed evoluzione del principio del primato prima della sentenza *Costa c. ENEL*’, in E. Triggiani et al. (eds) *Dialoghi con Ugo Villani* (2017) 949-957.

¹³⁶ See Article 14 of the United Nation International Law Commission, *Draft Declaration on Rights and Duties of States* (1949), annexed to the General Assembly Resolution 375 (IV) of 6 December 1949 (‘Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law’). See also F. Morgenstern, ‘Judicial Practice and the Supremacy of International Law’, 27 *British Yearbook of International Law*, (1950), 43 (‘It appears to be generally agreed that international law is binding upon states [...] and that the latter cannot rely upon [their] constitution[s] as an excuse. These facts alone are sufficient to establish the supremacy of international law over municipal law’).

¹³⁷ See D. Anzilotti, *Corso di diritto internazionale* (1955) 56-61; G. Morelli, *Nozioni di diritto internazionale* (1958), 66-88; R. Monaco, *Manuale di diritto internazionale pubblico* (1960) 126-143; but see R. Quadri, *Diritto internazionale pubblico* (1963), 41-68 (promoting a monist approach and the supremacy of international treaties over domestic statutes).

¹³⁸ ECJ, Case 6/60, *Humblet*, Judgment of 16 December 1960, EU:C:1960:48, 1960 ECR 559 at 569. Cf. N. Catalano, *Actes officiels du Congrès d'études sur la CECA* (1957) 329-330 (‘du fait même de la ratification

the prevailing view was that the rank of Community law within the Member States' legal orders was a matter of national law.¹³⁹ In Italy, in particular, most authors agreed that Community law took precedence over earlier domestic statutes, but could be overridden by subsequent conflicting statutes.¹⁴⁰

However, in 1962, the Director General of the European Commission's Legal Service, Michel Gaudet, argued that such a piecemeal approach was incompatible with the specific characteristics of the EEC¹⁴¹ and that the effects of Community law within Member States' legal orders had to be inferred from the EEC Treaty itself, as interpreted by the ECJ.¹⁴² Gaudet took the view that EEC Treaty provisions should take precedence over domestic statutes, even if adopted subsequently.¹⁴³ The President of the European Commission, Walter Hallstein, publicly reaffirmed that view at a speech before the European Parliament delivered on 18 June 1964, i.e. less than a month before the ECJ rendered its judgment in *Costa v ENEL*.¹⁴⁴

The ECJ's judgment in *Van Gend en Loos*,¹⁴⁵ of 5 February 1963, clarified that the effects of EEC law within the domestic legal orders were a matter of interpretation of the EEC Treaty, rather than of domestic constitutional law, and that certain Community provisions 'create[d] individual rights which national courts must protect'.¹⁴⁶ In order to facilitate the acceptance of the doctrine of direct effect at the national level, however, the

et de l'insertion du Traité [CECA] dans l'ordre juridique national, ce Traité est devenu une loi nationale [...] il a une force d'abrogation des lois antérieures incompatibles'). It is worth reminding that Catalano was one of the ECJ judges in *Humblet*.

¹³⁹ See P. De Visscher, *Actes officiels du Congrès d'études sur la CECA* (1957) 46 (noting that the authority of the provisions of the Community Treaties within the domestic legal orders had to be determined 'in accordance with the constitutional principles of the different Member States'). See also L. Erades, 'Rapport Général', in *Deuxième colloque international de droit Européen: La Haye 24-26 octobre 1963* (1966) 29-31 (providing a summary of the authority of the Community Treaties in the various Member States).

¹⁴⁰ See N. Catalano, *La Comunità economica europea e l'Euratom* (1957), 63-64; N. Catalano, *Manuale di diritto delle comunità europee* (1962) 145-146; A. Migliazza, *La Corte di giustizia delle Comunità Europee* (1961) 421; R. Monaco, 'Norme comunitarie e diritto statale interno', *Rivista di Diritto Europeo* (1962) 13; N. Catalano, R. Monaco, 'Le problème de l'applicabilité directe et immédiate des normes des traités instituant les Communautés Européennes', in *Deuxième colloque international de droit Européen: La Haye 24-26 octobre 1963* (1966), 127.

¹⁴¹ European Commission's Legal Service, Memo by M. Gaudet to J. Rey and M. Caron, 23 October 1962, 4.

¹⁴² *Ibid.*, 5.

¹⁴³ *Ibid.*, 12.

¹⁴⁴ European Commission, Speech by Walter Hallstein to the European Parliament, 18 June 1964, 11-12 (arguing that Community law took precedence not only over earlier national law, but also over subsequent national law).

¹⁴⁵ ECJ, Case 26/62, *Van Gend en Loos*, Judgment of 5 February 1963, EU:C:1963:1, [1963] ECR 1.

¹⁴⁶ *Ibid.*, 16 (para 1 of the operative part).

ECJ judges resolved not to address the issue of internal supremacy,¹⁴⁷ also because Netherlands constitutional law autonomously enabled domestic courts to set aside national legislation incompatible self-executing international agreements.¹⁴⁸ Yet, Italian commentators still doubted that, in a similar situation, Italian courts would be able to apply directly effective Community provisions in the presence of incompatible subsequent domestic statutes.¹⁴⁹

The ECJ ruling in *Costa v ENEL* is thus appropriately regarded as a ‘legal revolution’¹⁵⁰ because, whilst it did not create the principle of internal supremacy of Community law *ex nihilo*,¹⁵¹ it constituted an essential step in the *approfondissement* of international supremacy,¹⁵² by empowering national courts to set aside domestic statutes at variance with directly effective Community law provisions. This paved the way for the ‘judicialization’ of European politics,¹⁵³ a process pioneered by domestic courts, acting as

¹⁴⁷ See J. Weiler, ‘The Community System: the Dual Character of Supranationalism’, *Yearbook of European Law* (1981) 276 (speaking of a ‘deliberate and politically wise attempt to phase in the progressive evolution of normative supranationalism so as to ensure as far as possible a smooth reception in the national legal and political order.’); See also M. Rasmussen, ‘Revolutionizing European law: A history of the Van Gend en Loos Judgment’, 12 *International Journal of Constitutional Law* (2014) 154 (suggesting that ECJ Judge Alberto Trabucchi expressly asked the other judges not to address the issue of supremacy in *Van Gend en Loos* due to possible constitutional obstacles in Germany and Italy).

¹⁴⁸ See Opinion of AG Roemer in Case 26/62, *Van Gend en Loos*, EU:C:1962:42, 1963 ECR 16, at 20 (referring to Article 66 of the Netherlands Constitution as the source of the domestic supremacy of international agreements). See also L. Erades, ‘Rapport Général’, in *Deuxième colloque international de droit Européen: La Haye 24-26 octobre 1963* (1966) 29-30.

¹⁴⁹ See N. Catalano, ‘L’inserimento diretto delle disposizioni contenute nel Trattato istitutivo della CEE negli ordinamenti giuridici degli Stati membri’, *Foro Padano* (1963) V, 35-36 (arguing that Italian courts had no need to seek a preliminary ruling as they had no power to resolve that normative conflict); N. Ronzitti, ‘L’art. 12 del trattato istitutivo della C.E.E. ed i rapporti tra ordinamento comunitario e ordinamenti degli Stati membri’, *Foro Italiano* (1964), IV, 100 (‘against an ordinary statute introducing new custom duties [...] there would be no judicial remedy at the national level’).

¹⁵⁰ See M. Rasmussen, ‘From *Costa v ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution’ in M. Poiares Maduro and L. Azoulay (eds), *The Past and Future of EU Law* (2010), 68-95.

¹⁵¹ See A. Arena, ‘The Twin Doctrines of Supremacy and Pre-emption’, in R. Schütze, T. Tridimas (eds), *Oxford Principles of European Union Law* (2018), 311; A. Pellet, ‘Les fondements juridiques internationaux du droit communautaire’ (1997) 263; B. de Witte, ‘Direct Effect, Supremacy and the Nature of the Legal Order’ in G. de Búrca, P. Craig (eds), *The Evolution of EU Law* (2011) 361.

¹⁵² See J. Weiler, ‘The Community System: the Dual Character of Supranationalism’, 1 *Yearbook of European Law* (1981) 275-276.

¹⁵³ See M. Shapiro, A. Stone Sweet, *On Law, Politics, and Judicialization* (2002); A. Stone Sweet, ‘The European Court of Justice and the Judicialization of EU Governance’, in *Yale Faculty Scholarship Series* (2010).

‘motors’ of European integration,¹⁵⁴ through a ‘wide and enthusiastic’ use of the preliminary ruling procedure.¹⁵⁵

It cannot be ruled out that, without the *Costa v ENEL* saga, the internal supremacy of Community law would have emerged anyway.¹⁵⁶ After all, a growing body of legal scholarship,¹⁵⁷ the European Commission’s Legal Service,¹⁵⁸ and even some ECJ members¹⁵⁹ had already leaned in that direction before 1964. But it seems fair to say that, in such a counterfactual scenario, internal supremacy would have surfaced at a later date and not necessarily with the same features. In particular, it seems doubtful that, without the ICC Judgment in *Costa v ENEL* of 24 February 1964 – which, as noted above, posed an existential threat to the EEC and a direct challenge to the ECJ’s preliminary jurisdiction – the ECJ would have entrusted national courts with the mandate to disapply incompatible national laws as early as in 1964.¹⁶⁰ Had the ICC been requested to rule on a conflict between Community law and an item of domestic legislation of lesser importance for Italy’s political and economic stability than the ENEL Statute – say, a statute dating back to the Fascist era – the Italian justices might have been willing to strike down such a statute under Article 11 IC, thus giving Community law a rank higher than Italian statutes, without deviating from the well-established dualist understanding of the

¹⁵⁴ See K. Alter, ‘The European Court’s Political Power’ 19 *West European Politics* (1996) 467.

¹⁵⁵ See J. Weiler, ‘The Transformation of Europe’ 100 *The Yale Law Journal* (1991) 2426.

¹⁵⁶ On the use of counterfactual reasoning in legal research in general see G. Mitchell, ‘Case Studies, Counterfactuals, and Causal Explanations’, 152 *University of Pennsylvania Law Review* (2004) 1517; on its consistency with the international law methodology see R. Mushkat, ‘Counterfactual Reasoning: An Effective Component of the International Law Methodological Armor?’ 18 *German Law Journal* (2017) 59-98; on its application to EU competition law see V. Robertson, ‘A Counterfactual on Information Sharing: The Commission’s Horizontal Guidelines 2011 Applied to the Leading Cases’, 36 *World Competition* (2014) 459-488.

¹⁵⁷ See Fédération Internationale pour le Droit Européen, ‘Resolution of 25 October 1963’, in *Deuxième colloque international de droit Européen organisé par l’Association Néerlandaise pour le Droit Européen, La Haye 24-26 octobre 1963* (1966), 288-289 (unanimously stating that it was ‘absolutely necessary to ensure the supremacy of Community law over subsequent national law in all Member States’ to be achieved ‘either through constitutional amendments or via a development of the case-law based on the transfer of Member States’ competences’).

¹⁵⁸ European Commission’s Legal Service, Memo by M. Gaudet to J. Rey and M. Caron, 23 October 1962, 4; European Commission, Speech by Walter Hallstein to the European Parliament, 18 June 1964, 11-12.

¹⁵⁹ See A. M. Donner, ‘National Law and the Case Law of the Court of Justice of the European Communities’, 1 *Common Market Law Review* (1963) 14 (stating that, if asked to do so, the ECJ in *Van Gen den Loos* ‘would have presumably ruled that the EEC Treaty has precedence over local law’). For an assessment of Donner’s 1963 statements, see J. Reestman, M. Claes, ‘For History’s Sake: On *Costa v. ENEL*, André Donner and the Eternal Secret of the Court of Justice’s Deliberations’, *European Constitutional Law Review* (2014) 194-195.

¹⁶⁰ *Ibid.*, at 192 (noting that the ICC judgment in *Costa v ENEL* acted as a ‘trigger’ for the emergence of the supremacy doctrine in the ECJ jurisprudence).

relations between the Community legal order and the Italian one.¹⁶¹ And the ECJ, at least for some time, might have regarded that centralised judicial review mechanism as a sufficient ‘constitutional means’ to ensure the supremacy of Community law within the Italian legal order, as suggested by no other than Advocate General Lagrange,¹⁶² the spearhead of the ‘dissident supranationalists’ following the schism from international law scholars occurred at the 1957 Stresa Conference.¹⁶³

It is thus no wonder that the principle of Community (internal) supremacy is almost universally associated with *Costa v ENEL*. Yet, Stendardi’s name still lies in obscurity. Does this mean that Stendardi’s role was somewhat unessential, that any other lawyer worth his or her salt would have achieved the same outcome with Costa as a client? In fact, all evidence suggests that there would have been no *Costa v ENEL* without Stendardi: first, he sought out and found Costa, the perfect plaintiff for a lawsuit against ENEL, as he happened to be both a customer and a shareholder of Edisonvolta; second, Stendardi persuaded Costa to prevent ENEL employees from reading his meter and to refuse to pay his electricity bills, thus giving rise to a lawsuit that, because of its value (i.e. less than £2000), would have been handled by the *Giudice Conciliatore* as a court of last instance, thus triggering the obligation under Article 177(3) EEC to make a preliminary reference to the ECJ; third, he cajoled two different Italian magistrates – who presumably had very little knowledge of Italian constitutional justice, let alone of the preliminary ruling procedure – to refer the case to the ICC and, in one case, also to the ECJ;¹⁶⁴ fourth, he

¹⁶¹ The ICC actually reached that conclusion in Joined cases 50, 296, 297 and 298/75 (Reg. ord.), *Industrie chimiche Italia centrale (I.c.I.c.) v Ministero del commercio con l'estero*, Judgment no. 233 of 1975 (declaring certain provisions of a decree-law dealing with agricultural matters at variance with EEC law unconstitutional under Article 11 IC).

¹⁶² Advocate General Lagrange, Case 6/64, *Costa v ENEL*, Opinion of 25 June 1964, EU:C:1964:51, [1964] ECR 600, at 606-607 (claiming that conflicts between the EEC Treaty and subsequent domestic statutes were ‘a constitutional problem’ and that whether Italian courts could disapply those statutes or they were bound to refer the matter to the ICC was just ‘a matter relating to the division of internal jurisdiction between the courts of a Member State’, of no concern to the ECJ).

¹⁶³ See J. Bailleux, ‘Comment l’Europe vint au droit’, 60 *Revue française de science politique* (2010) 317-318 (noting that Maurice Lagrange published the inaugural manifesto for the ‘dissident supranationalists’: M. Lagrange, ‘L’ordre juridique de la CECA vu à travers la jurisprudence de sa Cour de Justice’, 5 *Revue du droit public et de la science politique en France et à l’étranger* (1958) 841-865).

¹⁶⁴ See T. Pavone, ‘Revisiting Judicial Empowerment in the European Union’, 6 *Journal of Law and Courts* (2018) (forthcoming) (suggesting that insufficient training, workload pressures, and cultural aversion to judicial review can induce lower domestic courts to resist Europeanization through the preliminary ruling procedure even when it would lead to judicial empowerment).

litigated and ultimately prevailed against some of Italy's most prominent lawyers and academics of the time;¹⁶⁵ fifth, he obtained an ECJ judgment that not only espoused his views on supremacy, but whose wording reflects – to a quite astonishing degree – that of his 1958 treatise on the relationship between Community and Italian law.¹⁶⁶

In sum, Stendardi prophesised Community supremacy and saw to it that his prophecy would be fulfilled. Yet, as so often, *nemo propheta in patria sua*:¹⁶⁷ Stendardi's name and his achievements are still known but to a few. It is thus time to finally recognise Stendardi's as the first of many Italian 'Euro-lawyers',¹⁶⁸ i.e. entrepreneurial attorneys constructing lawsuits and sometimes even ghost-writing preliminary references to the ECJ to further Europe's 'integration through law',¹⁶⁹ and arguably as the '*prime architect*' of the doctrine of internal supremacy of Community law.

¹⁶⁵ ENEL was represented, *inter alia*, by Italian academic heavyweights Francesco Santoro Passarelli, Luigi Galateria, Massimo Severo Giannini, and Leopoldo Piccardi, an attorney and former judge of the Italian Council of State; the Italian Council of Ministers was assisted by Deputy State Attorney General Luciano Tracanna and by Riccardo Monaco, an eminent professor of international law who would become the Italian judge at the ECJ as from October 1964.

¹⁶⁶ Cf. G. Stendardi, *I rapporti fra ordinamenti giuridici italiano e delle Comunità europee* (1958), 59 ('[T]he establishment of the Community would be quite meaningless, if the acts of its institutions could be nullified by means of a unilateral measure of a Member State which could prevail over Community law') and ECJ, Case 6/64, *Costa v ENEL*, Judgment of 15 July 1964, EU:C:1964:66, [1964] ECR 585, at 594 (stating that the binding effects of Community legislation 'would be quite meaningless, if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law').

¹⁶⁷ 'Nobody is a prophet in his own country'. Cf. John 4:44, Matthew 13:57, Mark 6:4, Luke 4:24.

¹⁶⁸ See A. Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (2015). See also W. Mattili, A. Slaughter, 'Constructing the European Community legal system from the ground up: the role of individual litigants and national courts', *Harvard Jean Monnet Working Papers Series*, 96(6) (1996). For a comprehensive assessment of the role of Euro-lawyers, see T. Pavone, *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe*, Princeton PhD Thesis (2018).

¹⁶⁹ For an account of the origins of the project, see R. Byberg, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe', 18 *German Law Journal* (2017), 1531-1556. For a recent reassessment of the project's findings, see D. Augenstein (ed), *'Integration through Law' Revisited: The Making of the European Polity* (2012).