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Better regulation in the global market: institutional and economic implications for Italy. The role of the World Trade Organization

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BETTER REGULATION IN THE GLOBAL MARKET: INSTITUTIONAL AND ECONOMIC IMPLICATIONS FOR ITALY. THE ROLE OF THE WORLD TRADE ORGANIZATION

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Italy is clearly undergoing a dramatic cultural regression, which makes it difficult for the country to see and understand its place in the world, and leads to superficial, snobbish attitudes. It is as if we were an elderly marquise looking at the world through her window, and not understanding it. We are experiencing a major revolution: in the last several years, two billion people have entered the market who were previously locked out of it, in the next few years, another two billion people will do so. This changes everything and provokes positive and negative reactions everywhere … [Italy] risks making all the wrong choices, because it cannot understand what is going on".
("Paese Miope", Corriere della Sera, 29 December 1996, Interview with Renato Ruggiero, Director General of the World Trade Organization).

Foreword[1]

This paper will try to analyze the goals, functions, and modalities of national regulation, in light of the new scenarios created by the global market, intended also as a new total competitive game permeated by rules. Significant space will be dedicated to the training efforts focusing on global international law which have arisen in the last decade. In this framework we will discuss the central role played by private subjects, who, in safeguarding their individual interests, become efficient servers of justice, to which they contribute both by exercising their right to participate in regulatory processes and by fueling international legal cases. Thanks to this double role, private subjects – which include, but are not limited to firms – operate as a widespread, plural source for fueling global law, and provide the indispensable and costly service of controlling and defending legal order.

Within the framework of the innovations promoted by legal globalization, specific attention will be paid to the implications on national regulation arising out of the "right to trade", which is universally recognized and molded after the rules of the WTO underwritten in Marrakech on 15 April 1994 and ratified by Italy with law n. 747 of 29 December 1994. We will attempt to provide a specific Italian interpretation of these implication, in order to identify possible solutions to be implemented for achieving coherence between the national legal system and international law. We will also look at

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[1] This contribution summarises the research undertaken on behalf of the Scuola Superiore della Pubblica Amministrazione (Research project "Evolutionary perspectives on the World Trade Organisation and Italy's role in the new cycle of trade negotiations"), and includes the contents of a presentation made at the Foundation for Legal Training of the Florence Bar Association (Presentation by D. Ciccarelli during the Study Day on "Legal aspects of the internationalisation of Italian firms: co-operation and outsourcing agreements", Florence, 23 March 2007). The contents of this paper are prevalently scientific in nature, and opinions expressed herein are strictly personal.

the existential drama of the European Community, whose reason for being, institutional profile, and legal subjectiveness have been sent into a crisis by the creation of the World Trade Organization and the development of global international law. This crisis provoked widespread heterogeneity, starting with the available seats in international organizations. However, rather than encouraging efforts to achieve coherence with the new legal centrality of nations and international organizations, it has so far been obscured by psychological inertia and inadequate customs, both of which fall mechanically into step with the importance of the role played by the European Community in the second half of the 20th century, and attempt the impossible feat of creating an epic role of the EU in fora reserved to nations, going as far as to augur and consent, without legal backing, the de facto re-interpretation of the European Union as a nation state[2].

1. National regulations in the new framework of legal globalization. Structural innovations made necessary by international law

Within the scenario of judicial globalization, national regulators, in their role as relevant actors for the correct functioning of the world market, are subject to an incisive judgment of legitimacy on the part of international law, whose main criterion for evaluation is reason (*aequitas*). This system is supported by competition, which hardly tolerates privileges and arbitrariness, and implemented by the WTO. In light of the pressures exerted by the market and by the WTO system, national regulators do not lose their policy privileges, in terms of having the right/obligation to pursue collective interests that go beyond trade throughout the national territory (health, environment, consumer protection, national security), but they can lose, in large part if not entirely, the freedom to adopt poor regulations that are inadequate to pursue stated goals, or to take decisions that lead to unjust privileges or excessive collateral damage (in terms of disrupting market behavior). To the extent that the quality of national legislation becomes a crucial prerequisite for the efficient functioning of international markets, national regulators will thus become the main actors in the WTO legal system. This legal system sees the principles of the efficient allocation of resources, fair competition, and sustainable development as parameters of legitimacy.

The rapid multiplication of trade relations between operators located in different continents has mandated that the rule of law also apply to the uncertain fluctuation of statute-based power, since the strength of the market itself has been responsible for providing the impulse for strengthening global international law, whose main innovation has been the addition of national regulators to the spectrum of actors subject to the norms and decision of a legal system that is becoming increasingly universal.
Although in the past the power of the state apparatus in national dynamics, although it was subject in principle to the counterbalances of single institutional assets, often prevailed over societal interests – which although widespread, were poorly organized compared to the compact defensive organization of bureaucracies – equality, reason, coherence, and proportionality, the judicial globalization that has now taken root as resulted in the global market, through the WTO, becoming a cohesive force at the service of local communities in each individual countries. It is thus able to ensure that the trend towards efficiency and rewarding of competitive advantages engendered by

[2] See. art. 241 and following articles of the penal code: “Crimes against the legal status of the State”.

competition will transform itself into a legal system that is able to stem the distortions produced by state bureaucracies. In this framework, in which individual interests become a category and instrument for law and justice – an "invisible justice", paraphrasing Adam Smith – the WTO becomes a healthy and efficient mechanism that the global market has adopted in order to tackle the injustices arising out of the decisions of national regulators. Seen in this light, the rulings of the WTO's legal organs become precious templates for the quality of regulation.
Each WTO case, rather than merely being a trade dispute between different counties, can thus be seen as evidence of a general, positive, silent, and stable process, on the part of the market, to erode the power of national administrations to adopt provisions that are misleading, technically inaccurate, and/or deliberately aiming at favoring certain small social groups, which are unjustly privileged by the law [3].

In order to fulfill its mission, the WTO system is based on simple, clear principles, but it also uses sophisticated, complex mechanisms. It eschews authoritarian impositions, but rather feeds off the market's energy and pluralist dynamics, which it uses in order to ensure that private interests themselves, organized according to varying strategies, become tools of enforcement that encourage a constant effort to continue along the process of juridicization of world trade[4], a process which includes both controls and sanctions: millions of individuals who are indirectly at the service of justice, and at no cost.

Within the framework of global law, savvy national regulators help draft, in a gradual and interactive manner, the rules of the international market, by organizing effective partnerships with firms and lawyers at the domestic level. The system that takes shape through judicial globalization is thus intelligent, since the ends harmoniously blend with the means, and form with substance. This system does not settle for adopting abstract norms and blaming reality for deviancy. It is rather, by its own nature, an expression of reality, which enters into a harmonious, collaborative relationship with other expressions of reality. In order to achieve efficient results in a highly complex scenario in which entrepreneurs and consumers from all over the world participate (as of 1 April 2007 the WTO has 150 member countries[5]), the components of the global judicial system must operate jointly, which requires sophisticated organizational and communication tools. The importance of these tools needs to be stressed, in part because it they contrast with many of the previous reference framework for law,

[3] "…commerce and manufactures gradually introduced order and good government, and with them, the liberty and security of individuals, among the inhabitants of the country, who had before lived almost in a continual state of war with their neighbours, and of servile dependency upon their superiors" (Adam Smith, 1776, The Wealth of Nations (Chapter IV "How the Commerce of the Towns contributed to the Improvement of the Country")

[4] To make things clear: the rules of commerce become rules of convenience whose capacity for compulsoriness is, in fact, applicable to all of life's situations, since in the era of the global market all which cannot be traded will not be produced nor consumed.

[5] In this paper, we will sometime adopt the term 'states' as a synonym of 'members'. Within the WTO framework, however, these terms are far from interchangeable (art. XII of the WTO Charter: "Any State or separate customs authority possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement …"): as critical cases, we can point to those of the European Community and of other situations (ex. Taiwan, Hong Kong, Macao). As we will see in this paper, these are truly problematic cases under many basic aspects.

especially civil law[6], in which problems associated with implementation seemed too close to actual reality and too far removed from perfect intellectual geometries to deserve the attention of legal scholars...

One of the main aspects of the WTO system is thus the fusion of the 'normative' and 'control' functions, which takes place through the actual behavior of the business community. The system of stakeholders that looks to the WTO is lacking – fortunately, it should be said – both a legislator (since rules tend to arise almost spontaneously out of market mechanisms, for which firms are bearers and states spokespeople) and an autonomous control apparatus that is formally entrusted with verifying that rules are respected throughout the world – a patently impossible task. There thus isn't an 'international trade police', and due to this vacuum, individual market stakeholders – whether entrepreneurs or consumers – take it upon themselves to exert vigilance. The idea of investing an administrative body with the role of 'neutral' custodian (*sine ira ac studio*, as Max Weber, the theorist of bureaucracy, would say) of global international law – from Australia to Tunisia, from Germany to India, from Brazil to Mexico, from Canada to Thailand, from Japan to Ghana – is neither serious nor realistic.

The judicial system promoted by the market government could thus be called a system 'of wide-raning intelligence'[7], since it feeds off the contributions of all the stakeholders within the trade community, granting each one of them a role within an efficient, transparent circuit that aims to favor the free flow and processing of information. This is a circuit whose use, functioning, and viability is in the interest of all. The capacity to transmit and process – through communications between the various components – an enormous mass of high quality (accurate, trustworthy, and timely) information is one of the system's main strengths, which leads to a virtuous circle (cooperative game) through which marginal stakeholders, attracted by the possibility of accessing this information, consent to paying entrance fees, which are the resources to be employed in fueling the process.
The game is certainly a complex one, since the scenario it deals with – the world market – is itself extremely complex. In this game, individuals recover part of their crucial functions, at the expense of central authorities. The new global international law framework only apparently remains dominated by the state, but it fact it promotes an extremely dense network of relations, which includes individuals, who can also act through civil society associations[8]. WTO law is thus fueled to a greater extent by the

[6] "[…] the dominant aspiration was towards pure lawfulness, the purification of the discipline from any contamination […]: constitutional, administrative, international, and lastly ecclesiastic legal scholars all followed this path […]. Today, many of us, but not all, see this purified law as a precious but empty subject, and we ask ourselves if these beautiful, perfect, exemplary formal constructs that have never been tested in real life have any other use besides giving intellectual joy. Therefore, many of us would like to test our constructs […]" (A. C. Jemolo, *Lezioni di diritto ecclesiastico*, 1954).
"Globalisation law is not pure, nor does it intend to be: purity is not among its goals, which instead include the implementation of relevant, effective tools that can be immediately put to use by economic operators. In this case, it is not validity that is dominant, but rather its opposite, effectiveness" (Paolo Grossi, "Globalizzazione, diritto, scienza giuridica", Conference held in front of the joint classes of the Accademia dei Lincei on March 7, 2002 (Il Foro Italiano, V, May 2002).
[7] This vivid expression (sistema ad intelligenze distribuite) was coined by prof. Stefano Micelli.
[8] "… according to the multi-level model, the State maintains a monopoly over relations with civil societies, while international organization maintain a monopoly over relations with states. Civil society is the foundation of the State, while states are the foundation of international organization. Instead, the latter

nation than by the state!

The penetration of international law into domestic legal system and into civil society thus tends to erode at the root many past dualisms ("The global legal system is not a layer that lies above the national system. We are not dealing with two levels .."[9]), especially the one between public and private sectors, with national interests taking shape directly in the global arena, especially thanks to individuals. States often play a role as mediators, oscillating between automatic ratification and intelligent synthesis, according to their authoritativeness in the social arena.
The new way in which law takes shape, through the active participation of stakeholders, seems to argue in favor of a more authentic, substantial form of *democracy*, which replaces *bureaucracy*, as the latter rests on the centrality of knowledge (it would be useful to critically re-evaluate the use of civil service public exams and recruitment methods through the prism of this new scenario) and administrative power. The formal bulkheads through which public administrations attempted to disassemble the national interest – both conceptually and in operational terms – have also fallen, and have given way to the emergence of the need to develop a national, unified, and strategic approach to ongoing international processes.

We have already hinted at the fact that in the new framework the modalities and tools for organizing participation have themselves become an important part of jurisprudence, since the participation of individuals is itself rigorously proceduralised. The right to "notice and comment" (in regulation procedures) and the right to be heard (in adjudication procedures), which are essential elements of correct procedures, play an important role in the functioning and legitimization of international organizations. The procedures that ensure this participation are originally complex and continuously evolving, as they need to balance the social aspiration to widespread participation with the expectation of public administrations[10]. By turning to the 'best doctrine' classification[11], we can identify five forms of participation accepted by international organizations to govern globalization: 1. the right of national governments to participate in global institutions (this is the typical functioning modality for international organizations); 2. the right of private subjects to participate in national procedures; 3.

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have established direct and indirect relationships with civil society. The World Bank, for example, requires that the states it finances consult local communities with regards to environmental projects and settlement plans, and allow them to appeal to a special Bank authority if national authorities do not respect their obligation to hear them out (in note: F. Bignami, *Civil Society and International Organizations: A Liberal Framework for Global Governance,* see http://eprints.law.duke.edu/archive/00001126/01/civil_society_3_19.pdf, p.3). It has been observed that the involvement of non-governmental institutions and civil society in treaty preparation procedures, in overseeing the respect of obligations contained therein, and in ensuring their implementation has been crucial and indispensable, since it has brought added knowledge and competence in the decision-making process (in note: E. Riedel, *The Development of International Law: Alternative Treaty-Making? International Organizations and Non-State Actors*, ..). Therefore, international organizations are not based only on states; they have established direct relationships with civil society" Sabino Cassese, *Oltre lo Stato*, Laterza, 2006.

[9] Sabino Cassese, *Oltre lo Stato*, op. cit.

[10] "Relationships are usually tri-lateral (between individuals, national governments, and international organizations), rather than bi-lateral" Sabino Cassese, *Oltre lo Stato*, op. cit.

[11] Sabino Cassese, *Oltre lo Stato*, op. cit.

the right of states to participate vis-à-vis other states; 4. the right of international organizations to participate in other international organizations; 5. the right of private subjects to participate in global institutions.

1.1 'Participation' as a pillar of judicial globalization. Focus on the World Trade Organization

With regards to the classification set out above, the World Trade Organization allows several forms of participation in its processes.

As a member-driven organization, and thus lacking a large central administration (the WTO Secretariat has a staff of just over 500, and its role is that of a secretariat in the narrow sense), the WTO does not have its own autonomous will; instead, it reflects the wills of the members.

The first of the forms of participation mentioned above (the right of national governments to participate in global institutions) is thus an important characteristic of the WTO. The WTO also extensively collaborates with other international organizations (art. V of the WTO charter) whose responsibilities are related to those of the WTO. The WTO framework also provides many opportunities and ways in which private individuals – as stakeholders and in light of their capacities – are called to participate in national and international decision-making processes. For example, the decisions and declarations on anti-dumping (GATT art. VI), with regards to national authorities that launch anti-dumping inquiries, allow stakeholders to safeguards their own interests during the inquiries themselves. Furthermore, authorities must provide all relevant information to interested parties, and allow the latter to present all useful elements, which will in turn be transmitted to other interested parties. Similar dispositions are present in the WTO Agreement on Safeguards, which disciplines the procedures through which members can launch an inquiry, and adopt restrictive measures with regards to imports (safeguards) should there be a "serious danger" for a given sector of the "national industry".

The WTO also has various ways to consult and cooperate (on-line as well) with non-governmental organizations (art. V of the Charter; Guidelines for the organization of relations with ONGs), while in the case of legal disputes, both ONGs and individuals are allowed to present their own briefs, which, at the discretion of the judicial authorities, can become official trial documents (*amicus curiae*) and thus provide interesting fodder for enriching legal doctrine, as well as being tools to achieve direct representation of specific segments of society. As we have already stated, private individuals play a role in the WTO not just as stakeholders, but also as actors whose contribution in terms of knowledge provided to the implementation process is widely recognized. An example of this is the wish to involve private firms in implementing public assistance efforts aiming to help poor countries integrate into world trade (see par. 51 Hong Kong Declaration, Aid for Trade, Integrated Framework).

With regards to the right of each member to participate in the decision-making processes of other members, there are many cases in which – despite the fact that international norms do not explicitly set out the obligation of allowing the participation of private subjects and limit themselves to giving central authorities the role of formal interfaces – the efficient and systematic participation of private national subjects becomes essential if a member intends to fully take advantage of the rights that have

been theoretically granted to it.
This is the case with the Agreement on Tariff Barriers to Trace (TBT Agreement), the Agreement on Technical Barriers to Trade (art. 2.9) and the Agreement on Sanitary and Phytosanitary measures (cd. SPS Agreement) (Annex B), through which the global circuit of WTO Enquiry Points takes shape. This circuit is worth discussing in more detail, since its working mechanisms provide insight on the overall structure of the entire WTO system. It should be stated that the main goal of the two above-mentioned agreements (TBT, SPS) is to prevent national legislators from introducing "unnecessary barriers to trade". The goal is thus to achieve a correct balance between the general interest for "free trade" – which all members declare themselves to be in support of once they underwrite the Marrakech Agreements - and (art. 2.2 TBT [12]) other legitimate national goals (including national security; the protection of human health and safety; animal and plant health; the environment) that are in constant competition with trade interests. The TBT and SPS agreements (so-called 'twin agreements'), much like the WTO itself, thus aim to prod national legislators to respect a series of guidelines that should guarantee that member states, in exercising their right to adopt restrictive trade measures, will follow criteria based on coherence, proportionality, impartiality, and reason, so that the measures that are adopted will be strictly related to stated goals, without creating redundant damages or privileges.
These two agreements are thus an efficient expression of one of the founding paradigms of the WTO system, in that they encourage members to try to achieve a correct balance, on a global scale, between the interests at stake. In order for this balance to be achieved, the WTO system, and thus the TBT and SPS agreements define ad hoc tools – namely, the Enquiry Point circuit – that allow each member to make use of the contribution of all interested parties throughout the world, in order to draft measures that can then be applied to the case at hand.

In cases in which national authorities, instead of focusing on the separation between norms and markets, are actually able to implement a strategic approach that is consistent with the WTO spirit, national Enquiry points can be entrusted with additional tasks that go beyond their standard obligations, and can thus become useful policy tools. This has been the case for Mexico, Brazil, and Canada, whose Enquiry Points have become intelligent sensors ('export alertness' services) for national exporters, allowing them to intervene – in compliance with WTO norms – with critical observations on normative processes in other nations that may damage their interests. Through a timely intervention in the SPS and TBT frameworks, it is possible to dissuade another member from introducing norms that are in compliance with WTO agreements but that set technical requirements that exports may not be able to meet. The circuit works through a system of notifications sent to national Enquiry Points, which theoretically makes it possible for everyone (although in practice this depends on the functioning of individual Enquiry Points) to rapidly become aware of normative processes being adopted

[12] Art. 2.2 of the Agreement on Technical Barriers to Trade: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment …".

anywhere in the world. Through a set procedure, notifications are followed by the observations of interested members, which the authority in charge of adopting the new norm in question is required to "take into account" (of course, this does not necessarily imply that these observations must be accepted). This requirement is one of the many facets of the general commitment to good faith and cooperation between WTO members, which translates into an obligation to motivate legal decisions, including national ones when relevant. The dispositions included in WTO agreements impact all of the law sources that are able to draft national regulations that are relevant to the global market (it is tempting to ask whether in fact there any irrelevant ones)[13].

We would now like to focus on the aspects regarding the innovative nature of the procedural framework, since it is here that the breathtaking innovations that judicial globalization produces – or will produce – can be found, along with important tools to guarantee the quality of regulations. Vice versa, until such innovations continue to be overlooked and thus implemented – in other words, as long as globalization continues to be ignored as the new and logical framework for national regulation and the WTO continues to be seen, in a short-sighted and arbitrary manner, as relevant only for trade and foreign policy – the Copernican revolution launched by the WTO will not be recognized. The steps to be taken will be discussed later in this paper, but it should be pointed out here that this cognitive dissonance is the main cause behind the superficiality and short-sightedness with which Italy – both on the whole and with regards to its communities (universities, professionals, media) – generally approaches the fascinating subject of globalization[14].

It thus happens that although the best doctrine[15] correctly frames Enquiry Points (art. 2.9) of the TBT Agreement as a key to interpret the new international judicial order and the emerging global legal procedures, it is quite unhelpful – indeed, intellectually mortifying – for the European Court of Justice to state, in Opinion 1/94 (par. IX), that TBT norms are "dispositions that...are merely meant to prevent technical rules and norms, along with evaluation procedures for compliance with technical rules and norms, from creating undue obstacles to international trade, in such a way that said agreement must be considered part of the common trade policy, and for this reason can only be stipulated by the Community". This showed that they were trying to confirm their theory that the WTO is merely a tool of communitary trade policy, rather than trying to arrive at a sound legal opinion. The position of the European Court of Justice with regards to the WTO is strongly criticized by many scholars (Tesauro, Tizzano, Everling, Cottier, Pescatore, Marcolungo, Mavroidis, Lavranos, etc.) and will be dealt with, including its existential malaise, later on in this paper.

Judicial globalization – at the center of which[16] the WTO rightly belongs, thanks to the effectiveness of its legal mechanisms – thus imposes a fundamental re-thinking of regulatory mechanisms. Such a process needs to be able to shift the axis of law from bureaucracy to democracy, from the state to society, from civil law to common law, from form to substance. This fundamental re-thinking could have the capacity to bring

[13] The general norm is found in art. XVI:4 of the WTO Charter: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".

[14] "Paese Miope", Corriere della Sera, 29 December 1996, Interview with Renato Ruggiero, cit.

[15] Sabino Cassese, *Oltre lo Stato*, op. cit.

[16] "At the centre of the system is the WTO. Through trade, it regulates – or rather, lends its regulatory authority – to different authorities, for the application of rules regarding the most disparate sectors, from environment to agriculture, fauna, health, and food security" (S. Cassese, *Oltre lo Stato*, op. cit.).

back to the surface the original characteristics of law[17], which many countries, including Italy, have so far largely eluded, thus remaining rooted in theory rather than in reality, in a framework based on the centrality of laws drafted through decision-making processes from which civil society is fundamentally and structurally excluded.

"There can be no doubt that today, law is perceived by laymen – or by relatively savvy legal scholars – as existing in an essentially authoritarian dimension, as a tool for state authority expressed in the normal manifestations of law, administrative acts, and judicial sentences; these manifestations all mark a degree of superiority and distance between the authorities that produce such laws and the wider community"[18] [19] [20].

[17] "Law is not necessarily linked to a socially and politically authoritative entity, and it does not necessarily have as a reference point that formidable power apparatus known as the modern state, even though the historical reality that has accompanied us to this day flaunts the monopoly on law that states have traditionally had. The necessary reference point for law is society, intended as a complex and structured reality, with the possibility for each of its manifestations to produce law, even the people queuing in front of a public office" (Paolo Grossi, "Prima lezione di diritto", Editori Laterza, 2003).

[18] P. Grossi, "L'ordine giuridico medioevale", Laterza, 2001.

[19] "In the immediate post-war period – in the year 1918, the year in which Santi Romano's pamphlet was published – an Italian legal scholar called the State 'a poor dethroned giant' (..). Eighty-five years later, we can still say the same thing; we can clearly see that the crown that was taken from the giant and smashed into pieces is the law itself, which was so precious and venerated in the previous era… Only the legislator – who is always identified with the ruling authority - is allowed to participate in the world of actual deeds; he is the only one who can transform culture, morality, justice, politics, and economics into law … And law, by becoming rigid and formal, thus stands apart from social matters and their irrepressible historicalness … Do we not continue to teach our new students that the characteristics of law are its rigidity, universality and abstraction? And do we not teach that the *civis*, this poor interlocutor, the true victim of power, is just its passive receiver?

There is a strictly cultural dimension (in terms of legal culture) that is impacted by globalization, which must not be kept silent. It concerns the significant introduction of common law cultural values in our world, which is based on civil law … By 'civil law world' we refer to the legal systems of continental Europe and its colonies, which were marked by the chasm opened by the French Revolution, an event that swept away all the judicial values of the Middle Ages and the *Ancien Régime*, and embraces the statuality of law, and identifies it with legal codes. This is the judicial world to which Italy still belongs today.

The common law world is a distant planet with a separate history, arising out of England and its former colonies. … All of this is useful to point out that, to this day, … common law and civil law are two separate judicial models with different bases and mentalities: two judicial customs that are not exactly opposed by certainly very different … The wind of globalization blows mainly from English-speaking North America; it does not bring only barbarism and new inventions, but most of all it brings to our shores a judicial system steeped in customs and judicial values that are quite natural on that continent but completely foreign here. The parallel channel of globalization law is characterized by a judicial culture that is, on the whole, different from ours...From a cultural point of view, the old formal legalism that is so strictly observed and hallowed in the civil law world, through contact with globalization, gains a broader outlook and incentives for many essential reforms" (Paolo Grossi, "Globalizzazione, diritto, scienza giuridica", Il Foro italiano, May 2002, V, 151, Conference in front of the joint classes of the Accademia dei Lincei, 7 March 2002).

[20] "Those who speak in a proper and measured manner do not do so in order to obey a rule, but rather because they are convinced that by doing so they can best communicate with their peers. This is the exact same attitude assumed by people waiting in queue, who are not doing so out of blind obedience, but rather because they feel it is the best way to organize themselves, and thus they get in line. The use of the term 'observing' rather than 'obeying' stresses the fact that the acceptance of these rules is not entirely passive, since it implies the presence of conviction and thus awareness as well. In observing linguistic and legal rules, the individual participates in a sort of collective cooperation in which submission is both spontaneous and objectified … We are all too often dazzled by what happens at the state level […] where law is transformed into authority and where the terrible recourse to sanctions is but a normal aspect of such authority, so normal in fact that it is perceived as an integral part of it … New laws receive little

Indeed, due to WTO rules and norms, a Canadian legislator in Quebec 'must' (compulsoriness is reflected in the utility that can be drawn from it) take into account contributions from entrepreneurs from Damodar in India or Paranà in Brazil, in order to improve his or her capacity to draft norms. At the same time, the system allows each entrepreneur, whether they be Brazilian or Indian (or Australian or German), to quickly intervene to safeguard his or her own interests from the legislative activities of Canadian authorities.

In keeping with the broad and complex scenario of global interdependence, the founding principle of judicial globalization is that of the insufficiency of isolated knowledge: cooperation does not reduce the scope for policy reserved for national representatives, but it does attack, at its very root, the false omniscience that has long been associated with it in the framework of legalistic idolatry.
While it is true that national safeguarding measures must not be 'excessively' restrictive for trade (that is, more restrictive than what is necessary in order to achieve their stated goals), it is also true that limits to trade are legitimate, and thus allowed, whenever it is justified – in terms of 'if', 'how much', and 'how' - by the presence of objective risks. This dynamic means that, within the WTO system, the push towards trade is no longer isolated[21] from other impulses: they all jointly promote increasingly advanced, sophisticated, and cooperative approaches to promoting markets and meeting other needs (environment, consumer protection, health, etc.). The system is thus able to reconcile specific needs for protection with the general, but not absolute, need for trade, proving that it is capable of ensuring the best possible balance between these needs.

In the Preamble to the WTO charter, the parts recognize the goal of the charter to be "raising standards of living" and "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development".

This new perspective also matches with the indications that other international organizations have long proposed, including ideas aiming to institutionalize participatory mechanisms that involve economic and social stakeholders in normative processes. Examples include OECD initiatives on 'Better Regulation', and United Nation (UNECE) initiatives on 'Trade Facilitation' (see UNECE Recommendation n. 4 of 1974), which have the potential for launching a revolution in simplification.

Italy's national institute for simplification, Sem.Pro.Italia, was created within the framework of Trade Facilitation. It was formally instituted in 1991 (Cipes resolution of 4 December 1991), after a survey undertaken by a special study commission ("Technical Commission for the analysis of the costs burdening Italian exports") chaired by prof. Sabino Cassese. In the conclusion of its report – which presented a critical survey of the excessive costs burdening Italy from the logistical, banking, insurance,

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input from legislators – who are rare, careless, and unsystematic -, but rather they arise out of the spontaneous systematization of everyday life, which varies according to place and time in accordance with the needs at hand … I think that the complexity of modern society mandates a return to common sense, equity, and reason. Law is never a cloud that floats above a historical landscape. It is part and parcel of this landscape, one of its fundamental and typical components" (Paolo Grossi, *Prima lezione di diritto*, Laterza, 2003).

[21] We refer to the historical ruling of the WTO Appellate Body on the *Gasoline* dispute of May 1996, in which Venezuela and Brazil accused the USA of applying higher standards to imported gasoline than to domestic gasoline. On that occasion, stated that "the *General Agreement* is not to be read in clinical isolation from public international law", Report of the Appellate Body, DS 2, 29 April 1996).

financial, fiscal, and customs points of view – the Technical Commission stated that "in order to make the updating of procedures permanent, Italy would need to create an ad hoc office in charge of following this matter full time, involving all economic categories in the process to simplify procedures and documentation"[22]. In fact, the new office, in spite of being formally instituted and placed under the aegis of the Ministry of Foreign Trade, never became functional due to the reasons listed above, nor will it ever be able to do so without the fundamental reforms hinted at above, and which are the indispensable prerequisite for tools such as Sem.Pro.Italia.

2. The WTO mechanism for solving controversies at the centre of the international judicial system: the new role of the market for legal training

The juridification process of the multi-lateral trade system – and through it, of the entire system of international relations[23] - was enshrined in Marrakech on 15 April 1994, when, along with the creation of the World Trade Organization, several specific and fundamental innovations were adopted that superseded the norms regulating litigation in the previous GATT framework that was established in 1947.
There are three main elements, which all arise out of the Dispute Settlement Understanding signed in Marrakech, the combination of which produced the most significant progress in the Copernican revolution of judicial globalization:

1. The establishment (art. 6.1 of the Dispute Settlement Understanding or DSU) of a right to judicial action for every WTO member. Unlike the previous GATT system, which allowed the activation of judicial proceedings to ascertain the legitimacy of the conduct of member states only in the case of unanimous consent, the new norms make it possible to open a dispute and establish a panel even if only one member requests it, without any other member having veto power (the so-called 'reverse consent' rule: the dispute is blocked only if the totality of members, including the one who originally requested it, decides not to establish a panel).

2. the possibility that after a ruling by WTO 'judges' (1st degree: Panel; 2nd degree: Appellate Body), a third party (an arbitrator, ex art. 22.6 DSU) can authorize a member to introduce internal reprisal measures (from raising customs duties to suspending copyright protection) against the member that fails to abide by the decision of the ruling panel. Reprisal measures thus admit national behavior that deviates from WTO rules: the injured party can thus suspend tariff concessions or other obligations arising out of WTO membership. These exceptions are granted to an extent and within a timeframe that will make the reprisal equivalent, in economic terms, to the damage caused by the original infraction (art. 22.4 DSU). Although these measures are introduced "unilaterally"[24] by the injured party, they can be seen as efficient sanctions that the multi-lateral judicial system, as a whole, adopts to restore order and ensure justice. Through this mechanism, the WTO confers effectiveness – a rare quality in the field of international organizations – to the evaluations contained in the rulings issued by its

[22] http://www.mincomes.it/semproitalia/chi_e.htm
[23] We here refer to the fact that the strength of the WTO legal system is extended to other sources of international law (S. Cassese, *Oltre lo Stato*, op. cit.).
[24] It should be noted that 'unilaterality' is only apparent, since reprisals are made 'multi-lateral' by the fact that they are recognized by an Agreement, the DSU, that was underwritten by all WTO members, and that they are subject to authorization and discipline on the part of an arbitrator who operated on the basis of a shared rule (art. 21.5 DSU).

judicial bodies.

3. the recognition (art. 3.2 DSU) of customary rules of interpretation of international law as the parameters to interpret the dispositions included in the WTO Agreements (the Appellate Body talked of the end of the 'clinical isolation' of the WTO system from the rest of international law): in light of repeated rulings (in particular, *Gasoline*, *Japan-Alcoholic Beverages*, *Poultry* and *Computer Equipment*), WTO judges expressly stated that articles 31 and 32 of the Vienna Convention[25] are relevant to the interpretation of WTO Agreements. This has been crucial – and will likely be even more crucial in the future – to the achievement of an increasingly advanced equilibrium in reconciling the rules governing trade with those governing collective goods (such as health and the environment) that are protected by other international treaties. A possible case would be that of a member that cites public ethics motives (art. XX GATT) to ban the import of goods produced in violation of the norms of the International Labor Organization. The Panels and the Appellate Body have also made reference to certain general legal interpretative principles, such as the useful effect principle and the *in dubio mitius* principle.

International doctrine[26] has not failed to register the extraordinary impact that the

[25] *Article 31 General rule of interpretation*
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a)
any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b)
any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a)
any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b)
any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c)
any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a)
leaves the meaning ambiguous or obscure; or
(b)
leads to a result which is manifestly absurd or unreasonable.

[26] An interesting contribution is that of T. Brode, who observes that the juridicization of the WTO has gone beyond the original intentions of its members, and how the existence of this process can be detected only through an in-depth analysis: "All too often, international organizations are not what their members – both individually and collectively – truly hoped they would be...The phenomenon of 'friction, as

Marrakech innovations had in the legal field, thus relegating into irrelevancy the built-in antagonism – reflected in the language - of certain ways of looking at WTO disputes ("trade wars").

"It has been said, ad nauseam according to Professor Weiler, that the World Trade Organization's dispute settlement system has been marked by a "juridification" from the predecessor system of the General Agreement on Tariffs and Trade (GATT), which was based on diplomacy, to a system based on the rule of law"[27]. According to P. Nichols, the dispute settlement system of the WTO is "the most important innovation in global economic law of the second half of the 20th century"[28].

The introduction, on April 15, 1994, of an efficient mechanisms to settle disputes thus changed the very nature of the GATT system, and helped transform it into a nearly complete legal system. The juridicization dynamics of this system have been able to strengthen other sources of international law (WTO judges make extensive recourse to other international treaties, such as the Codex Alimentarius, the UN Convention on the Law of the Sea, the Convention on Biodiversity, or the Convention on International Trade in Endangered Species), and thus promoting a profound re-thinking of the basic categories of legal culture established in previous centuries[29].
As of April 15, 1994, the clarity of the WTO legal platform, continuously updated thanks to the dynamism granted to its participants, guarantees a legal framework for

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conceived by Clausewitz, is almost as endemic to international organization policies as to his image of war....things do not go the way one expects them to: from up close, things appear differently than from afar, and in practice they will follow a different path, sometimes significantly so, from the path drawn by even the most careful of original plans (..). … once an international institution has been established and begun its activity, it will have to deal with the... surprises of reality, and develop the unpredictable vibrations of organizational culture along with increasing field experience arising out of tackling unexpected problems, leading to an expansion and development that go well beyond the original intentions of members, and indeed occasionally contrasting with them and with the formal structure of the organization … This study is first of all 'an anatomy of legal influence' in the WTO, which aims to provide a judicial and institutional analysis of the distribution of power and normative influence between the legal and political elements in the WTO decision-making process …" (Tomer Brode "International Governance in the WTO: Judicial Boundaries and Political Capitulation", Cameron May, 2004).

[27] D. Steger, "Peace Through Trade. Building the WTO", Cameron May, 2004 [10. *The Rule of Law or the Rule of Lawyers? – Introduction*.

[28] P. Nicholls, *GATT doctrine*, 2 Virginia J. Int'l L. (1996).

[29] "Although a WTO Panel has jurisdiction only over WTO claims, it should be recalled that some WTO rules (..) explicitly confirm and incorporate pre-existing non-WTO treaty rules. These non-WTO rules have thereby become WTO rules that can be judicially enforced by a Panel (..). Other WTO rules do not incorporate non-WTO rules but do refer to them explicitly. In this way these non-WTO rules can become part of a WTO claim (though not having been incorporated, they cannot be judicially enforced independently of other WTO rules). An example of "incorporation" is the TRIPS Agreement, which assimilates, inter alia, provisions of the Bern, Paris, and Rome Conventions.
Examples of "explicit reference" are the SPS Agreement, the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Subsidies and Countervailing Measures (SCM Agreement ..), which mention international standards adopted in the Codex Alimentarius Commission (SPS Agreement), the International Agency for Research on Cancer (..) (TBT Agreement), and the Arrangement on Guidelines for Officially Supported Export Credits of the Organization for Economic Co-operation and Development (SCM Agreement). The incorporated rules in the TRIPS Agreement are legally binding as such in the WTO (..). The non-WTO rules in the other WTO Agreements serve only as a benchmark or basis for the assessment of a distinct WTO-specific obligation. Thus, the international standards referred to in the SPS Agreement (say, codex standards) cannot serve as the basis for an independent claim of breach before a WTO Panel, but when WTO members base their sanitary measures on such standards, they will be presumed to conform with the SPS Agreement as well" ("The Role of Public International Law in the Wto: How far can we go?", Joost Pauwelyn).

problems related to the world market. A new and crucial role is granted to legal scholars, who must not rely on a formal, completed legal text that can be mechanically applied to the extremely uneven panorama of cases, but rather on a rich system of principles that can be adapted to a very complex reality by applying reason, good faith, and equity.
The concrete results of these changes are evident in the reports of WTO bodies (Panel, Appellate Body), who, through the rule of law[30], can express themselves without any concern for the relative power of the litigants, thus increasing the system's strength and credibility[31].

The clear legal connotation of the WTO is efficiently expressed in another way as well: of all the components of the WTO's institutional framework, the only truly super-national dimension is the legal one. The rule of law thus applies to everyone and everything. This leads to an enveloping tension, almost as if the entire membership were transformed into a single, well-balanced, and sensible entity, oriented towards relations, change, and healthy competition. It should also be noted that, with regards to active legitimization, WTO dispute settlement bodies have adopted a rather broad interpretation of the notion of 'interest to act', by considering *potential* damage to a state to be a sufficient condition for launching a legal procedure. In particular, in the 'Banana' dispute (DS 27), it became clear that all members, regardless of the commercial interests at stake in the case at hand, are considered 'interested parties' in ensuring that other members abide by their commitments.

Once their are exposed to the judicial evaluation of each member, excessively eccentric national positions are inevitably marginalized from the system. Judicial services thus guarantees the credibility of the process: courts, especially the Appellate Body – are made up of eminent legal scholars with extensive experience, who have full legitimacy when it comes to issuing definitive rulings[32],and who defer to the rule of law, not to the power of individual states.

The density of innovations introduced in Marrakech can also be seen in language. The way in which the key expressions of the 1994 'judicial revolution' are translated into Italian is telling: for example, Dispute Settlement Body is translated into "Organo di conciliazione", literally "Conciliatory Body", and thus one of the qualifying characteristics of the new system is lost in translation.

"Early dispute settlement in GATT reflected its diplomatic roots. In fact, the process initially was referred to as 'conciliation', not as dispute settlement … Sporadic references can be found in Panel reports to the

[30] "The State does not create the rule of law, it creates law, and the State and law both are subject to the rule of law" (Erich Kaufmann, Die Gleichneit vor dem Gesetz, quoted in: P. Grossi, Prima lezione di diritto, Laterza 2003).
[31] An eloquent example is the case in which the USA were sentenced to abide by the ruling issued when they were brought before the DSB by Antigua & Barbuda "The Panel accordingly recommended that the Dispute Settlement Body ("DSB") request the United States to bring the measures that the Panel had identified as GATS-inconsistent into conformity with the United States' obligations under the GATS" (Conclusions of the Panel Report, WT/DS285/AB/R - 7 April 2005, Antigua & Barbuda vs. USA).
[32] The option of adopting interpretations of the Agreement with *erga omnes* value is formally attributed to the Conference of Ministers and the General Council (art. IX: II of the WTO Charter). However, as we have said, in practical terms the interpretation function seems to have become a prerogative that is solidly entrenched in the judicial dimension.

teachings and writings of highly qualified publicists in GATT law, but these references were rare (..). In large part, this reticence may stem from GATT's diplomatic heritage. What is now essentially a juridical system of dispute settlement began as a diplomatic system of "conciliation". Not only were diplomats less likely than lawyers even to be aware of, let alone to be influenced by, the writings of legal scholars, GATT diplomats for many years were decidedly averse to the very notion of turning conciliation into a legal proceeding" [33].

By the same token "customary rules" (art. 3.2 DSU), is translated as "habitual norms", which does not reflect the importance of the customary matrix that is so typical of *common law* legal and cultural paradigms.

On this last point, the writings of M. G. Losano ("The great judicial systems") are worth reporting: "From a practical point of view, jurists in continental Europe now rely almost exclusively on written rules that generally deny all legal value to uses that do not conform to them: as a consequence, the study of customs becomes irrelevant, since it has no concrete applications. From a theoretical point of view, however, this silence over customs is embarrassing, since the dominant legal theory in Europe is still the positivist one, according to which only positive law, decreed by the State, can be considered law. Since customs are judicial norms of a non-state origin, they are incompatible with the theoretical constructs of judicial positivism. There is thus a preference for relegating it to the margins of all treatises, or even ignoring it: customary law is the skeleton in the closet of judicial positivism".

In 1994, law asserts its primacy over diplomacy[34]. Without understanding this, and without understanding the implications of this revolution, it is impossible to understand, or explain, anything about the WTO and the transformations it has brought to the

[33] Palmeter D., Mavroidis P. C., "Dispute Settlement in the World Trade Organization" (Kluwer Law International, 1999)

[34] "This article deals with the development of law; that is, the evolution of a judicial system in a field that was not previously subject to law … The agreement reached during the Uruguay Round [*referring to art. 6.1 DSU and the recognition of the right to judicial action of each member*] surprised many, pundits included, in that at the start of the negotiation there was a diffuse opposition to the elimination of the requirement for unanimity and the veto power that was de facto granted to each State. The opinion was finally reached that, in any case, GATT rules were not sufficiently strong to force dissident States to comply… Without ignoring the importance of other factors, it seems that the most important cause of the juridicization process in international trade is the growing economic interdependence of States... Until now this article has dealt with the formation process of a substantial, formal judicial system that regulates the reciprocal rights and obligations of sovereign States in the field of international commercial relations. Nonetheless, there is a natural attempt to look for analogies between this process, its possible causes, and what we know about the formation of judicial systems in general, and in particular about systems that regulate reciprocal relations between individuals...This comparison is particularly appropriate in the framework of the Hobbesian theory on the origins of law, a theory whose starting point is the 'natural' state of anarchy in which 'man eats man', which is remedied by the 'social charter' ... Against this background, the achievement of a 'social charter', in the shape of the WTO Agreement, prevented the explosion of anarchy. States could be told that a new world judicial system has been created, with roots and characteristics that are similar to those of EVERY judicial system in human history, in keeping with the positions of great thinkers such as Hobbes, Rousseau and Grotius … From our analysis, it is evident that recently a 'world society', a society characterized by increasing interactions between sectors (that is, between States, firms, and individuals) and by the establishment of a judicial and organizational system that regulates these interactions, has begun to take shape in the international economic arena... … The next stage in this process will probably be the increasing integration of international trade law in national judicial system, and the recognition that private actors have the right to act against other individuals. In practice, this process has already begun, and if it continues, it will have the potential to tear down the 'great wall', conceived by dualistic theory, between international public law and national law. Indeed, it seems that international trade relations may continue to serve as a new, exciting goal to be pursued by the rule of law" (Arie Rich, "From Diplomacy to Law: the Juridicization of International Trade Relations", Northwestern Journal of International Law & Business, 1996-97).

international legal framework.
Through the prism of the judicial value of globalization, we can draw important insights on the new global order – established by international institutions – which seems to be much more in tune, in terms of its philosophical structure and functioning modalities, to judicial experiences (medieval law; Anglo-Saxon rule of law) that are quite different from the legalistic and Napoleonic model typical of continental Europe over the last two centuries.
The WTO judicial framework for identifying the legal principles to be applied in actual cases requires the observation of all available elements, each one of which will play a role in shaping the orientation of the panel of judges. In this complex interpretative process, which is impossible to abstractly codify, the principle of reason (see the *Gasoline* and *Shrimp* cases) becomes the guiding principle. WTO law clearly affirms the principle according to which the discriminatory character of restrictive measures adopted by a member (applied to imports) in pursuing a non-trade objective can be discerned only in part through an analysis of the measure itself, since much of the evaluation must actually focus on the rigor with which that country has pursued that same goal at the national level, through behaviors that may or may not imply restrictions and penalties for domestic producers as well. In such a situation, the panel of judges will evaluate the common sense and coherence of national regulators over the course of time and their synopsis of national regulations, so that the other measures that the 'accused' member will have adopted on its own territory will help define the overall conduct upon which the ruling will be based. Indeed, WTO law emphasizes results-oriented objectives, which implies that its censure falls upon a broad spectrum of behaviors on the part of national regulators (including competent authorities at various government levels).

"States are called upon to abide by[35] the agreements underwritten in Marrakech on the basis of the good faith principle (US – Sections 301-310 …; Canada – Patent Protection of Pharmaceutical Products, WT/DS114/R), explicitly sanctioned by the Vienna Convention in articles 31 (…) and 26 (…) and reiterated in numerous reports[36]. Good faith is thus one of the system's mail pillars[37]". According to art. 11 of the DSU , the panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case …".

WTO litigation law is a healthy, orderly, and fair aspect of global competition, with which it lives in harmonious symbiosis, and of which it represents the judicial and institutional complement that the litigants themselves need in order to make sure that the equity intrinsic in meritocracies is applied also to the behavior of States. The innovative nature of the rulings of the WTO, and the way they mark new milestones along the road to global law, is revealed not so much by their conclusions, but especially by the logical and judicial path through which they reach them. The Panel and the Appellate Body, aside from ensuring that the behavior of individual states is in line with WTO, often have to identify a balance between the various values that are

[35] Claudia Marcolungo, "Gli effetti degli atti del WTO sugli Operatori economici privati", Rivista Trimestrale di Diritto Pubblico n. 4/2003.
[36] *US – Import Prohibition of certain Shrimp and Shrimp Products* (WT/DS58/AB/R, par. 158): "This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states … whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say reasonably …"
[37] *US-Transitional Safeguard Measure on Combed Cotton yarn from Pakistan*, WT/DS192/AB/R par. 81, which explicitly states that "the pervasive general principle of good faith underlies all treaties".

protected by the Agreements. By accurately gauging the interests at play, including the contributions of other international treaties, WTO judges draw indications that become precious guidelines for national regulators, regardless of their actual involvement in the dispute at hand.
It thus can, and does, happen that a dispute over shrimp ends up making legal history since it provides useful interpretation parameters, or that a dispute over coconut flakes provides insight on the retro-activity of treaty, or that a dispute over tuna leads to new perspectives regarding the rules of interpretation of the entire system of WTO Agreements.

Although it does not explicitly adhere to it, since the rulings of the panels do not formally become 'binding precedents', the WTO legal system seems to be inevitably drawn[38] towards Common Law, which is characterized "by the *stare decisis* principle and the binding nature of legal precedent"[39], in both cases recognizing itself as a social guide to the rulings expressed by the interpreting authority[40].

"U.S. public-private partnerships can shape the jurisprudential application of WTO law to the United States' advantage. The WTO legal system is leaning towards a U.S. common law, fact-intensive, case-by-case adversarial approach … The fact that the WTO's Appellate Body increasingly functions not simply like a court, as distinct from an arbitral tribunal, but like an American court, is one aspect of this more general trend in the global economy of the new millennium (..)"[41].

The rule of law thus expands its area of influence thanks to a spontaneous force: the natural human impulse to compete includes, as a necessary corollary, the need to rules and institutions that can reward merit and sanction abuse. In light of this expansion, there is a loss of influence of the political power that is formally enshrined in the state apparatus, which is based on a premise, that of national law, which has now been rendered anachronistic by the earthquake caused by the global interconnections of social processes[42] .

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[38] The debate on this issue is very rich. See, among others, John Ragosta: "Unmasking the WTO: Access To the DSB System: Can The WTO DSB Live Up To The Moniker 'World Trade Court' "?; Alan Wm. Wolff and John A. Ragosta, "Will the WTO Result in International Trade Common Law? The Problem for U.S. Lawyers," in The World Trade Organization: Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation, (T. Stewart ed.) 695 et seq. (1996) ("Wolff & Ragosta, 'Will the WTO Result in International Trade Common Law?'"). On the potential breadth of WTO law, R. Ruggiero: "I suspect that neither governments nor industries are yet aware of the actual breadth of these guarantees" in: "The World Trade Battle Heats Up," The Vancouver Sun, A15 (Nov. 30, 1999).

[39] Marino Bin, Il precedente giudiziario, Cedam, Padova, 1995.

[40] "Certainly in part because of the fact that previous Panel reports are not binding, but perhaps also because of diplomatic heritage, the parts and the Panels use a specific language when talking about previous rulings. They 'note' previous reports; (..) they 'recall' them (..). They 'agree' with the reasoning of the previous Panel. (..) In one of the WTO Panel's first reports, the Panel quoted a lengthy excerpt from another report, saying 'We feel this argument is very strong'. (..) Whatever language they use, in any case, Panels tend to 'follow' previous reports and Panels, unless the reports are clearly distinct from the dispute at hand, or the Panels reach the conclusion that previous Panels were mistaken (..)" (Palmeter D., Mavroidis P. C., op. cit.).

[41] G. C. Shaffer, "Defending Interests. Public-private partnerships in WTO Litigation", Brookings Institution Press, 2003.

[42] "The current hermeneutic movement crowns (and defines with theoretical care) the doubts, intuitions, and tentative proposals that historians have identified as having accompanied open-minded and brave jurists throughout the 20th century. There is an important shift in focus, from the moment of production of legal texts and the dispositions and intentions enshrined therein – moments, intentions, and texts that

The substance of WTO trials shows an approach to law that is qualitatively set apart from civil law frameworks, in which the role of the judge seems to be increasingly bound by the constraints of formality, leading to the frustration of social expectations of substantial justice[43]. WTO interpreters have at their disposal a wider array of tools, which gives them the responsibility of stating a *ius* that is *ius iustum* rather than *ius iussum*[44].

In WTO jurisdiction, the evasion mechanism – which is characterized by the formal observance and de facto violation of a norm – is ineffective by definition, since the judge has both the right mandate and tools for verifying the lawfulness of conduct as a whole. No type of behavior on the part of public authorities falls outside the competence and sanctions of WTO rules[45].
A WTO dispute thus unfolds as a noble event, which enjoys the contribution of the world's greatest legal scholars and which encourages everyone to hone their thoughts and arguments, listen to each other's positions, and try to better them with superior arguments. WTO do not look at the signatures at the bottom of a document, but instead they rigorously examine its contents. Within the WTO, it sometimes happens that two nations are involved in one case as adversaries, while at the same time they are arguing a joint position in another case. Even the moment when authorizations to 'unilateral'

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had monopolized all of the naive zeal of the old jurists, who were under the influence of a coercive ideology – towards the evolution of norms over time and space; the normative process is no longer seen as ending with the production of norms, but rather including their interpretation and application; no longer will judges be nailed to the cross of the tyranny of texts that are obsolete and do not reflect social changes; those who interpret and apply laws are finally granted an active role that goes well beyond passive exegesis, and the harshness of norms that the rapidity of change (which we can observe on a daily basis) has made unbearable is attenuated. Judicial interpretation thus leaves the exile of exercises in logic and syllogisms, and becomes involved in (and thus helps shape) the complex normative process. Since I am addressing practitioners (or students destined to be lawyers and judges in the future), I would like to recall the philosopher Gadamer, who in carefully examining judicial interpretation did not think only of that of theorists (exiling the contribution of practitioners); on the contrary, he taught that "application, along with understanding and explanation, a founding aspect of the interpretative act as a whole (..). This is the maximum re-evaluation of the moment of application within the complex process of normative itineraries". (Opening speech Prof. Paolo Grossi, Professor in History of Italian Law in the Department of Law of the University of Florence, held during the opening ceremony for the Graduate School for legal professions).

[43] "Only exegesis is reserved for jurists, and indeed the term 'école de l'exégèse' is used to refer to post-Napoleonic France, which reflects the ideological depth of modern panlegalism. The notion of exegesis is borrowed from theology, and it is well suited to those who handle 'sacred' texts, which are subject to veneration, not to change" (Paolo Grossi, "Globalizzazione, diritto, scienza giuridica" (P. Grossi, Conference held before the joint classes of the Accademia dei Lincei on 7 March 2002, cit.).

[44] "The evolutionary interpretation is often accused of being in contradiction of the *pacta sunt servanda* principle and the general rule that states that the intentions of the parties at the time of the conclusion of the treaty must be the only basis for interpretation. Nevertheless, the dispositions of the Vienna Convention recognize that successive events to the conclusion of the treaty can reveal and influence the principle of good faith interpretation of the dispositions.
Despite the fact that the ordinary meaning of a term used in a treaty should be used as the key *par excellence* for the interpretation of shared intentions of the parts at the conclusion of a treaty, par. 3 of art. 31 states that facts that post-date the conclusion of the treaty itself can be taken into consideration as valid elements for interpretation" (Gabrielle Marceau, "A Call for coherence in International Law – Praises for the prohibition against "Clinical Isolation" in WTO Dispute Settlement System", Journal of World Trade, Kluwer Law International, vol. 33, No 5 October 1999).

[45] "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." (art. 16.4 – WTO Charter).

reprisals are granted is market by great civility: the arbitrator makes these reprisal measures – which are unilateral only in terms of their material execution (and this is in line with the lack of a world trade policy) – an essential part of what remains a shared game. Indeed, reprisals and compensatory measures – such as the suspension of concessions or other obligations – are conceivable and effective because of the solid relationship between litigants, which will certainly survive the dispute, so that it is possible to act upon this (trade) relationship with judiciary acts.

Many of the innovations introduced by the WTO and by judicial globalization can thus be traced to the template for solving disputes adopted in Marrakech. In light of this, we cannot fail to mention, and will discuss in greater detail later on in this paper, the way in which the revolution of April 15, 1994 has been almost completely sterilized in Italy by the European Community system, according to which (EC Regulation n. 3286/94) EU member states, as such, lose all the rights granted to them by WTO membership, and thus no longer have the right to set in motion a WTO dispute. According to EC Regulation 3286/94, the activation of a dispute aiming to restore WTO order is subordinate to the approval of the European Commission, which is called upon to evaluate the presence of an unspecified European interest in the matter.

The most important of rights arising out of judicial globalization would thus be cancelled – but only within a weak interpretation that recognizes the primacy of EU norms over international law – by the communitary system. While the global system is undergoing juridicization (and democratization), the EU system – and through it, the national communities that are part of it – is growing increasingly politicized (or rather, bureaucratized). While in the rest of the world the centrality of administrative authorities is facing a crisis, or at least is subject to profound reforms and being gradually eroded by the actions of organized social forces, in the EU the will of the central authority (European Commission) prevails over the rule of law. We will see later on how this contradiction leads to widespread damage, as many authoritative scholars have already said (among others, C. Marcolungo[46], G. Tesauro[47], P. Pescatore[48], U. Everling[49], T. Cottier and M. Oesch[50], N. Lavranos[51]).

Gregory C. Shaffer[52] also focuses on the implications of the monolithic centralism of the European Commission as opposed to the social energy unleashed by WTO law. In examining the galaxy of public-private partnerships associated with the WTO dispute

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[46] Claudia Marcolungo, "Gli effetti degli atti del WTO sugli Operatori economici privati", Rivista Trimestrale di Diritto Pubblico n. 4/2003.

[47] Giuseppe Tesauro, "I rapporti tra la Comunità europea e l'OMC", in "Diritto e Organizzazione del commercio internazionale dopo la creazione della Organizzazione Mondiale del Commercio" (Società Italiana di Diritto Internazionale, II Convegno, Milano, 5-7 giugno 1997, Editoriale Scientifica).

[48] Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International.

[49] Everling U., "Will Europe slip on bananas? The bananas judgment of the Court of Justice and National Courts", in Comm. Mark. Law Rev., 1996.

[50] T. Cottier e M. Oesch, "The paradox of judicial review in International Trade Regulation: Towards a Comprehensive Framework", in: "The Role of the Judge in International Trade Regulation", edited by T. Cottier e P.C. Mavroidis, Michigan, 2000.

[51] N. Lavranos, "The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law", *European Foreign Affairs Review* 10: 313–338, 2005 - 2005 *Kluwer Law International*.

[52] "The U.S. approach to public-private networks tends to be more 'bottom-up', with firms and trade associations playing a proactive role. The EC approach tends to be 'top-down', with a public authority (the European Commission) playing the predominant, entrepreneurial role" (G. C. Shaffer, "Defending Interests. Public-private partnerships in WTO Litigation", Brookings Institution Press, 2003).

mechanisms, he explains among other things how the U.S. approach is 'bottom-up' – with an important role played by lawyers and private sector representatives – while the communitary approach is 'top-down'.

3. Italian regulation, from a communitary framework to a legal framework. The development of international law as the cause of the crisis of the EU system.

The presentation, however brief, of the main contents and characteristics of the 'giant steps'[53] taken by judicial globalization over the last several decades should by now have brought to the surface the problems associated with the case of the EU, an entity whose judicial profile is indefinable and which represents an anomaly in the field of international organizations and law (both of which are based, by definition, on the judicial category of the 'nation' as a subject with its own rights, obligations, and responsibilities)[54]. A sign of these problems is the volatility of language, which reflects and confirms the absence of certainty over fundamental aspects of life and law.

Even Sabino Cassese, current member of the Italian Constitutional Court, cannot escape this volatility. In his seminal "Oltre lo Stato" ["Beyond the State"], he paints an accurate portrait of the issues that make up the new judicial globalization framework. With regards to the matter of the EU's judicial subjectivity – and thus, *a contrario*, of the judicial subjectivity of his own Italy - Cassese, faced with the objective impossibility of achieving certainty, chooses to withdraw, limiting himself to providing some incidental references that surprisingly seem to relegate the matter to the rank of irrelevant details. "… not all international organizations have been made up of States (..) and States are not the only members of international organizations, which can include super-statal powers, such as the European Union (which belongs to the World Trade Organization and the International Olive Oil Council) .." (page 9). "… We exclude from this analysis 'regional' organizations such as the European Union, which evolve public powers similar to, but different from, those of States" (note n. 15 page 74).

The WTO is an excellent vantage point for looking at the EU question, since as Cassese and other authoritative scholars point out, the WTO is at the centre of the new international judicial system. It is thus useful to closely analyze the judicial nature of the European Community's participation in this Organization, in order to draw inferences that can be applied to the entire framework of global international law, and the relationship between the latter and national legal systems. There has been a surprising lack of attention paid to this issue by analysts, which has left much room for inevitably changeable practices. These practices seem to be able to withstand some very significant uncertainties, to the extent that even today, starting with the WTO, it is still not clear whether according to international law the term 'country' (see art. 2 of the WTO Agreement on Anti-dumping Measures, Agreement on Rules of Origin, GATT art. IX on brands of origin, etc.) or 'nation' refers to each EU state (and thus Italy) or to the EU as whole.
The history of EC/WTO mingling begins on September 20, 1986, on the occasion of the Punta del Este ministerial declaration that officially opened the Uruguay Round (which ended in 1994 with the establishment of the WTO). On that occasion, the Council and

[53] "Until twenty years ago, the inadequacy of law regarding international organizations could rightly be remarked upon (..). However .. in the last quarter century the global judicial order has taken giant steps, so that law now plays a decisive role" (Sabino Cassese, *Oltre lo Stato*, op. cit.)
[54] Later on we will discuss the problems that the EU poses with regards to the Italian Constitution, in whose text the category of Europe (or of a European State) is absent, while articles 10 and 11 clearly stress the links with international law and organizations.

the member states had decided on one hand that "in order to ensure maximum coherence in the negotiations", the "Commission would have acted as the sole negotiator for the Community and its Member States", and on the other they stated, in the minutes of the same meeting, that said decision would not have "jeopardized the question of competence of the Community and of its Member States with regards to specific points". Doubts re-emerged at the end of the Uruguay Round, when, in the session of 7-8 March 1994 (thus a mere 37 days before the Marrakech meeting of April 15, which concluded the Uruguay Round), the UE Council, in dissent with the European Commission, decided to proceed, in its own capacity, to the signature of the Final Act that was to adopt the results of the multi-lateral trade negotiations of the Uruguay Round and of the WTO Charter. The Council authorized the President of the Council and Sir Leon Brittan, member of the Commission, to sign on April 15 in Marrakech, on behalf of the European Union Council, the Final Act and the Agreement establishing the WTO, considering that the acts also regarded "questions of national competence". On the other hand, the Commission held that States had no competence in the matter, and in the minutes of the same meeting it stated that "the Final Act (...) along with the accords attached to it are under the exclusive competence of the Community".

Since these divergences continued, the WTO Agreements were underwritten by representatives of the individual member states of the EU, as well as by the Community. Both the European Community and its individual states acquired, and still hold, the status of WTO members. Article XI of the WTO charter explicitly states that the European Community holds the title of original WTO member.

Italy ratified the Uruguay Round agreements (including the WTO charter) with a State law (law n. 747 of 29 December 1994), probably without the slightest understanding of the meaning of this action[55].

Nominally, both Italy and the EC are WTO members. However, it still remains to be ascertained which one of these entities is the holder, in concrete terms, of the legal rights and obligations arising out of WTO dispositions. While it is true that in many – but not all (see for example the Budget Committee or the Integrated Framework Steering Committee) – WTO committees the delegations of EU states tend to keep silent as a standard procedure, and let the European Commission act as their spokesperson, the legitimacy behind this role is still unclear[56]. In other words, what is the actual legal basis for this procedure? The very nature of WTO dispositions, along

[55] "The ratification makes obsolete the judicial-formal diatribe over which institutional organ is in charge of approval" (1994, declaration of the Minister of Foreign Trade, Giorgio Bernini).

[56] An example of this is the case in which, during a meeting of the negotiation group for market access of industrial products, the Cuban delegation (document TN/MA/W/71 of 15 May 2006) invoked WTO norms to call for the removal of the US embargo (".. the blockade is a fundamental component of the policy of State terrorism which silently and systematically, bit by bit, in an inhuman and pitiless manner, affects the entire Cuban population … the continuing invocation by the United States of GATT Article XXI on Security Exceptions is unfounded … "The United States considers the embargo to be a bilateral matter which should not be brought before the General Assembly. Clearly, it is not a blockade since we do not interfere with Cuba's trade with other nations." This quote has been repeated many times by US Government representatives, and was included in some conversation points concerning the Cuban Resolution entitled "The necessity of ending the US economic, commercial and financial blockade of Cuba", circulated by Cuba to all other delegations on 18 October 2004 at UN Headquarters in New York. Alternatively, one can think of the case in which during a meeting of the Council for Trade in Goods, the same delegation presented a document (G/C/W/562 of November 9, 2006) which denounced "the US government's policy of aggression".

with the basic principles of responsibility, makes the continuing uncertainty regarding the institutional ownership of subjective legal positions unsustainable, as many legal experts have pointed out[57] [58] [59] [60]. In other words, do the representatives of individual States keep quiet because they want to, or because they have to?

Although practice has so far shown to apparently be able to co-exist with the circumstance that both the EC and its 27 member states are WTO members, it remains important to ascertain whether WTO disposition confer legal title over subjective judicial position to one party (the EC) or the other (each individual state), since co-existence is admittedly inadmissible. With regards to this – and while we refer to the thousands of dispositions on WTO Agreements for clear evidence of the inadmissibility of ambivalence – we reiterate the urgent need for clarity with regards to the application of norms on country of origin, and to over who has the authority to ratify amendments to WTO Agreements, now and in the future. With regards to the latter issue, the specialized international press[61] regularly stresses the often dramatic consequences of

[57] "The WTO Treaty as a Mixed Agreement: problems with the EC's and the EC Member States' Membership of the WTO" (Eva Steinberger, 'The European Journal of International Law, Vol. 17 n° 4, 2006).

[58] "The true significance of the situation created by the signature and the acceptance of the WTO Agreement can be deduced only from the WTO Agreement itself. The terms of acceptance could not be altered unilaterally by the Court through the categories of the EC Treaty" (Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International). With regards to the framework established by the European Court of Justice with regards to the way in which the EC and its member states should relate to the WTO (opinion CGCE 1/94), Pescatore talks about "Inappropriate questions of the Commission, followed by incoherent answers of the Court" and states that "… the position of the Court has no hope of being accepted at the WTO level should conflict arise between the Community and individual member states".

[59] "the international personality (note 30) that regards the title to subjective judicial situations arising out of international law must not be confused with the capacity of domestic law regarding the judicial capacity necessary for the Organization to perform its functions (..)" (Anna Lucia Valvo, Rivista della Cooperazione Giuridica Internazionale, Nagard, n. 19, 2005) - note 30: "Sometimes the statute of the organization explicitly establishes that the latter has 'international judicial personality', but international personality cannot be assigned by institutive treaties, and thus by the states themselves. It arises out of the international legal system... (N. Ronzitti, Introduzione al diritto internazionale, Giappichelli 2004).

[60] "Can the United States and France Veto a Doha Deal: the Legal Dimension" (S. Luk and N. Meurens, University of Toronto, 9 December 2005). "According to press reports Mr. Chirac told the EU Summit in Hampton Court, England, that France would 'veto' a Doha round agreement on Agriculture ... But France cannot vet, on its own, EC policy decisions on external trade or in WTO where the Commission speaks and negotiates on behalf of all members of the Treaty of Rome ... In the WTO, both France the EC are original members. It's a unique double *dipping arrangement* that arises out of the EC's status as the only large customs union in WTO ... So, when we get to the final scene of the Doha Round, France, as a full member of WTO, may refuse to join a consensus on the Agreement on Agriculture, even if the other members of the EC go along with the consensus ..." (P. Gallager, "Testing le défi francais on Agriculture", 28.10.2005, http://www.inquit.com).

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this uncertainty. On the occasion of the first amendment to the Marrakech Agreement, introduced in 2005 to give the world's poorest countries the chance to be exempt from WTO norms on patents in order to provide low-cost pharmaceuticals to their citizens suffering from diseases like AIDS, tuberculosis, and malaria, the uncertainties over the status of the European Community and its 27 member states inevitably re-emerged, and prevented other signatures from being added to those of the states that had already done so (El Salvador, USA, Switzerland, South Korea, Norway) and thus contributing to reaching the threshold (which is of two-thirds of WTO membership: due to the EU problem, there is uncertainty over the overall number of members to be used in order to calculate this threshold) for the adoption of the amendment, a necessary condition for the countries in question to be subject to the exemption and legitimately produce life-saving pharmaceuticals at low cost. Just like in Punta del Este, there are is a lack of clarity on the institutional seat – communitary? National? – for ratification, and we still do not know whether, one, 27, or 28 ratifications are necessary.
The fact that the matter of the EU has not yet been seriously tackled, and thus remains unsolved, is probably related to the breadth of its implications, some of which relate to

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Norway Notifies WTO of Ratification of WTO TRIPs Amendment on Medicines
GENEVA--Norway has notified the World Trade Organization that it has ratified amendments to the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPs**) formally incorporating an August 2003 deal on access to essential **medicines** into the accord. Norway's notification of acceptance was circulated by the WTO on Feb. 12. Norway becomes the fifth WTO member to ratify the **TRIPs** changes, after the United States (December 2005), Switzerland and El Salvador (both in September 2006), and South Korea (January 2007).
The deal on access to essential **medicines**, concluded in August 2003, allows developing countries to issue compulsory licenses in order to override patent rights and import generic copies of **medicines** needed to address serious public health problems, especially HIV/AIDS, tuberculosis, malaria, and other epidemics (170 WTO, 09/3/03). The agreement addresses an anomaly in the **TRIPs** accord that authorized governments to issue compulsory licenses only if the license is used "predominantly" for the supply of the domestic market, effectively preventing poor countries with no pharmaceutical industry from utilizing the provisions.
The agreement was drafted into amendments to the **TRIPs** agreement, which WTO members finalized in December 2005 (234 WTO, 12/7/05). Under the terms of the agreement, the amendments will only take effect after two-thirds of the WTO's member governments have accepted the changes.

Dec. 1 Ratification Date

Members have set a Dec. 1, 2007, target date for achieving the necessary ratifications. However, officials said there were legal questions concerning the acceptance threshold as it applies to the European Union and its member states. The questions center on whether the EU should be considered as one entity or as 27 separate entities (covering the 27 EU member states) for the purposes of achieving the two-thirds acceptance threshold.
Counting the EU as a single entity would make it more difficult to achieve the two-thirds threshold, requiring an additional 77 ratifications (in addition to the five that have already ratified). If the threshold includes each EU member state individually, acceptance by Brussels would require an additional 68 ratifications to achieve the two-thirds threshold.

EU member states retain their individual seats in the WTO, but by tradition Brussels speaks on behalf of the 27 members at the organization's meetings. However, since the **TRIPs** amendment represents the first time that a WTO agreement adopted in the Uruguay Round has been legally changed, questions have been raised whether the EU can accept the amendments on behalf of the member states or whether they require ratification by the 27 member state governments. *By Daniel Pruzin*

the very existence of the EU and thus may appear daunting. If the same states who adopted the communitary system also adhered to a different system in Marrakech, it should be evident that the roles, competences, and functions (Commission, Council, Parliament, Court of Justice) that underlie communitary treaties are inevitably thrown into disarray.
If two organizations are incompatible – and this is undoubtedly the case with the EU and the WTO – then the rule of law should step in and decide which one of the two lives. There is instead a trend to tackle the communitary question without the necessary careful analyses, and sometimes without the necessary scrutiny of the sustainability of formal or nominal hypothesis, leading to the assumption that the EU anomaly can be transported to all the other fora in which the 27 states.

In this regard, it is useful to refer to the discussions on the hypothesis of making the EU a member of the United Nations Security Council. "A European Union seat does not conflict with the existence of those of France and Great Britain; in the history of the United Nations there already are precedents of seats assigned to countries that belonged to other state organizations: one need only think of the Ukraine and other countries who were members of the United Nations (albeit not on the Security Council), in spite of being part of the Soviet Union" (on. Sergio Mattarella, remarks to the III Commission of the Chamber of Deputies of July 28, 2006, regarding the Italian proposal to make the EU a member of the United Nations Security Council).

It should be noted that, in agreement with the language used in front of the III Commission of the Chamber of Deputies, the European Union would no longer be considered an International Organization – a quality which had ensured the recognition of its legitimacy on the part of the Italian Constitutional Court, based on article 11 of the Constitution – but rather a 'state organization', or, in clearer terms, a State. This last assertion casts heavy doubts on the judicial basis for the legitimization of the EU in the Italian constitutional order, and thus inevitably implies that Italy has already lost, to the EU's benefit, of its legal status as a State, having been transformed, although no one knows when or how, into a sub-state entity such as a region or province.
If the WTO lies at the heart of global international law, it follows that judicial globalization as a whole suffers from the uncertainties associated with the nature and legal personality of the EU. In its first 12 years of life, the WTO – the rule-based international organization *par excellence* – has failed to tackle the problem, although its has repeatedly found itself having to deal with the consequences, often with some difficulty.
It is thus worth remembering that article XII of the WTO charter grants the possibility of becoming WTO members to only two entities : 1. States, and 2. Separate customs authorities possessing full autonomy in the conduct of their external commercial relations and of the other matters provided for in the Agreement. The European Communities, however, do not belong to either one of these categories, as the WTO itself ruled in 2005[62].
The EC's status as a WTO member is thus a « sui generis » status (stated explicitly in par. 7.158 of the Panel Report DS 174), although the rights and obligations associated with this status remain to be verified. This can only happen through interpreting the relevant elements provided by the WTO Agreements and the general system of

[62] «The European Communities submits that it is not a separate customs territory Member of the WTO », par. 7.156, DS 174 ; «It is not disputed that the European Communities is not a State », par. 7.159, DS 174 ; « The European Communities is not a country », par. 7.160, DS 174.

international law. In the absence of explicit norms, the clear and unambiguous definition of the legal prerogatives to be associated the EC on one hand and the 27 individual states on the other must be achieved through interpretation, using the hermeneutic criteria provided by WTO law, and by relying on the exact meaning of the terms (Vienna Convention for the Interpretation of Treaties) and other "habitual norms for the interpretation of international public law" in accordance with art. 3.2 DSU.
In this context, it is crucial to note that the explicatory note of the WTO charter does not apply to the EC, since in keeping with Art. XII on membership categories, it reiterates that apart from states, the terms "country" and "national" can apply only to separate customs territory members of the WTO[63]. The very fact that an exception was explicitly set out in an explicatory note seems to indicate that apart from this case – which is fully coherent with Art. XII – the general norm is that the words "country", "countries" and "national" in WTO dispositions apply to WTO member states only.
In searching for relevant parameters with which to interpret the EC's position, two other indications contained in the WTO Charter are quite helpful. Note n. 2 of art. IX:I establishes that " The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities", while art. IX :1 reiterates that the European Communities do not have an autonomous vote that is additional to that of each state that is both a WTO and EC member (art. IX :1 : « Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member states"). These limitations are quite relevant in terms of establishing a legal framework. The limitations set out in art. IX :I can be considered indicative of the general lack of a concrete judicial subjectivity of the EC in the WTO system, since the right to vote is granted to individual WTO member states, while the EC is not granted a vote, but only the chance to announce, as spokesperson, the votes of its member states.
If title to these judicial positions (rights and obligations within the WTO framework) belongs to states and not the EC, it follows that the diplomatic and negotiation role of the European Commission (speaking with one voice) is a choice that can be reversed, and not a legal obligation, as France pointed out in October 2005[64]. In any case, as we have said, the above-mentioned practice has no judicial link with communitary treaties, since the only relevant sources in this regard are international law and WTO rules.
It thus must be inevitably admitted that the certainties associated with communitary treaties were irreversibly swept away by the creation of the WTO (and in Italy's case, with the ratification law n. 747 of 29 December 1994). They appear to resist to this day only thanks to the inertia and silence of current practice, which has so far consented to following the EU in pretending that international law is not relevant and declined to exert many of its rights, without stressing the devastating impact that the WTO framework has so far had on the EU system (re-attribution of the full suite of rights and

[63] "The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO. In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified".
[64] In October 2005, French President J. Chirac publicly reiterated (the matter was widely reported in the international media) that, should the European Commission have assumed an unfavorable negotiating position with regards to agriculture, France would have autonomously exerted its WTO rights and prevented the unanimous consent necessary for the deliberation to be adopted at the WTO ministerial conference in Honk Kong .

obligations regarding international market law to states[65]; collapse of the first pillar of the communitary system).
Along the same line of argument, it is worth noting that in the WTO framework, along with the absence of autonomous representation, the European Communities are also exempt from another basic duty (taxation), and thus do not contribute to the WTO's annual budget, in spite of the fact that art. VII of the WTO charter explicitly sets out this obligation for "each member".
Communitary treaties have no relevance in interpreting WTO guidelines regarding the EU[66]. Their normative system is also subject to the WTO's legal opinion, since the EU is a regional trade agreement, and thus the WTO has the power to verify its compliance with WTO norms. In the WTO framework, communitary treaties, which have the status of rules regulating a regional market, are themselves subject to the evaluation of their legitimacy [67] [68] [69] [70] [71] [72] [73] and compliance with WTO norms, which were introduced in

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[65] ".. As Jacques Delors recently said, if competition between European nations were to be added to competition among firms, it would lead to the very negation of the European Community..." (Remarks of the President of the Republic, on. Giorgio Napolitano, during the ceremony marking the 20th anniversary of the death of Altiero Spinelli, Ventotene, 21 May 2006).

[66] With regards to a WTO dispute on state aid (case DS 301), in paragraph 7.53 of the Final Report, the Panel replied to the European Commission, who referred to the norms contained in communitary treaties in order to justify support measures on the part of certain EU states, by reiterating that compliance with communitary treaties has no "relevance" with regards to compliance with WTO law.

[67] The WTO website, in the section on Regional Trade Agreements (titled: **"**Regionalism: friends or rivals?"), one can read the following: "One of the most frequently asked questions is whether these regional groups help or hinder the WTO's multilateral trading system"

[68] See the recent WTO dispute 'DS 315', in which the Appellate Body (13 November 2006), in considering the Panel's evaluation of the customs system (normative, administrative, and legal) established by communitary treaties (judged by the Panel to be "complicated and, at times, opaque and confusing"), recognized the USA's right to challenge the entire EC system "... the Appellate Body .. reverses the Panel's finding .. that .. the United States was precluded from challenging the European Communities' system of customs administration as a whole or overall; and reverses also the Panel's finding, in paragraphs 7.63, 7.64, and 8.1(a)(iii) of the Panel Report, that the Panel was precluded from considering the United States' argument that the "design and structure" of the European Communities' system of customs administration necessarily result in a violation of Article X:3(a) of the GATT 1994..".

[69] "When former international trade judge James Bacchus speaks of a 'legal time bomb' ticking away inside the World Trade Organization, he is not warning of an explosion at the WTO's Geneva headquarters. Bacchus – a former Florida lawmaker who served eight years as a judge in the WTO tribunal known as the Appellate Body – is talking about a contradiction within the rules of the WTO that could develop into one of the world's largest trade fights if any country decides to lob the first volley. Most of the several hundred regional free trade agreements negotiated in the last decade have not actually received the WTO's stamp of approval, certifying they are in compliance with Article XXIV – a provision that allows countries to form regional trade blocs, such as the European Union or the North American Free Trade Agreement, and grant better status to selected trade partners. Potentially, a third party country could file a complaint with the WTO, charging that regional trade agreements discriminate against the goods of countries outside the bloc … 'This is a legal time bomb waiting to happen', Bacchus said recently. 'I am very glad it did not come to the WTO Appellate Body when I was a member' …". ("Contradiction in WTO rules could develop into trade fight", The Miami Herald, 1 nov 2004. http://www.miami.com/mld/miamiherald/business...).

[70] The unresolved question of the conformity of communitary treaties with the GATT cropped up as early as 1957, when the majority of the working group in charge of verifying the conformity of the Treaty of Rome with GATT rules found extensive incompatibilities between the two systems (see Report of 29 November 1957).

order to promote and regulate a harmonious legislative framework for the global market, which includes what was formerly defined as the "communitary market".

3.1 The 'unacceptable' mechanisms that have so far protected the European Union, shielding it from legal globalization: the 'communitarization' of international law as an exception to the global rule of law.

Judicial globalization, as we have seen, is based on international law, which arises out of international organizations. Both international law and international organizations are based, by definition, on the nation as the subject with title to rights and obligations. An inevitable outcome of this fact seems to be the end of the normative system created through the communitary treaties, and thus the dissolution of the very entity known as the "European Union". Indeed, both the EU and the communitary treaties were born and evolved in an international law vacuum (the incompatibilities between the EEC and GATT were clear from the very start[74]), within a legal framework that was less mature

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[71] "… it should be stressed that the ECSC (European Coal and Steel Community), established by treaty on April 18, 1951, being a customs union limited to certain products, and which did not abide by liberalization rules for the majority of trade, could not in any case be considered compatible with art. XXIV. Its existence was thus sanctioned through an exemption, ex art. XXV, par. 5, granted by a large majority of GATT members on 10 November 1952 (..). The matter was different from the very beginning with regards to the European Economic Community, which on the basis of art. 234 of the Treaty of Rome, bound the six member states to abide by the obligations arising out of previous conventions, and was thus submitted for GATT approval, in accordance with art. XXIV... That debate .. did not reach a definitive result, given the manifest impossibility of GATT censure, which could have led the six original member states to condemn the General Agreement…" (P. Picone, A. Ligustro "Diritto dell'Organizzazione Mondiale del Commercio", Cedam 2002).

[72] "The current alternative to globalization is to divide the world in large, inter-continental regions. The choice before us is thus either a world divided into blocs, or a single market regulated by a universal system of rules and sanctions. This second option is the one embraced by the WTO. It is not accepted by all, but it has no other alternative apart from a closed world in which divisions, terrorism, and war will increase" ("Paese miope", 29 December 1996, Interview with WTO General Director Renato Ruggiero, Il Corriere della Sera).

[73] "Let us be clear: the multilateral trade system is based on the most favorite nation clause, on non-discrimination. It is also based on rules negotiated multilaterally and agreed by all. We are now changing the system, or at least the balance between the multilateral trade system based on non-discrimination, and the preferential agreements both on a bilateral or regional framework, based on discrimination. We have to restore the undisputed primacy of the multilateral trade system … At the beginning of the GATT system, preferential agreements were the exception. The main source of preferential agreements was the European Community ... Are we "deglobalizing" the international trade system? The rigidities of the system will increase and the disputes between these vast regional preferential areas could become very dangerous.

This is, I believe, the most important challenge in today's international trading system. … Let us work together to save the future of the WTO and the primacy of multilateral system" (Renato Ruggiero's remarks at the WTO Symposium 2005 – Geneva, 20 April 2005).

[74] We quote once again: "... it should be stressed that the ECSC (European Coal and Steel Community), established by treaty on April 18, 1951, being a customs union limited to certain products, and which did not abide by liberalization rules for the majority of trade, could not in any case be considered compatible with art. XXIV. Its existence was thus sanctioned through an exemption, ex art. XXV, par. 5, granted by a large majority of GATT members on 10 November 1952 (..). The matter was different from the very beginning with regards to the European Economic Community, which on the basis of art. 234 of the Treaty of Rome, bound the six member states to abide by the obligations arising out of previous conventions, and was thus submitted for GATT approval, in accordance with art. XXIV... That debate .. did not reach a definitive result, given the manifest impossibility of GATT censure, which could have led

than today's, and which had not stressed – unlike today, when it does so on a daily basis – the unsustainability of the anomalies associated with that system (communitary treaties) and with the EEC/EC/EU.
The gradual fine-tuning of international law thus sends the communitary system into an irreversible crisis, as the latter is based on entities (Commission, Council, Parliament) that are irrelevant in terms of international law. If the European Union has so far survived international law, it is only thanks to the combination of two factors: the strategic effort of communitary organs to deny at the root the very existence of international law (*tamquam non esset*), and the acritical, 'non-intelligent'[75] attitude present at the national level (in EU states), where there is an inexplicable lack of debate over basic questions. This leads, most likely in an unaware manner, to the establishment of a unfounded qualitative supremacy, almost a genetic superiority, of communitary norms over international ones[76]. Both the EU and its member states are thus forced to trivialize the exceptions (such as all the instances in which communitary states operate as full members of international organizations[77], despite the fact that communitary treaties do not and cannot have any relevancy in these fora in terms of regulating relations among nations) and the contradictions (cases in which national constitutional courts, such as the German one in the "bananas" case, have ruled on the inapplicability of communitary regulations that were contrary to GATT international law) that cannot

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the six original member states to condemn the General Agreement…" (P. Picone, A. Ligustro "Diritto dell'Organizzazione Mondiale del Commercio", Cedam 2002).

[75] "Intelligence is a learned word, that comes from the Latin root *intelligentia*, which in turn comes from the verb *intelligere*, to understand. The latter is made up of *inter*, meaning between, and *legere*, meaning 'to choose', so that the original meaning was 'knowing how to choose', and thus, in an abstract sense, being able to know through thought, and thus to understand. *Intelligentia* is thus the faculty of those who are *intelligens*, those who can understand reality and the world around them, by understanding the links between different experiences" (http://www.educational.rai.it/lemma/testi/educazione/intelligenza.htm).

[76] "… at least part of our doctrine has now come to rely on more concrete and productive terms, finally abandoning the pretence...of being able to simplistically solve everything through the same generic observations on so-called super-nationality and thus on the goals and characteristics of the European integration process … Meanwhile .. an initial reflection is suggested by the explicit affirmation, in the motivation to the sentence discusses here, of the principle according to which so-called self-executing international norms, once they are accepted by the Italian legal system, are immediately applicable and produce rights and obligations for those subject to national law. This affirmation allows us to reiterate once again (..) that the indicated effects, contrary to many claims, do not constitute a peculiarity of communitary norms...The orientation assumed so far by the Constitutional Court is noteworthy, since it assimilates, under this particular profile, communitary treaties with other international treaties". "[The advocates of the primacy of communitary law] .. who once again fall in the trap of excessive communitary attachment, seem to have been inspired only by the impulse to favor at all costs European treaties, in order to turn them into super-treaties, of exceptional value and irresistible strength, not so much in light of rigorous scientific evaluations or indisputable normative data, but rather in the name of apodictic proclamations of 'novelty', 'variety', etc. that are directly linked with the stated superiority and absolute nature of their ultimate political goals". "…it should be stressed that these ideas .. end up provoking unjustified and dangerous instances of discrimination between pactitional international norms with regards to their effectiveness in national legal system.". "We can thus conclude that the trends shown by our jurisprudence are not justified. No decisive argument seems to back up the alleged difference in 'position' between Italian norms regarding the observance of international treaties, whether we refer to communitary treaties or not" (A. Tizzano, see also: "Pretesa diversità di effetti del G.A.T.T. e dei Trattati comunitari nell'ordinamento italiano", in "Il Foro Italiano", 1973, n. 9, I, p. 2443-2452).

[77] There are many examples at the WTO level as well: one need only think of the thousands of communications (see WTO website) automatically transmitted by states (including Italy), or the fact that states (including Italy) contribute to the WTO budget, and thus meet one of the main obligations of membership while the EU does not.

fail to be noticed. The presumed primacy of communitary norms over international law, along with shallow conformist attitudes, define a framework in which it becomes acceptable to not know whether, with regards to the application of international law, the term "nation" (for example, with regards to WTO clauses on most-favored nation status) indicates a single state (such as Italy) or the European Communities; in which the responsibilities underlying the ratification of an international agreement are trivialized[78] [79]; in which rhetorical assertiveness prevails over legal rigor; which promotes an inferiority and inadequacy complex according to which Italian, unlike Mexicans, Nigerians, Icelanders, or Vietnamese are not able to handle the challenges of global competition by themselves, needing instead to rely on the increased power that comes with being associated with the administrative structures of a larger state, the European Union.

In the following section we will discuss in greater detail the relationship – that the Constitution qualifies as strong and direct – between the Italian legal system and international law. Here we stress the fact that at the community level, EU organs have so far failed to submit – thus preventing hundreds of millions of people from doing so – to the new requirements of the WTO system, global markets, and international law, by portraying themselves as above international law itself, whose relevance they overlook. According to the framework created by communitary organs, the contents of international norms exist only to the extent that they take on the form of communitary acts (the "comunitarization" [80] of international law denounced by N. Lavranos as a "great exception to the global rule of law").
In concrete terms, this framework implies, among other things, that if Germany or the EU itself enact or keep norms that violate WTO laws, all other non-EU WTO states (from China to the USA, from Canada to Mexico) can act in order to restore the WTO, but Italy, France, Finland or any of the other states that adhere to both the EU and the WTO cannot do so; this is because the European Court of Justice would not recognize[81] the WTO norm as the normative reference framework, and because EC Regulation n. 3286/94, in comunitarizing the entire WTO dispute settlement system, cancels the rights of the 27 EU/WTO states, by banning them from autonomously bringing cases before

[78] On. Prof. Giulio Tremonti ("Rischi fatali", Mondatori, first ed. 2005), focuses his analysis on the one hand on the 'fatal risks' of globalization (1994: establishment of the WTO, 2001: China's entry in the WTO), but on the other fails to grasp the essence of the new scheme to assign responsibilities adopted by the international system; he states "The EU-China negotiations on the WTO ended on May 19, 2000. At this point, adhesion is a compulsory act for individual European states, since foreign trade, the external projection of the domestic market, is under specific European jurisdiction". Prof. Tremonti also states that "other countries, our competitors, are represented in the WTO by their governments. Europe is represented by a 'commissioner' ", thus showing the proper regard for the fact that Italy is a member in full standing of the WTO and is represented there by its governments, like all the rest of the world's state, within a system – that of the WTO – whose rules, starting with those on participation, do not confer any relevancy of the dispositions of communitary treaties (*res inter alios acta*).
[79] The Minister for Foreign Trade at the time, on. Giorgio Bernini, the Italian ratification of the Marrakech Agreement, through Parliamentary Law n. 747 of 29 December 1994: "The ratification makes obsolete the judicial-formal diatribe over which institutional organ is in charge of approval".
[80] N. Lavranos, "The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law", *European Foreign Affairs Review* 10: 313–338, 2005 - 2005 *Kluwer Law* International.
[81] The European Court of Justice has repeatedly reiterated that "in light of their nature and their economy, WTO Agreements are not, in principles, among the norms in light of which the Court controls the legitimacy of the acts of communitary institutions" (case C-377/02, 1 March 2005).

the WTO. The social outcome of this is that the national communities (schools, universities, media, firms, tribunals, etc.) in each EU state are encouraged to ignore international law and consider only communitary law. It is clear that a community that remains holed up in the communitary cave will be increasingly scared to leave it, and will feel the need for a tutor to take on the challenges of the world outside it.
From a different vantage point, one can see how the bureaucracies of EU states and communitary organs are provided incentives to violate international law, since by denying at its root the latter's pressure, the benefits of rule violations accrue to interest groups present on the territory of a given state (for example, public aid that is not allowed by WTO norms) while the damage from any sanctions (such as reprisals sanctioned by the WTO) would be felt throughout the territories of the 27 EU states (see for example the case of FIAMM[82]).

[82] In dispute T-69/00, brought before the Court of First Instance of the European Communities by two car battery manufacturers (FIAMM) against the Council of the European Union and the Commission of the European Communities, the recourse was aimed at obtaining compensation for the damages caused by the 100% customs tax imposed by the United States of America, with the authorization of the WTO, on a series of products imported by firms operating on communitary soil, including the batteries produced by the applicants. The customs tax was authorized (ex art. 22 of the WTO Dispute Settlement Understanding) by the WTO as a legitimate reprisal in light of the incompatibility of the communitary regime for the import of bananas with the WTO agreements. With an appeal to the Court on March 23, 2000, the manufacturers asked for compensation for the damages arising out of the U.S. tax (extracontractual responsibility of the Community). With regards to this request, the European Community preliminarily stated "the application of the customs tax to the products imported by the applicants in the territory of the United States arises out of a decision of said State, and not from the act of a Community institution", while the applicants claimed that "the existence of a causal link by the damages incurred by them and the behavior of the defendant institutions cannot be reasonably denied. There is no doubt regarding the fact that the U.S. government would not have imposed a customs tax on the import of the applicants' goods had this not been authorized by the DSU following the violation of WTO norms on the part of the Community". The applicants also claimed that the Commission and the Council "have also infringed the principles of the protection of legitimate expectations and of legal certainty. Every citizen must be able to enjoy the legal certainty that he will not have to bear the consequences of unlawful conduct by the Community authorities. The applicants claim that they had a legitimate expectation, not that the tariff concessions negotiated with the United States of America in the form of the original import duty at the rate of 3.5% would continue to apply, but that those concessions would not be altered because of the Community institutions' unlawful conduct. … The defendant institutions also infringed the applicants' right to property and pursuit of an economic activity, which is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950".
In its ruling on the case (14 December 2005), the Court stated the following:

"Before examining the legality of the conduct of the Community institutions, it is necessary to decide whether the WTO agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation if the DSB has declared that both that legislation and the subsequent legislation adopted by the Community in order to comply with the WTO rules in question are incompatible with those rules.

109 The applicants rely in this connection on the principle *pacta sunt servanda*, which is one of the rules of law with which the Community institutions must comply when carrying out their functions, being a fundamental principle of all legal orders and particularly of the international legal order (Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 49).

110 However, the principle *pacta sunt servanda* cannot be asserted against the defendants in the present case since, in accordance with settled case-law, the WTO agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the

In this very fragile framework, which places the European Communities at the center of global law, the transposition of international law in the communitary legal system, when it does take place, is far from neutral, but rather greatly transforms international law[83], and alters its nature and rank, by turning it into derived communitary law (subordinate to treaties[84] and to be interpreted in conformity with them). The transformation of international law into communitary norms also results in attributing to the EU, rather than to national states, title to the rights and obligations posed by the original norms; in identifying the European Commission – rather than international organizations – as the administrative body in charge of verifying their application; and in identifying the European Court of Justice – instead of international jurisdictions – as the competent legal forum for their interpretation[85]. This artificial dynamic, which concentrates all roles at the EU level, lacks a solid judicial foundation, and according to numerous authoritative scholars, it seems to answer exclusively to an attempt to preserve the power of EU organs[86] from being further irredeemably eroded by international law and

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legality of action by the Community institutions (judgment in Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47; order in Case C-307/99 *OGTFruchthandelsgesellschaft* [2001] ECR I-3159, paragraph 24; and judgments in Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 93, Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 53, and Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 52)".

The Court of First Instance thus dismissed their action and ordered "the applicants to bear, in addition to their own costs, the costs incurred by the Council and the Commission, in accordance to the applications made to that effect by both defendant institutions".

[83] "When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty" (CGCE, Case C-61/94, of 10.9.1996, European Commission vs. Federal Republic of Germany).

[84] At the WTO (see par. 7.42 of the WTO Panel Report, case DS 174), the EU Commission explicitly stated that "Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law". The European Court of Justice declared as follows (dispute C-61/94, EC Commission vs. Federal Republic of Germany, par. 52 of the ruling): "When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty ..".

[85] "Indeed, a well known example is the divergent jurisprudence that exists between the ECJ and the European Court of Human Rights (ECrtHR) in regard to the interpretation and application of the fundamental rights as protected by the European Convention of Human Rights (ECHR)", N. Lavranos, "Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals" (European Environmental Law Review August/September 2005).

[86] "It is interesting to note that the direct effect of the agreements is much less controversial when its impact on internal power structures does not appear to be significant … The direct effect is recognized when obligations fall upon member states or foreign countries, and not on communitary organs". (T. Cottier and M. Oesch, "The paradox of judicial review in International Trade Regulation: Towards a Comprehensive Framework", in: "The Role of the Judge in International Trade Regulation", edited by T. Cottier and P.C. Mavroidis, Michigan , 2000).

"The Court of Justice … has affirmed numerous times its unwillingness to recognize direct effect for GATT norms … This position has been criticized by many scholars (..) since it reduces the potential for application of the WTO system, provides lower protection for private subject, and is not, under the current state of affairs, justifiable on the basis of the flexibility of the GATT, which now clearly follows a legalistic approach … Given the European Court of Justice's clear refusal of such a solution, several authoritative scholars have sought an alternative path and framed the question in terms of the effective protection of individuals and their basic rights" (Claudia Marcolungo, "Gli effetti degli atti del WTO sugli Operatori economici privati", Rivista Trimestrale di Diritto Pubblico n. 4/2003).

universal international organizations. The latter, by their own nature, do not recognize any significant role for the EU, since they grant rights and obligations directly to nation states, and control functions to themselves. The communitarization of international law completely demolishes the necessary alterity between player and referee (state/international organization) and generates objectively ambiguous situations in which, within the same entity (European Commission), there is both a European Commissioner for trade, in charge of negotiating over agricultural subsidies in the WTO with ministers from Japan, India, or Brazil, and a European Commissioner for competition, who is in charge of evaluating the compliance EU states with communitary norms on competition.
Some of the perverse effects of this "transformation" thus inevitably include an uncertain profile for the EU as a whole, an entity which, in order to survive tries to portray itself as a state in Geneva (with regards to the rest of the world) and as an international organization in Brussels (with regards to its member states).

The "made in Italy" case.
An emblematic case of the above-mentioned dynamic of communitarization of WTO is the so-called "made in Italy" case. Art. IX GATT grants each WTO member the right of labeling as "made in" (country of origin) products imported from other member countries. Because of this, the international legal system grants Italy the right to impose, through a State norm, the label of origin for products from other WTO countries. Indeed, many other WTO states, including the USA, avail themselves of this right. When these states receive products from any other state, they consider each one of these (Italy, France, Germany, etc.) as the "country of origin" and thus impose the "made in" label (made in Italy, made in Germany, etc.).

At the EU level, within the systemic ambiguities discussed above, the Court of Justice has repeatedly[87] denied the states the possibility to introduce, through national norms, the obligation to use the "made in" label for imported products (both from within and outside the EU), by maintaining that this imposition could lead to discriminatory behavior on the part of consumers, who could choose to prefer domestic products. Because of this, the Court of Justice – having preliminarily ascertained, in terms of merit, the irrelevance of art. IX GATT, as well as of all other WTO norms– ruled that the imposition of the "made in" label within the EU is illegitimate, since it is incompatible with the common European market[88]. Similar problems arise with regards to the protection of quality national products whose reputation rests on their region of origin (Geographic Indications of source, art. 22 WTO Agreement on intellectual property). "Made in" and geographic indications are unitary matters [89] and in both cases the problem

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[87] See for example similar measures introduced by the United Kingdom and contained in the "Sale of Goods Act" of 1979, the "Trade Descriptions Act" of 1968, the "Consumer Protection Act" of 1987 and the "Trade Descriptions Order" of 1981, which included the obligation of indications of origins for a series of products, and with the European Court of Justice. - ECJ 25 April 1985, Case 207/83, European Commission vs. United Kingdom – judges to be illegitimate trade restrictions. The ECJ has condemned on numerous other occasions (e.g. case 113/80) national norms aiming to introduce compulsory indications of origin for imported products.

[88] "... The ultimate goal of the Soviet Union was to create a new historical entity, the "Soviet people", in the entire world. The same goal is being pursued today by the EU. They are trying to create a new people. According to communist doctrine, as well as many versions of socialist thought, the state, the nation-state, is destined to disappear. In the USSR the Soviet state became very powerful, and the various nationalities that made it up were annihilated. But once the USSR collapsed, the opposite process took place. The stifled sentiments of national identity re-emerged and have almost destroyed the country … " (« Former Soviet dissident: the EU is becoming a police state », Paul Belien interviewing Vladimir Bukovsky, during a visit to the European Parliament, Brussels, 3.12.2006 ; http://italia.pravda.ru/world/3956-3/).

[89] "Geographical Indications of source are names which indicate a specific place of origin of the product which may or may not be connected with certain techniques or methods of production (the name of the product itself, for example, 'France', 'Rome', 'Ardennes'; an adjective connected with a place, for

belongs to the EU [90] and not to the WTO.
This is a complex and important manner, especially in light of the evolutionary dynamics of globalization and of the risks, underlined by many – of the homogenization of consumer styles – and thus of production, which must necessarily adapt to them – with the gradual extinction of originality, diversity, cultures, and traditions.

The reasons adopted by the ECJ to support its rulings on banning compulsory 'made in' labels relate to three factors:

a) the introduction of this obligation would imply – according to the Court[91] - a measure equivalent to the restriction of imports, and would weaken the completion of the common European market;
b) Indication of origin is worthy of protection only when the product has specific quality and specific characteristics[92].
c) Such an obligation would give consumers "the chance to let their prejudices over foreign goods prevail"[93].

The arguments of the Court of Justice lead to several doubts on the EU plan for a common European market separate from the global one. With regards to the second argument, in considering compulsory indications of origin judicially acceptable only in cases in which products have specific quality and specific characteristics, the Court of Justice seems to give in to the temptation of substituting its judgment to that of the consumers, and adhering to a price formation theory based on intrinsic value (the value-labor theory of K. Marx) which is not the one embraced by free markets, which instead is based on the value perceived by individual consumers according to their own subjective preferences. Further questions apply to the third argument. If the matter is analyzed from the point of view of the consumer, who is the focal point of any free market, compulsory indications of origin do not seem to meet any goals apart from providing additional information. The fact that on the basis of this information the consumer might adopt buying habits that are viewed unfavorably by the central communitary authority does not seem to be a sufficient reason to suppress such freedom. This is all the more true in light of the fact that the possibility of making such indications compulsory is accepted by international market laws (art. IX GATT) and has long been a matter of practice.

The overall impact of the systematic effort to "communitarize" international law is that of fueling a separate, non global microcosm, which isolates its inhabitants from the evolution of judicial globalization, inducing these inhabitants (including entrepreneurs, judges, lawyers, university professors, civil servants, etc.) to believe, erroneously, that the administrative authorities of the EU are at the center of the universe, if not the universe itself .

Opinion n. 1 of the European Court of Justice of 15 November 1994 (relativo alla competenza della Comunità a stipulare accordi internazionali in materia di servizi e di tutela della proprietà intellettuale) as a crucial moment in the communitarization process of the WTO.

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example, 'German beer'; or a label, for example, 'fabriqué en France', 'printed in the UK', 'made in Portugal', and so on (..)" (B. O'Connor, "The Law of Geographical Indications", Cameron May, 2004).
[90] With regards to this, Bernard O'Connor writes "by comparing the protection granted by the EU with the protection guaranteed in many non-EU countries, it clearly emerges that the European Union was rather restrictive in its normative coverage. EU rules protect exclusively agricultural products and some, but not all, food products. Other countries are instead more ambitious, and rightly so, and allow the protection of industrial products as well as agricultural ones. This seems to be a better approach. Some of the most famous ancient examples of geographical indications of source, such as Murano glass or Waterford crystal, are certainly not agricultural products" (B. O'Connor, "The Law of Geographical Indications", Cameron May, 2004).
[91] Case 207/83.
[92] Case 12/74, European Commission *vs.* Germany.
[93] Case 207/83 and Case C-325/00 (European Commission *vs.* Germany.).

The framework established by the European Court of Justice with regards to how member states of the EU and European Communities should relate to the WTO (Opinion 1/94) seems wholly inadequate in terms of supplying realistic indications, since this opinion was reached by taking communitary treaties as a starting point, and thus without any regards for the ways in which the WTO system works. On this matter, Pierre Pescatore's position ("Inappropriate questions of the Commission, followed by incoherent answers of the Court") is crystal clear: "… the Court's position has no chance of being received at WTO level whenever it would bring out conflicts between the Community and individual Member States" [94].
Opinion 1/94 cannot in any way alter the status of any WTO member, since the contents of this status are irrevocably bound to the characteristics, which cannot be modified unilaterally, of the WTO system as defined by the Agreements. For the EU and the WTO states that are members of its, all initial uncertainties thus persist, starting with those having to do with denominations[95].
The distribution of responsibilities, at both the horizontal (between areas of government) and vertical (between levels of government) levels, require, within the structure of the WTO ("What does commercial policy really mean?"[96] asks P. Pescatore), stable and unanimous integration.

The Court of Justice could not thus supply any useful element to solve the dispute that arose on the occasion of the underwriting of the Uruguay Round, when a serious uncertainty emerged over the role that EU states and the European Commission would play in the WTO system after the signature of the Agreements. With regards to this uncertainty, it should be immediately pointed out that, in general, communitary law norms related to the assignment of the competence to stipulate agreements do not have any legal effects on non-communitary states, unless these norms are explicitly contemplated by the international agreement, which did not happen in the WTO case.

"The true significance of the situation created by the signature and the acceptance of the WTO Agreement can be deduced only from the WTO Agreement itself. The terms of acceptance could not be altered unilaterally by the Court through the categories of the EC Treaty" [97].

The conclusions reached by the Court of Justice, following intensive arguments that merit further analysis, are well known[98].

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[94] Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International.
[95] In meetings of WTO committees on "services" and "intellectual property", the European Commission acts as the representative of the "European Communities and its Member States". In committees on "goods", it instead uses the definition of "European Communities". With regards to disputes, the array of possibilities includes, along with the standard case in which the "European Communities" are exclusively considered parties to the disputes, situations in which the member states are involved individually (DS 210, DS 173, DS 131, DS 130, DS 129, DS 128, DS 127, DS 125), and, recently, situations in which the denomination used is "European Communities and certain Member States" (DS 316 - Measures affecting trade in large civil aircraft).
[96] "what *do* the words 'commercial policy' and 'trade agreement' in Article 113 mean? Surely not what today's interpreters, quite gratuitously, suppose to have been the understanding of the authors of the EC Treaty. Surely not what GATT signified at that time, because GATT, which is no more than a fragment detached from the Havana Charter, did not exhaust what could be understood by commercial o trade policy …" (Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International).
[97] Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International.
[98] "Article XI of the WTO Agreement calls for the participation in the WTO of the "European Communities"; however, in conformity with Opinion 1/94 of the European Court of Justice in November 1994 (..), only the EC, and not the European Coal and Steel Community (ECSC) nor the European Atomic Energy Community (EAEC), became a WTO member: the Court ruled that the Agreements also apply to international trade in coal, steel, and nuclear products. The problem of the adhesion of the ECSC and the EAEC could not arise in any case: the ECSC Treaty does not call for a joint foreign policy on the part of member states, which are instead granted exclusive competence in this field by Article 71 of the Treaty … The question instead arises in terms of the relationship between the EC and its member states, who invoked, particularly in the case of ECSC products, their exclusive competence to adhere to the WTO Agreement to the extent that annexed agreements also refer to their trade. The Court of Justice

The Court … expresses the following opinion:

1. The Community has the exclusive competence, under art. 113 of the EC Treaty, to conclude multilateral agreements on the trade of goods.
2. Competence to conclude the GATS is shared between the Community and its Member States.
3. Competence to conclude TRIP is shared between the Community and its Member States.

If we look at the position held by the ECJ in light of the reality of the WTO system, we can clearly see that the Court's opinion simply cannot be implemented. The way in which the Court would like to organize the participation of EU (and WTO) Member States and of the EU itself in WTO does not take into account the rules under which the WTO functions, and thus appears to be based upon an inaccurate depiction of reality.
The ECJ, in examining the case brought before it, shows that it adheres to an inwards looking framework. The Court seemed to be aware of the weakness of its own analysis when it candidly stated, as part of Opinion 1/94, that " … the problem of the repartition of competences cannot be solved in function of the difficulties that may arise once the agreements are to be implemented".

"The starting point of my own reasoning is that all the actors who have taken part in the proceedings leading up to opinion 1/94 shared a fundamental misapprehension of the problem raised by the outcome of the Uruguay Round. The misapprehension consisted in assessing the results of this negotiation exclusively under the angle of the rules governing the functioning of the *internal market of the EC*, instead of placing themselves in the perspective of the requirements of a meaningful concept of 'trade policy' as it is used in the international context … The initial error of those who inspired Opinion 1/94 was therefore to reduce the scope of the discussion to some fringe aspects of the vast field of trade covered by the WTO and to seek a solution of the problems raised by the Marrakech Agreements in the light of the rules of competence which had been defined almost 40 years earlier with a view to establish the framework of the EC's *internal* market"[99].

"It is distressing that **the Court did not display any awareness of the realities and evolutions of international law**, judging the whole matter according to the allocation of competence, real or imaginary, for the purpose of the internal market" (emphasis mine)[100].

The Court thus seems to have attempted the impossible task of breaking apart the multidimensional, indivisible unity of dynamics that are objectively and intrinsically integrated, whose actual configuration inevitably escapes the capacity for control and decision-making of the Court itself. Those who observe the WTO case through the distorted prism of Opinion 1/94 cannot grasp the very essence of the matter. Decision-making processes within the WTO are based on a cardinal principle, that of 'single undertaking', on the basis of which each member negotiates the agreement as a whole – which it will have to eventually formally accept or reject – since it is not admissible for members to accept parts of an agreement and reject others.

"Almost all of the commentators consider that the Court, by separating from their context certain provisions of the GATS and almost the whole of the TRIPS, has come short of Article II:2 of the WTO Agreement, according to which the whole complex of the agreements convened at Marrakech can be visualized only as inseparable whole – a propriety popularized under the words of a 'single undertaking'' "[101].

Thanks to this principle, it is evident that representatives who are negotiating a rule related to the Agreement on intellectual property are, at that same moment, negotiating also with regards to the

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rejected this argument …" (G. Adinolfi, "L'Organizzazione Mondiale del Commercio. Profili istituzionali e normativi" – Cedam, 2001).

[99] Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International

[100] Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International).

[101] Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International

'service' sector and the 'products' sector; the fact that the representative is not fully aware of this links is not enough to prevent them from being there. Negotiations take place through a 'credits and debits' process, in virtue of which a conquest – or even a demand – of negotiation in one sector tends to generate the need for concessions in other sector. It is thus impossible to conduct WTO negotiation in a sensible manner without single negotiator for each party, who is able to evaluate from within and manage from outside all the compensations between various sectors, and jointly representing the positions and proposals (it should be reiterated that art. XII of the WTO Charter talks of WTO members as "possessing full autonomy in the conduct of their external commercial relations and of the other matters provided for in the Agreement …") that are in his or her community's interest.

"the situation has been pertinently summed up in this phrase of Georges Friden: "It is particularly regrettable and illogical that at a time when the multilateral trade system was accomplishing its most important advance since 1947, by merging into a coherent whole the rules relating to services and the rules relating to goods, demonstrating thus the close link between both fields and making clear the fact that one could not conceive at present international trade law without taking account of the rules applicable to services, the Court made the Community take a step in exactly the opposite direction."[102].

"Critical commentators single out **the deficiency of the Court's arguments, which nourishes the supposition that this Opinion is inspired by political rather than by legal consideration**" [103]. (emphasis mine).

It should be noted that the links and complexities discussed here all pertain to internal WTO dynamics, and thus leave out the fundamental policy coordination mechanisms between the decisions that members are called upon to implement, according to the usual credit-debit framework, within the various international organizations and with regards to bi-lateral and multilateral relations.

Again within the framework of the WTO Agreements, serious doubts remain over the operation through which the Court of Justice identifies the contents of complex agreements merely on the basis of their names ('products', 'services', intellectual property'). For example, it should be noted that the WTO Agreement on goods had an impact on penal law in Italy (with regards to art. 517 of the penal code, which punishes those who violate the rules on the origin of products, and the fact that the way in which the origins of such products is defined, in part, on the basis of the WTO Agreement on 'rules of origin) and on justice (with regards to art. X GATT, which imposes on members the obligation to adopt certain judicial procedures to guarantee the timely revision of the decisions taken by customs authorities).
Similar doubts arise with regards to the description that the ECJ gives of other agreements, such as the one on the application of sanitary and phytosanitary measures, whose function is thus described by the Court: "it limits itself to establishing a multilateral framework of rules and norms aiming to guide the elaboration, adoption, and application of sanitary and phytosanitary measures…". The Court's use of the expression 'limits itself' is rather embarrassing with regards to the importance of an agreement that encompasses the entire world and which disciplines (art. 2 - "Fundamental rights and obligations") the modalities of adoption of national measures to "the protection of human health and safety; animal and plant health".
In order to understand the breadth and the importance of the situations the Agreement on Sanitary and Phytosanitary Measures is responsible for, and its incisiveness on the national agencies in charge of guaranteeing its applications, all one has to do is note the matters on the agenda of any meeting of the WTO committee on said agreement (genetically modified organisms, BSE, foot-and-mouth disease, avian flu, etc.)[104].

[102] Friden, "Cour de Justice des Communautés Européen", Annales du Droit Luxemburgeois, 4 (1994), quoted in: Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International
[103] Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International.
[104] See G. Marceau – J. P. Tracthman, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade" (Journal of World Trade, 2002, Kluwer Law International).

With regards to the interpretations of the phenomenon of the communitarization of international law provided by legal doctrine, current Constitutional Court judge Giuseppe Tesauro[105], as early as 1997, defined as "unacceptable" the barriers raised by the EU (through the European Court of Justice) against the WTO. As early as 1996, U. Everling[106], denounced the communitarization of international law, with regards to which, in 2005, Nikolaos Lavranos[107] called for the decisive intervention of the Court for Human Rights.

The fact remains, as we have stated here and as the authors cited above perhaps failed to note, that the EU's closure towards international law is structural and strategic in nature, and strictly aimed at furthering the survival and strengthening of communitary organs.

The problems and characteristics of this closure deserve systematic analysis, and an interesting attempt to do so is that of Nikolaos Lavranos, in "Concurrent Jurisdiction: European and International" (European Environmental Law Review, August/September 2005). Lavranos' research makes it possible to note that "while on the one hand the right of states to solve international environmental disputes in front of international courts and tribunals is widened, on the other this right is gradually being eroded for the Member States of the European Communities, due to the gradual expansion of the competences of the European Court of Justice". In discussing the relationship between the EU and the WTO, Lavranos notes that "in refusing to follow the WTO Appellate Body, the European Court of Justice presents itself as an example of disobedience and lack of respect for the WTO Appellate Body...This in turn jeopardizes the authority of the WTO Appellate Body and the entire dispute settlement mechanism of the WTO ..". With regards to the breadth of the implications arising out of the antagonism between the EU judicial system and the international judicial system, Lavranos writes: "The consequences of the expansion of the jurisdiction of the European Court of Justice with regards to international law matters are not limited to other international courts, but affect the Member States of the EC as well, who lose their freedom to select and use what they feel to be the most appropriate mechanism for solving a dispute" … "The combination of all these elements contributes to the danger of the fragmentation of international law, and jeopardizes the coherence and the authority of the decisions of international tribunals and thus international law in general. Furthermore, the growing number of decisions in conflict with each other

[105] "…we can exhaust ourselves in a long, in-depth dialectic exercise on the differences between the GATT and WTO, and say everything that can be said about the improvements to the 'lawfulness' of the system and the suitability of norms, now or then, to be parameters of legitimacy to be invoked by individuals. There is no solution to this debate, for the simple reason that the reasons for the Court's orientation are to be found elsewhere. What emerges clearly, especially in the joint analysis of the bananas sentence (sent. 5 October 1994, case C-280/93, Germany vs. Council) and the milk sentence (Sent. 10 September 1996, case C-61/94, Commission vs. Germany ..), is not so much a judicial issue rather than a matter of opportunity or institutional policy. In concrete terms, the interpretation and the management of conventional GATT and WTO norms should be left to the political institutions, namely the Commission and the Council (..) Given these conditions, I hope that the Court will at least partially revise its jurisprudence, and avoid excluding in an absolute and preliminary manner any possibility to attribute direct effects to WTO norms that allow it … Additionally, and independently from direct effect, member states should be allowed to challenge the legitimacy of communitary norms with regards to the parameters of WTO norms. I think it is unacceptable to suggest that suitability of WTO and GATT norms to be used as parameters for the legitimacy of domestic communitary norms be affected by the direct effect of the norm itself, as affirmed so far by the Court of Justice" (Giuseppe Tesauro, "I rapporti tra la Comunità europea e l'OMC", in "Diritto e Organizzazione del commercio internazionale dopo la creazione della Organizzazione Mondiale del Commercio", Società Italiana di Diritto Internazionale, II Convegno, Milano, 5-7 giugno 1997, Editoriale Scientifica).

[106] "The GATT is not the caricature of an international agreement; on the contrary, it is binding for the Community and its Member States. It should thus be taken seriously by the institutions and the Court" (Everling U., "Will Europe slip on bananas? The bananas judgment of the Court of Justice and National Courts", in Comm. Mark. Law Rev., 1996).

[107] N. Lavranos, "The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law", op. cit.

brings the state to a dilemma, in that they no longer know which of their obligations they should respect, and which ones they should violate".

In light of efforts throughout the world to strengthen a unitary system of international law based on 'coherence' (see the remarks[108] of Pascal Lamy, WTO General Director, at the Sorbonne University in Paris on 19 May 2006) between all international organizations, we must agree with prof. Tesauro with regards to the 'unacceptable' role played in this process by the European Union, which has now come to represent, in an evident and intrinsic manner, the maximum denial of international law.

4. Italy and the system of international organizations. The basic principles of the Constitution as a binding guide.

We will complete the analysis of the current relationship between the communitary framework and international law with a survey of the relevant aspects arising out of the Italian Constitution, particularly its inalienable basic principles. Such a historical and judicial overview is necessary, since the founding fathers included among the fundamental principles of the Republic the basic criteria disciplining the relationship between Italy and the rest of the world's nations.

"The matter brought up by the Hon. Bastianetto, regarding the mentioning of European unity, has not been examined by the Commission. However, by listening to numerous opinions, my understanding is that it could not receive unanimous votes in its favor. The desire for European unity is a quintessentially Italian principle; Italian thinkers have postulated that Europe is a second home for us. However, it also appears that at this historical conjuncture, any international framework can and must look beyond Europe's borders. Staying within these borders would not be opportune in light of the fact that other continents, such as America, wish to participate in the international system. I think that in order to reach an agreement, the text of the Constitution should not preclude the formation of closer bonds within the European framework, but it should also not make this a limit to other ways to reach peace and justice between all peoples" (remarks of the Hon. Meuccio Ruini, plenary session of the Constitutional Assembly, afternoon session of 24 March 1947. The transcript of the Constitutional Assembly meeting that hosted these discussions is available on the website of the Italian Parliament (http://legislature.camera.it/_dati/costituente/lavori/Assemblea/sed074/sed074nc_2429.pdf).

When called upon to give its opinion on the legitimacy of communitary treaties in 1973, the Constitutional Court remained faithful to the vision of the Constitutional Assembly,

[108] "The effectiveness and legitimacy of the WTO depends on how it relates to norms of other legal systems and on the nature and quality of its relationships with other international organizations … As I wrote it in 2004 in a book about "international democracy", I am a firm advocate of international coherence. I wouldn't dare to say that "international coherence" is a general principle of international law! But I recall that international cooperation is one of the United Nations objectives as stated in Article 1 of the UN Charter. I believe that efforts of international coherence are the only way to ensure the peaceful evolution of international relations and of our international legal system. But international coherence is also crucial to ensuring the legitimacy of the WTO and the effectiveness of trade rules … Existing relations between the WTO and other international organizations again reflect efforts of coherence within the international legal order. Now that the WTO is an authentic international organization will full legal personality, it has set up an important network of formal and de facto arrangements with other actors on the international scene. The greater the coherence within the international legal order, the stronger the international "community" [P. Lamy, "The Place and Role of the WTO (WTO Law) in the International Legal Order"; Sorbonne University, Paris, 19.5.2006).

and recognized the acceptability of communitary treaties in the Italian legal system, as they were felt to be capable of playing a role in support of the ideals and goals set out in art. 11 Cost. The values through which the institutional system of the EEC market could be accepted in Italy were thus contained in art. 11 of the Constitution ("Italy … consents, in conditions of parity with other states, to the necessary limitations on sovereignty for an arrangement that ensures peace and justice among nations; it promotes and favors international organizations devoted to this cause"), whose text, however, vigorously reflects the universalistic impulse of the founding fathers, who, in defining the framework within which the relationship between the Italian and international legal systems was to take place, were able to provide unambiguous guidelines and answers.

The hypothesis of granting communitary norms primacy over those of international law could have had a constitutional basis if the Bastianetto proposal had been accepted. As we have seen, however, this did not happen, and any reconstructions of the fact that attempt to reach different conclusions are, in spite of their authoritativeness, baseless and misleading[109]. In light of the risk of new dualisms and new biases, Italy has the obligation to fully apply the Ruini option and take its place, without showing uncertainty, in the front lines of the fight for the full affirmation of international law and international organizations on a global scale.

In 1973, our Constitutional Court seemed to be well aware of this outlook. "It scarcely needs to be added that on the basis of art. 11 of the Constitution, limitations on sovereignty **aiming solely to pursue the goals indicated here** have been allowed; it should be thus ruled out that said limitations, which were concretely clarified in the Treaty of Rome – underwritten by countries whose legal systems are inspired by the principle of the rule of law, and which guarantee the basic rights of citizens -, can grant EEC organs **the unacceptable power to violate the fundamental principles of our Constitutional order**, or the inalienable rights of human beings. It is obvious that should art. 189 be interpreted in such an aberrant manner, **the jurisdictional competence of this Court on the compatibility of the Treaty with the above-mentioned fundamental principles would be guaranteed** …" (emphasis mine). (Sentence 183 of 1973 of the Constitutional Court).

In 1973, the Court did not consent to any plans for a new State. The way in which, in a given historical and institutional context, the communitary process was legitimized and validated in Italy, through the scrutiny of the highest and most authoritative body in our legal system – the Constitutional Court – cannot be considered an unconditional welcome, nor a neutral passage or an empty opening.

"As is well known, the formulation of art. 11 on the part of the constitutional assembly had a specific goal: that of ensuring the rapid return of post-war, democratic, and republican Italy into the community of nations, and in particular its admission into the new international organization known as the United Nations, whose charter had been adopted on June 25, 1945. In light of this, the Constitution repudiates

[109] The Hon. Giorgio Napolitano, during his hearing, as President of the Commission for Constitutional Affairs of the European Parliament, in front of Commission I of the Chamber of Deputies on September 24, 2002, stated: "It is worth re-reading the acts of the Constitutional Assembly: in the session held on 23 March 1947, the Hon. Bastianetto presented an amendment aiming to make explicit reference to European unity...and the fact that this amendment was withdrawn and not voted upon is due to what happened after the remarks of the President of the Commission of the 75, the Hon. Meuccio Ruini ... 'Europe' – the Hon. Ruini stressed – 'is a second home for us' ... As such, in my opinion, there is no doubt that the wording of article 11 was formulated in part in light of a specific European arrangement...".

war as a tool to damage other peoples and as a way to resolve international disputes; it affirms Italy's willingness to give its consent, in conditions of parity with other states, to the limitations of sovereignty necessary to create a framework that ensure peace and justice among nations; and it affirms Italy's willingness to promote and encourage international organizations that pursue this aim"[110]. "As is well known, the original plan at the end of World War Two had been to create an International Trade Organization alongside with several other specialized agencies of the United Nations"[111].

Through art. 11, the Italian Constitution had thus made the goal of world peace and justice a policy objective and a binding legal obligations for national institutions, and a binding, fundamental principle for the entire republican system. The fundamental principles of the Constitution of 1948 did not grant autonomous dignity to territorial or institutional arrangements that were intermediate between Italy and the world. The word Europe was never mentioned, and this dimension, as we have seen, was deliberately kept out of the political and legal bases[112] upon which the Republic's institutional framework and its future outlook rested.

"… the general opinion remains that art. 11 intended to limit itself to the issues surrounding the presence of the new international organization known as the United Nations, which however is not expressly mentioned in art. 11, since it is interpreted to be included in the concept of 'international organizations' aiming to ensure 'peace and justice among nations[113]".

In keeping with its responsibilities, and in light of art. 11, the Constitutional Court has at times effectively exerted its control over the ratification law for the EEC Treaty and the conformity of its dispositions (as interpreted by the European Court of Justice) with the fundamental principles of the Italian legal system. In particular, in sentence n. 232 of 1989 (*Fragd* case), the Court came very close to giving a shocking ruling[114].
In granting the communitary system a teleological relationship with regards to art. 11, in 1973 the Constitutional Court revived legal arguments that made it possible for a normative system, that of the European common market, that was entirely outside the system of powers established by the Constitution, to acquire an area of application

[110] Final Report on the forms and conditions for Italy's participation in International Organizations and the European integration process (Presidency of the Council of Ministers, Department for Institutional Reforms and Devolution, Committee for Constitutional Studies, 2004)..
[111] Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International.
[112] The internationalist bent of the Constitution can also be inferred from art. 10: "The Italian judicial system complies with the generally recognized norms of international law".
[113] Final Report on the forms and conditions for Italy's participation in International Organizations and the European integration process (Presidency of the Council of Ministers, Department for Institutional Reforms and Devolution, Committee for Constitutional Studies, 2004).
[114] "The Court avoided the question by declaring the matter irrelevant, since the dispute brought before the *a quo* judge 'is not (…) the same one that led to the declaratory judgment of the set of rules under challenge' and thus not creating 'the necessary relationship between principal judgment and incidental judgment' (..). The fact remains that … the Constitutional Court, first with sentence n. 183/1973 (..) and then with sentence n. 170/1984 (..) had made it clear that communitary acts could not violate the founding principles of our legal system …" (Rossella Miceli - Giuseppe Melis: "Le sentenze interpretative della Corte di Giustizia delle Comunità europee nel diritto tributario: spunti dalla giurisprudenza relativa alle direttive sulla "imposta sui conferimenti" e sull'IVA" in:
http://www.judicium.it/news/ins_11_02_04/ArticoloMelisMiceli.html#sdfootnote132anc**).**

(delimited by the Treaty of Rome) from whose framework the Italian legal system consented to withdrawing[115].

This was the opinion of the Constitutional Court in 1973 (sentence n. 183): "The matter is unfounded. The law of 14 October 1957, n. 1203, through which the Italian Parliament fully implemented the ECC Charter, is legitimized in full by art. 11 of the Constitution, on the basis of which 'Italy allows, given paritary conditions with other states, the necessary limitations on sovereignty for an arrangement that ensures peace and justice among Nations', and thus 'promotes and encourages international organizations devoted to this goal'. This disposition, which was included among the 'fundamental principles' of the Constitution, marks a clear and precise policy orientation: the constitutional assembly was referring to Italy's participation in the United Nations, but it was inspired by general policy principles, of which the EEC and other regions European organizations are the current manifestations".

In this same ruling – in a manner that could be seen as exhaustively defining, even for the future, the legal reference framework – the Constitutional Court stressed that it both wanted and was obliged to keep for itself the task of ensuring that the activities of communitary organs remained compliant with the original mandate, which for Italian institutions meant complying with the dispositions contained in art. 11.
In keeping with the framework defined by the Constitution and the interpretations of it provided by the Court, the changes that took place in the following decades, starting with the establishment of the World Trade Organization, seem to spur all the organs of the Republic to re-acquire a critical sense, which might make it possible to re-evaluate in a responsible and accurate manner the international legal framework in which Italy currently finds itself. Within and in support of said perspective, the elements provided by Italian jurisprudence over the last several decades should prove useful, as the later has repeatedly been called upon, at many levels, to review international judicial dynamics, including with specific reference to the relationship between GATT norms and art. 11 of our Constitution. The question of the status of GATT/WTO norms in our domestic legal system, and their suitability for arriving at subjective legal positions with regards to individuals (direct effect), thus fall within this problematic framework. We will not discuss this question in detail[116], even though it is relevant to many of the

[115] "The norms arising from it, on the basis of art. 11 Cost., can be directly applied on Italian soil, but remain outside the system of domestic law: if this is the case, they cannot be evaluated on the basis of the tools used for solving conflicts between our own domestic norms. This thus explains the statement, contained in sentence n. 232/75, that internal norms do not cede, with regards to communitary norms, on the basis of their respective degrees of resistance. The principles established by the Court with regards to communitary law – or in the case at hand, regulations – gain their significance from this: that the EEC legal system and the domestic ones, albeit distinct and autonomous, are, in accordance with the Treaty of Rome, necessarily coordinated; coordination is based on the fact that the Treaty implementation law transferred to communitary organs, in keeping with art. 11 Cost., the competences which they exert on the matters reserved to them" (Sentence of the Constitutional Court n. 170 of 1984).

[116] **Notes on the suitability of GATT/WTO to arrive at subjective legal positions with regards to individuals (direct effect) in Italy.** "Despite the different orientation of communitary jurisprudence, the protocols of the GATT Agreement, thanks to the ratification and implementation laws, attribute to individuals rights that are fully protected by the national jurisdiction" (Naples Tribunal, 12 November 1984, Soc. Montedison C. Min. fin.).

"Art. 11 of the GATT agreement on customs fees, concluded in Geneva on 30 October 1947 and entered into force with l. 5 April 1950, n. 295, which bans the increase of customs fees and other fees on imports, regards only the goods included in the lists annexed to the agreement itself (for Italy, list XXVII approved through the Annecy protocol of 10 October 1949, entered into force with l. n. 295 of 1950); therefore,

fees for administrative services, established with l. 15 June 1950, n. 330, must be considered legitimately collected with regards to goods not included on the original lists …" (Cass. Civ., 07/11/1985, n. 5412).

"Art. 2 of the GATT agreement on customs fees, entered into force with l. 5 April 1950, n. 295, which bans the increase of customs fees and other fees on imports, regards only the goods included in the lists annexed to the agreement itself (for Italy, list XXVII approved through the Annecy protocol of 10 October 1949); it follows that with regards to fossil fuels, which are not included in said list (..), fees for administrative services, established with l. 15 June 1950, n. 330, must be considered legitimately collected …" (Cass. civ., 14/10/1985, n. 4971).

"In the GATT system (entered into force with l. 5 April 1950, n. 295) there is no general ban on introducing new import fees, but there is a ban on increasing customs fees, other fees on imports, regards only the goods included in the lists annexed to the agreement itself (for Italy, list XXVII approved through the Annecy protocol of 10 October 1949); it follows that, for other goods, although originating from the GATT area, fees for administrative services must be considered legitimately collected ……" (Cass. civ., n. 6368 del 16/12/1985).

In favor of the direct applicability of GATT norms, and against the orientation indicated by the European Court of Justice, Court of Cassation, Joint Sessions, 20 October 1975, n. 3403.

The divergence of opinions in this field also emerged during the course of the proceedings themselves, upon which the European Court of Justice pronounced itself several times.

During the impingement proceedings C-93/02 P and C94/02 (P Biret International SA and Etablissements Biret et Cie. SA/Council of the European Union), general counsel Alber argued that WTO norms are directly applicable, when the WTO dispute settlement body confirms the incompatibility of a communitary measure with WTO law and the Community does not implement relevant recommendations or decisions within a reasonable amount of time set by the WTO.

By the same token, general counsel A. Tizzano, in proceeding C-377/02 (Lèon Van Parys NV) had set out the conditions for the recognition of the direct applicability of WTO norms in the communitary legal system. In this circumstance, the European Community had failed to comply with the indications of the dispute settlement body of the WTO, which had (on September 25, 1997) sanctioned the violation of art. I and XIII of the GATT on the part of a communitary regulation (reg. 404/93) which introduced a joint regime for the import of bananas. In ruling on this case (1 March 2005) the Court of Justice reiterated that "**è giurisprudenza costante che, tenuto conto della loro natura e della loro economia, gli accordi OMC non figurano in linea di principio tra le normative alla luce delle quali la Corte controlla la legittimità degli atti delle istituzioni comunitarie** (sentence 23 November 1999, case C-149/96, Portugal/Council …; ordinance 2 May 2001, caseC-307/99 …; sentences 12 March 2002, joint cases C-27/00 e C-122/00 …; 9 January 2003, case C-76/00 …; and 30 September 2003, case C-93/02 …)".

Giuseppe Tesauro shares Everling's observations on the lack of recognition of the direct effect of WTO norms on the part of the European Court of Justice, and defines them as "valid criticism". As we have already seen, Tesauro's disagreement with the orientation of the European Court of Justice on this point is firm and profound.
"It seems to me impossible to reasonably doubt the fact that binding international norms for the Community and its member states, an integral part of the overall communitary judicial system, are a parameter for the legitimacy and suitability of the norms over which they prevail. Frankly, I cannot agree with other types of solutions, and in particular I cannot imagine how a WTO or GATT norms, which is binding for the Community and its member states, and thus an integral part of the communitary system, cannot lead to the invalidity of a communitary or national norms that conflicts with it, unless one wants to grant WTO norms an inferior rank, which is clearly inadmissible under the general theory of international law.
The jurisprudence of the Court with regards to GATT 1947 is however quite different, if not in complete contrast. I thus feel it useful to underline its most significant characteristics.
The first and most important aspect of this is undoubtedly the International sentence, in which the Court, having affirmed its competence in examining motives for invalidity arising out of international law (points 4/6), then specified that, in order for the validity of a communitary norm to be nullified due to its

incompatibility with a norm of international law, the latter must be binding for the Community and, furthermore, must grant individuals the right to present their reasons against a communitary act in a court of law; it should thus be a norm with direct effect (point 7/9) … The Court therefore concluded that, in the absence of explicit reference to the jurisprudence of Fediol and Nakajima, it is not bound to verify the legitimacy of a communitary act in light of GATT norms (point 11). This is undoubtedly a type of jurisprudence which, apart from the absence of direct effect of GATT norms, poses serious problems and risk achieving dubious and contradictory results, as shown by a successive case, in which, with an appeal to the Commission against Germany ex art. 169 of the Treaty, accused the latter of violating certain dispositions of an agreement adopted within the GATT framework … Whether Germany violated the agreement is not so important: what really is important is that the Court used the GATT as a parameter for legitimacy with regards to a national norm that was in conformity with a communitary regulation. This was precisely what had been excluded by the opposite hypothesis, when, in the banana case, Germany itself had, through a direct appeal ex art. 173, asked that a GATT norm be used as the parameter for the validity of a communitary act.

…

With this approach the Court thus agreed with the position of the Commission, according to which member states cannot invoke *their own* interpretation of GATT obligations and decide whether or not to abide by them; nor can they invoke *their own* interpretation in order to support the invalidity of a communitary position based on derived law. Indeed, in both cases the Commission claims the right to decide, on the basis that only the Commission is responsible for external relations, whatever the correct interpretation of the obligations assumed under the GATT framework. This position implies that enforcement of compliance with a treaty, which both the Community and its member states are bound to, can be taken on by the Court only in cases in which a member state is responsible for the violation, and not when the violation is due to the behavior of the institutions themselves. In this last case, the violation of GATT obligations can be sanctioned only by the instruments recognized by international law, and not through the jurisdictional control of the Court.

I cannot agree with this solution, which takes away from communitary judges part of the jurisdictional control over communitary acts with regards to WTO and GATT norms, which are also part of the communitary judicial system. At the very least, I cannot understand the judicial basis for this solution.

Indeed, the system in question ends up representing the conventional norms discussed here as having less value than "normal" conventional international norms, even with regards to the fundamental principle of *pacta sunt servanda*. Even under this profile, this hypothesis cannot be sustained through a rapid and less rigorous evaluation.

…

It thus clearly emerges that the direct effect was made subordinate by the Court to the verification of two elements, namely the characteristics of the GATT system (goals, structure, characters of the norms, measures in cases of violations) and the contents of the norms.

It is true that there has never been a verification of the contents of the norm, in the sense that the Court has never attempted to verify whether the norm in question was clear, precise, and unconditional, in accordance with the traditional criteria that have brought the Court to confer – or refuse to confer direct effect on communitary norms. This is due to the fact that the Court has always held itself, with negative outcomes, to the initial verification of the salient characteristics of the GATT system as a whole. With regards to this, I would note that it does seems to me that the GATT norms that were brought to the Court were any less clear, precise, and unconditional that other conventional norms that were generously granted direct effect by the Court itself …" (Tesauro G., "I rapporti tra la Comunità europea e l'OMC", in "Diritto e Organizzazione del commercio internazionale dopo la creazione della Organizzazione Mondiale del Commercio", Società Italiana di Diritto Internazionale, II Convegno, Milan, 5-7 June 1997, Editoriale Scientifica).

In his critique, Tesauro does not limit himself to a rigorous descriptive analysis of the weaknesses of communitary jurisprudence. He also proposes an explanation for this behavior, which is related to the observations discussed above .

"… we can exhaust ourselves in a long, in-depth dialectic exercise on the differences between the GATT and WTO, and say everything that can be said about the improvements to the 'lawfulness' of the system and the suitability of norms, now or then, to be parameters of legitimacy to be invoked by individuals. There is no solution to this debate, for the simple reason that the reasons for the Court's orientation are to be found elsewhere. What emerges clearly, especially in the joint analysis of the bananas sentence (sent. 5 October 1994, case C-280/93, Germany vs. Council) and the milk sentence (Sent. 10 September 1996,

questions regarding the applicability of said norms to Italy as a WTO member state, and thus regarding the 'unacceptable' closure towards these norms on the part of the communitary system, which is accepted thanks to the dogmatic deference to the latter shown by many in Italy.

How would the judges serving on our Constitutional Court, including prof. Giuseppe Tesauro himself, pronounce themselves today if they were called upon[117] to rule on the

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case C-61/94, Commission vs. Germany ..), is not so much a judicial issue rather than a matter of opportunity or institutional policy. In concrete terms, the interpretation and the management of conventional GATT and WTO norms should be left to the political institutions, namely the Commission and the Council (..) Given these conditions, I hope that the Court will at least partially revise its jurisprudence, and avoid excluding in an absolute and preliminary manner any possibility to attribute direct effects to WTO norms that allow it … Additionally, and independently from direct effect, member states should be allowed to challenge the legitimacy of communitary norms with regards to the parameters of WTO norms. I think it is unacceptable to suggest that suitability of WTO and GATT norms to be used as parameters for the legitimacy of domestic communitary norms be affected by the direct effect of the norm itself, as affirmed so far by the Court of Justice" (G. Tesauro, op. cit.)

Giorgio Sacerdoti, currently a member of the WTO Appellate Body, also offers his authoritative opinion on the matter (G. Sacerdoti, "Profili istituzionali …" op. cit., 1997): "The negotiating authorities of the European Union and the USA have stated that they do not want to confer self-executing status or direct internal efficacy to the Agreements of the Uruguay Round … This choice is open to criticism , since it contrasts with the goals and the results of the negotiation … [the author adds in a footnote: ' .. The exclusion of direct applicability, declared unilaterally in the framework of the restrictions on the efficacy of commitments seems to be of dubious validity in the presence of objectively self-executing norms]".

Along these lines, the CGCE rulings (C-300/98 e C-392/98) in which the Court, contradicting itself, affirms that member states are responsible for recognizing – or failing to do so – direct effect for TRIPS norms in fields in which the Community has not legislated, are quite interesting. "This is an interesting conclusion, that contrasts with the overall reasoning according to which GATT-WTO norms are not precise enough, and thus should not enjoy the status of direct effect"[116].

C. Marcolungo is another critic of the Community's lukewarm embrace of WTO law: "… This line of behavior is not entirely coherent with the need for the rule of law and the rule-oriented system that characterizes the WTO system, and thus represents a left-over from the power-oriented aspects that the Dsb mistrusts … The WTO now plays a role as a regulator, on a global scale, of the trade market. Regulation takes place especially though the instruments typical of cross-examination, on the basis of the principles of the due process of law, reason, proportionality, transparency, and efficacy" (C. Marcolungo, op. cit.).

Tesauro seems to hope that national organs will not uncritically follow communitary positions: "For example, we should ask ourselves whether it is correct for judges and national administrations to be bound – in the application of conventional norms that are the province of the State (and not of the Community as well) – to follow the interpretation of the Court and not, for example, its own interpretation or that of a WTO Panel, expressed within the framework of the dispute settlement mechanisms, in light also of the inevitable consequences in terms of responsibility …".

[117] "In excluding the applicability of regulations, since they are part of another legal system with its own legal and political control instruments, the Court also tackled the issue of their potential violation of the fundamental principles of Italian law, or of the inalienable rights of persons: in this case the requirements indicated by art. 11 Cost. which confer legitimacy on the Italian membership in the EU would be lacking, and as a consequence the Court could reject the implementation law of the Treaty itself. This hypothesis was considered highly unlikely, given the limited normative competences given to the Community, but it is interesting to note that, with regards to a similar question, the German Constitutional Court, which could rely on an art.24 whose content is analogous to our art.11, gave the opposite ruling, accepting the heteronymous nature of the regulations, but considering itself competent to rule on their compatibility

conformity of the "communitarization" process of international law with the fundamental principles of the Italian Constitution? In particular, would the Court accept the disavowal, on the part of communitary organs, of the relevance of WTO norms? Could the Court confer legitimacy on the communitary treaty, which was established in order to favor the affirmation of international law and the work of international organizations, but which is today irrevocably in contrast with both?
The author is convinced that, should the Constitutional Court be called to do this, it would not fail to confer the appropriate relevance to the innovations contained in the Final Agreements of the Uruguay Round, underwritten in 1994, the most important of which is not so much the admittedly historical establishment of the WTO, but rather the strengthening of GATT judicial mechanisms, which are now at the service of the entire international judicial system.

"If, as some believe, economic and trade competition will replace traditional political and military competition in terms of importance and potential for conflict, and the WTO were thus destined to become the 21st century's UN …"[118].
"… the fundamental result of the Uruguay Round, legally speaking, was to transform the General Agreement into an international treaty duly negotiated and put into force, according to the standards of the Vienna Convention on Treaty Law, and to transmute by this the General Agreement into an international organization, with an appropriate constitutional structure, having its own personality, a decisional capacity and a system of genuine dispute settlement"[119]. "Fifty years after the failed attempt to create the ITO through the Havana Charter, the old plan for such an organization has now been completed, in keeping with the spirit of the times ..."[120]. "The World Trade Organization officially was established on January 1, 1995, as the successor to GATT and as the legal and institutional foundation of the international trading system"[121].

Nor could the Court realistically abstain itself from expressing appreciation for the fact that with "the institution of an Appellate Body, the judicial system of the World Trade Organization has acquired an important characteristic typical of all mature judicial

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with fundamental rights and their applicability on German soil, since the guarantees provided by the communitary system with regards to democracy and individual rights cannot be equated with Constitutional guarantees (sentence of 29.5.74). The Constitutional Court's position on the protection of the rights of German citizens – considered intangible even on the part of communitary norms, albeit at the price of a re-enactment of the relationship between legal systems that is less elegant and formally unassailable as the one adopted by the Italian court – along with the frequent adjournments on the part of judges who asked the Court of Justice to pronounce itself with regards to the invalidity of communitary acts that were claimed to be in violation of rights protected by Germany, profoundly influenced the European Court of Justice, leading it to adopt human rights legislation that was more open and protective of civil rights that had originally been announced, and which affirmed the illegitimacy of 'measures that are incompatible with the fundamental rights enshrined in the constitutions' of member states and the human rights treaties they signed. This is a valid example of the collaboration and interaction between domestic and communitary legal systems, and especially between their respective jurisdictional systems, which was discussed above, and to which Italy has not always been able to contribute significantly" (Claudia Morviducci, "The Italian Constitution and European Institutions", Seminar on "The Constitution and the Republic" – April/October 1997).

[118] Sacerdoti G., "Profili istituzionali dell'OMC e principi base degli Accordi di settore", in "Diritto e Organizzazione del commercio internazionale dopo la creazione della Organizzazione Mondiale del Commercio" (Società Italiana di Diritto Internazionale, II Convegno, Milano, 5-7 June 1997) (Editoriale Scientifica).

[119] Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", Common Market Law Review 36, 1999 Kluwer Law International:

[120] P. Picone, A. Ligustro, cit.

[121] Palmeter D., Mavroidis P. C., cit.

systems: the separation of judiciary power from the other organs of governance (or in this case, of the organization)"[122]. Should it be called upon to pronounce itself on its hierarchy of values between the communitary and WTO systems, the Court, in light of the new developments that took place in Marrakech, could potentially make significant revisions to its previous position[123].

[122] Palmeter D., Mavroidis P. C., cit.

[123] In particular, the Constitutional Court had been asked to rule on the matter of the direct effect of GATT norms in Italy, since some Tribunals ("*a quo* judges") felt that this direct effect could and should be considered effective, in light of art. 11 of the Constitution, as – they felt – the constitutional ideals of peace and justice between nations had the same relationship with GATT norms as their previously recognized relationship with EEC norms.

The reasons adopted in that circumstance (case n. 96 of 1982), both by those negating the relationship of GATT norms with art. 11 Cost. (State Bar Association) and those affirming it (*a quo* judge) are worth summarizing here.

"It is the opinion of the Bar that the claimed violation of art. 11 Cost. is unfounded. With regards to this Constitutional decree, the Bar attributes the significance of a norms that allows, at most, limitations to state sovereignty, but which does not automatically lead to the prevalence of the norms contained in the treaty over conflicting internal norms. With regards to the parameter considered here, the subordination of the law to the Treaty could be put forward only in cases in which the limitation of state sovereignty is connected, in conformity with Constitutional norms, **with the establishment of bodies analogous to the EEC**, and the pursuit of their institutional goals. **The GATT, a mere tariffs and trade agreement**, would remain outside this perspective, especially since the **original plan for an International Trade Organization**, aiming to overcome protectionist positions on a super-national basis, has not been implemented" (Preamble. Sentence 96/82 of the Constitutional Court.). [emphasis mine]".

"In light of this, the Milan Tribunal felt an obligation to pose to the Court the following question on constitutionality: … With this, art. 11 of the Constitution would be violated, on the assumption that the GATT could be assimilated with the charter of the European Communities and enjoy the same constitutional protection" (Preamble. Sentence 96/82 of the Constitutional Court.).

"On the eve of the audience, the defense of the Società Castoldi and the others produces additional memory. It notes that the only remedy to mistakes on the part of the lawmaker or to excessive legislative power – in cases where there are no corrections on the part of the lawmaking body – is provided by the examination of constitutionality. The present question can be posed in essentially the same term as the one concerning the so-called rights to sanitary visits, decided by the Court with sentence n. 163 of 1977. The national norms that established this right, which was then ruled to be incompatible, due to its violation of art. 11 Cost., with the banning of customs fees enshrined by EEC norms, were declared unconstitutional by the Court" (Preamble. Sentence 96/82 of the Constitutional Court.).

"According to the Milan Tribunal, such fiscal treatments amount to unjust discrimination against imported products, in favor of domestic ones. This leads to the present question, as submitted to the Court's attention:...From this we deduce that both dispositions being examined are constitutionally illegitimate, either due to their incompatibility with art. 11 of the Constitution, with regards to the norms that authorized the ratification of the GATT and made it effective domestically, or on the basis that said agreement should, with regards to its relationship with domestic laws, be made assimilable to the EEC charter" (Preamble. Sentence 96/82 of the Constitutional Court.).

In ruling on this question in 1982, the Italian Constitutional court neither accepted nor reject, at its root or in more general terms, the direct applicability of the system of GATT norms, but it felt that a position on this matter should be subordinate to judgments to be made in light of the nature of the individual norms, and thus their effective clarity and precision.

"The documentation provided by the Ministry of Foreign Affairs in compliance with said measure shows that there is still a divergence of opinions within the GATT over how the ban on fiscal discrimination of imported goods must be implemented in each national legal system: to the extent that, in the competent

Each one of the arguments that was used in the past by the Constitutional Court to deny the relevance of art. 11 Cost. to GATT norms seems to have been rendered invalid on April 15, 1994. Should the Constitutional Court be once again invited to express its opinion, it could provide not only Italy, but the entire world with a renewed framework for the rule of law, by granting its own authoritative certification to the historical relevance of an event, the signing of the Marrakech Agreements (April 15, 1994), that was a crucial step in the definition of an institutional system that is capable of forging a

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fora, it has not been possible to adopt any interpretative statute for the Agreement, on the basis of which the thesis of the parity of individual tax rates can, as requested by private parties, be regarded as preferred over that of the overall fiscal burden of the products in question. (Cfr. the Analytical Index, sub art. III, 2, 5 (c) which specifically refers to domestic taxes affecting various stages of production: 3 s/210211 para. 10)" (Sentence 96/82 of the Constitutional Court.).

The Constitutional Court, as early as 1982, recognized a clear analogy, in terms of missions, between the EEC legal system and the GATT legal system.

"The criteria of the overall fiscal burden is already in place in our legal system, namely through the fiscal parity clause of the Treaty of Rome (art. 95), which is undoubtedly analogous to the one under examination, since the EEC promotes and protects – not unlike the GATT: indeed, with all the institutional resources of a super-national entity – freedom of trade and exchange between member states".

In the case at hand, the Court denied the existence of a direct relationship between art. 11 Cost. and the specific GATT norms in question: it should be remembered that this took place in 1982, well before the new developments introduced by the Uruguay Round and the extraordinary advances that WTO law would then have brought upon the system's strength and reach.

A new case, having to do with the relationship between GATT norms and art. 11 of the Constitution, was brought before the Italian Constitutional Court in 1985.

From the text of Constitutional Court sentence n. 219 del 1985:

"According to the *a quo* judge the alleged violation of art. III of the GATT Treaty would contrast with art. 11 Cost., according to a reasoning akin to that expressed by this Court with regards to the EEC Treaty".

With regards to the position of the Bar Association

"Art. III of the GATT Treaty cannot be considered a self-executing norm, and thus eligible for becoming part of the legal system; it must be considered a mere expression of a commitment to be pursued through domestic norms."

And that of the *a quo* Judge

"… The infraction of art. III of GATT would imply the constitutional illegitimacy of the institutive norm on settlements which institutes the settlement duty, due to incompatibility with art. 11 Cost.. This article, according to the *a quo* judge, guarantees compliance with GATT on the part of the legislator, not unlike, according to the jurisprudence of the Court as contained in the adjournment injuction (cfr. sent. n. 183/73), what happens with the Treaty of Rome regarding the establishment of the EEC"
This was the conclusion of the Court, who once again anchored its ruling on a specific way of being, at a given time (1985) of the GATT system:
5.1 - Sentence n. 96/82 ascertains, first of all, that the question posed in regards to art. 11 Cost. is unfounded. In any regard, the GATT execution law must not and cannot be assimilated, in the case of internal sources, to the law issued to confer domestic efficacy to the Treaty of Rome: the latter, in conformity with and upholding of said Constitutional principle, authorized the limitation of the sovreign power of the State and their relative transfer to a super-national authority, **as required by Italy's entry into the Common Market system. The GATT is merely a tariff and trade agreement**. (emphasis mine).

universal push[124] towards unity in trade, law, peace, and justice.

The 15 of April 1994 should perhaps be celebrated especially in Italy, since the Marrakech Agreements seem to have finally given shape to the idea that the far-sighted Meuccio Ruini, as the President of the Constitutional Assembly, described and constitutionalized as far back as 1947. Today, this idea, thanks mostly to the WTO dispute settlement system, has taken on the form of a world subject to the rule of law, in which all nations tend to develop trade relations, thus promoting peace and justice.

4. Conclusions

Within the current non-relationship between Italy and judicial globalization, a relationship that is hindered by the so-called communitarization of international law, it is objectively impossible to make proposals that are non-structural in nature. Indeed, the framework as a whole deserves critical re-thinking, which will ultimately have to rely on the inviolable parameters provided by the fundamental principles of the Italian Constitution (art. 10 and 11).
How committed to the basic principles of the Italian Constitutions are the people with the institutional responsibility of applying and interpreting law? Since the EU system, in and of itself, does not have any original legitimacy in Italy, but is instead judicially acceptable only in light of its presumed capacity to pursue the goals set out in art. 11 of the Constitution, and thus of its capacity to contribute better than international law – which, as we have instead seen, the EU system radically negates – to the promotion of peace and justice among nations, where can one make the necessary comparative analysis – between EU norms and international norms - that can justify the preferences that are systematically granted to EU law? Moreover, what is the degree of knowledge of international law exhibited by the institutional representatives, judges, and officials of the Italian public administration who choose to ignore, everyday, the norms of international law, in spite of the Italian Constitution, while privileging the acts of a body, such as the European Community, whose nature is ambiguous and which are lacking any legitimacy with regards to the letter and the intention of the Constitution?
In the era of globalization, these questions can no longer go unanswered.
Although we have not evaded our responsibility to try to provide answers, what we feel is most essential is that the issues discussed here be removed from the field of false and unquestionable certainties and be restored to the dignified rank of unsolved questions. The law, and intelligence, will only benefit from this.

[124] As of 31 March 2007, 150 countries are WTO members, and many other important ones - including Afghanistan, Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Ethiopia, Iran, Iraq, Lebanon, Libya, Russia, Saudi Arabia, Serbia, Sudan – are currently engaged in the negotiation process that leads to WTO membership.