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Crossing the Atlantic: the European Union, Canada, and NAFTA in Comparative Perspective

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List of Abbreviations

AFTA/FTAA	American Free Trade Area (or Free Trade Area of the Americas)
BENELUX	Belgium, Netherlands, Luxemburg
BNA	British North America Act
CEC	Commission for Environmental Cooperation
CFSP	Common Foreign and Security Policy
CT	Constitutional Treaty
CUSFTA	Canada–USA Free Trade Agreement
EAEC	European Atomic Energy Community
EC	European Community (subsequently EU)
ECB	European Central Bank
EDC	European Defense Community
EEC	European Economic Community
EMU	Economic and Monetary Union
EP	European Parliament
EU	European Union
FDI	Foreign Direct Investment
FMC	First Ministers' Conference
FTA	Free Trade Area
FTAA	Free Trade Area of the Americas
IGC	Intergovernmental Conference
IGR	Intergovernmental Relations
IMF	International Monetary Fund
GATT	General Agreement on Tariffs and Trade
JHA	Justice and home affairs
JPAC	Joint Public Advisory Committee
LT	Lisbon Treaty
MLG	Multi-level governance
NAFTA	North American Free Trade Agreement
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labor Cooperation

NATO	North Atlantic Treaty Organization
POGG	Peace, Order and Good Government
QMV	Qualified majority vote
ROC	Rest of Canada
RTA	Regional Trade Agreements
TEC	Treaty of European Community
TEU	Treaty of European Union
TFEU	Treaty on the Functioning of the European Union
USA	United States of America
WEU	Western European Union
WTO	World Trade Organization

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Introduction

i. The Concept

The most basic question, namely what kind of polity or political system the European Union is, has no ready-made answer. Whilst we are well aware that the United Nations is an international organization, or Italy is a state, it is far from obvious what kind of political community is the European Union (EU): is it an international organization, a state in the making, a regional economic organization or a radically new type of polity?

In order to clarify the nature of the EU as a polity, analysts rely on different vocabularies. Some see the EU as “a compound democracy” (Fabbrini 2010, 197), or “a new kind of commonwealth” (McCormick 1999, 191), or a “mixed commonwealth” (Bellamy and Castiglione 1997), or *condominio*, *consortio* (Schmitter 1992; 1996); others think of it as a “partial polity” (Wallace 1993, 101) and “uncompleted polity” (McKay 1999; 2001), or a “post national entity” (Curtin 1997; Habermas 1998) or “post-modern entity” (Ruggie 1993): and others have described it in globalist terms, such as cosmopolitanism (Held 1993; 1995; Linklater 1996; 1998). Bearing the EU complexity and institutional novelty in mind, it seems right to assert that the EU is “an essentially contested project, in polity terms” (Fossum 2004, 18).

However, the EU’s allocation of authority upward, downward, and sideways from central states has led many analysts to designate it as a multi-level system of governance (Marks *et al.* 1996; Hooghe and Marks 2003; Schmitter 2004). Indeed,

multi-level governance (MLG), initially described a “system of continuous negotiation among nested governments at several territorial tiers –supranational, national, regional and local” seems to perfectly grasp the distinctiveness of EU structural policy (Marks 1993, 392; Hooghe 1996). Although the label multi-level governance became common currency among scholars and decision makers close to the field of EU studies, it then had been considered to be a wider concept also relevant to entities different from the EU. As Schmitter (2004, 49) observes:

“Multi-level governance can be defined as an arrangement for making binding decisions that engages a multiplicity of politically independent but otherwise interdependent actors – private and public – at different levels of territorial aggregation in more-or-less continuous negotiation / deliberation/ implementation, and that does not assign exclusive policy competence or assert a stable hierarchy of political authority to any of these levels.”

Further, it has been noted (Piattoni 2009) that the term multi-level governance clearly denotes a different set of arrangements, a panoply of systems of coordination and negotiation among formally independent, but functionally interdependent entities, which stand in complex relations to one another and that, through coordination and negotiation, keep redefining these relations.

In essence, MLG refers to processes of structural change caused by a partial shift of powers across the various levels of governance. As a result, the concept has become widely used to study political processes that cut across the territorial boundaries of an entity. In this regard, MLG resembles also more conventional federal systems, which have established a stable division of power between a limited number of levels of government with general jurisdiction over a given territory or a given set of issues and mutually exclusive membership. In this regard, it has been

noted (Marks *et al.* 1996; Hooghe and Marks 2003; Piattoni 2009) that the levels which are connected by MLG may be understood as *territorial levels* (supranational, national, subnational in the case of the EU, and federal, sub-federal and municipal in the case of a federal state), each commanding a certain degree of authority over its territory and the individuals residing in it, but also more generally as *jurisdictional levels*, identified with regard to a certain function and to the constituents who are interested in the performance of that function.

However, even an exhaustive and descriptive evidence of multi-level governance, as the one above, does not really do justice to the complexity of the phenomena that are captured by this term. The reason has its roots in the fact that term multi-level governance seems to be too vague, indiscriminate and encompassing –or better insufficient –to help much in establishing what kind of polity or political system the European Union is.

Anyhow, it is not the purpose of this work to deny in any way the idea of the EU as a multi-level system of governance. In fact, herein, I start from the assumption that the EU *is* a multi-level system of governance. For the scope of this paper, this is a necessary and useful assumption, however, it is not sufficient. Indeed, as we have shown, the multi-level system category is deeply nuanced. In this regard, empirical researches have uncovered a wide variety of patterns of multilevel governance under the form of system of network governance, federal and confederal states, intergovernmental organizations, and different varieties of regional economic organizations.

ii. *The Approach*

Subsequently, from a scientific perspective, it seems clear that the research question this work must address is: what kind of multi-level system of governance is the EU?

In order to give a satisfying answer to our question, we, therefore, necessitate a deeper reasoning. We start from these assumptions:

- a. the EU is a multi-level system of governance;
- b. this starting point is necessary but not sufficient because ... ;
- c. ... the *family* of multi-level systems of governance is very nuanced and diverse. It contains different *genera*.

Since this work aims at giving us a clearer sense of what the EU is and is not, and how it might change over time, its underlying premise is that political systems are best comprehensible in comparative perspective. A comparison between the EU and other multi-level systems of governance will give us a clear idea on how nuanced is the *family* of multi-level systems and to what *genus* the EU belongs –or better in which direction it is heading.

Two important considerations have to be made: first, the aims of the research will be pursued through comparative and diagnostic institutional approaches. The comparative institutional method will allow us to focus on institutions (considered as both independent and dependent variables), historical processes, and division of powers among the government levels of the entities compared; whereas the diagnostic method will allow us to start by identifying the basic challenges the entities faced and discussing then how these challenges have been dealt with.

Second, our investigation precludes its comparison with any of EU member

states, as they are intrinsic parts of the entity.

That being said, by looking for feasible multi-level entities to be compared, one approach could consist, on one hand, in taking polities that have followed similar trajectories and compare the EU with such. One possibility might be to identify those entities that were set out to be, but which never succeeded in becoming nation-states, and although their failure to comply, they prompted a search for alternative organizational forms or modes of belonging (Fossum 2006). I then decided to treat the EU as it belongs to the genus of federal political systems, and thus to compare it to a multi-level federal system with similar features and that faced similar challenges. As a result of the regarding research, one possible comparable case is indeed Canada.

On the other hand, I noticed that the interpretation of the EU as a regional economic organization has seen an increasing pile of books and publications with the purpose to describe the EU entity of networks under the genus of international organizations. Pursuing this further, since the EU is considered the first and most prominent experience of regional cooperation (Roy and Dominguez 2005), and since it has played a fundamental role in promoting world regionalism, it has been usually located in a *continuum* with other regional organizations. The difference between the EU and other forms of regional economic organization, as noted by Fabbrini (2015, 96), has been considered to be “a difference of degree and not of kind.” For this reason, since the existence of a variety of integration processes around the world, scholars still produce a comparative literature on the distinct types of regional integration models, working on the same *continuum* among different entities. For these reasons, I decided to embark on the attempt to clarify whether the EU clearly belongs to this genus, or it is the direction in which it is heading. This comparative analysis will either confirm or rather deny the idea that the EU is in a *continuum* with other

regional organizations and that they belong to the same *genus*. To do so, I take a comparative look to another large trading bloc amongst industrialized countries: NAFTA.

That being said, once I have identified two alternatives of multi-level systems, this comparative context will lead us to assess what kind of multi-level system the EU is and in which direction it is heading. To ease the analysis, I decided to put a federal multilevel-system of governance –Canada –and a multi-level regional economic system of governance –NAFTA –poles apart (see Figure I.1).

Figure I.1. Thesis' comparative experiment



On the one pole, there is Canada, a multi-level system with shared governance working inside a constitutional federal state. On the other pole, there is NAFTA, a multi-level system working around a regional economic organization aimed at benefitting from a free trade area. The EU, as illustrated, stands in-between the two extremes –a federal state and an economic regional organization. The comparative analysis on the *family* of multi-level systems of governance will give us an idea on what *genus* belongs to the EU and in which direction it is heading: is the EU more similar to a multi-level federal system rather than a multi-level economic regional organization?

iii. *Apples and Oranges*

Comparing the EU to a federal state and, at the same time, to an economic regional organization may appear to compare fruit and vegetables rather than apples and oranges. Indeed, while the comparison between the EU and NAFTA might seem an obvious exercise, comparing Canada and the EU is another matter.

In this regard, one might argue that it would make more sense to compare the EU with the United States, instead of Canada. However, the academic literature is crowded of eminent and excellent works on the comparison between the EU and the US (see *inter alia* Fabbrini 2005; 2010; Sbragia 2006; Nicolaïdis 2006; Weiler 2001).

Nonetheless, herein, through our research, we will discover that clearly there are certain areas where the EU-Canada comparison is not only justified but also more appropriate than the EU-US comparison.

Notwithstanding that, we believe that a comparison between either apples and oranges or fruit and vegetables is academically useful and worthwhile. The academic aim of this work is to demonstrate and perhaps to convince the utility of comparisons. Yet on this matter, we will demonstrate that a comparison is more useful when pursued between entities that not only belong to the same *family*, but better to the same *genus*.

iv. *Thesis Structure*

The central thesis will revolve around the following questions:

- a. What kind of multi-level system of governance is the EU?
- b. Is the EU more similar to a multi-level federal system rather than a multi-level economic regional organization?

To answer these questions, I will first examine each of the three entities on their own. In beginning the comparative analysis, the *first* chapter deals with the European Union. Firstly, after an introduction, the second sub-chapter (1.2) will deal with the EU historical integration process, explaining its evolution from the Rome Treaty to the Lisbon Treaty. Then, the third sub-chapter (1.3) will be related to the institutional structure of the EU. It is divided into two parts: the first one will be an analysis of the horizontal level and the second one will deal with the vertical level, examining the division of competences and subsidiarity principle in particular. This reasoning will lead us to the question addressed by the fourth sub-chapter (1.4): is the EU a federation? By analyzing its peculiar governmental federal architecture and structure, the answer will move to the *sui generis* concept of federal union. Lastly, the final sub-chapter (1.5) will examine first the challenge of constitution-making the EU faced and then how it dealt with it by embracing intergovernmentalism, which has been developed over time into a specific constitutional model and decision-making regime in the EU.

In the *second* chapter of the thesis, I will assess the second entity of our comparative exercise: Canada. After a brief introduction, the second part (2.2) will be an attempt to frame Canada into the historical context that characterized its history as

a nation. Then (2.3), I will focus on the Canadian federal architecture and institutional structure. This part will be divided into two parts: the first one analyzes the federal, provincial, and municipal levels, whereas the second part will illustrate how powers are divided among different levels. In the fourth sub-chapter (2.4), I will provide a deep analysis on the intergovernmental executive mode of federalism that characterizes Canadian constitutional and decision-making systems. Lastly, the final sub-chapter (2.5) will address the constitution-making process by focusing on the democratic constitutional shift that Canada faced in the Post-Charter era.

In the *third* chapter, I will assess the third and last entity of our comparison: NAFTA. This chapter is made up of an introduction (3.1) and four sub-chapters. The analysis will begin (3.2) with a historical explanation of the process of regionalization that NAFTA has set in motion in North America. In the next part (3.3) I will illustrate the institutional structure and the institutions making up NAFTA decision-making system. Then (3.4), since NAFTA is a regional economic organization, I will focus on the scope, features, and achievements, as these will prove to be useful for the EU-NAFTA comparison. The last part (3.5) will investigate the idea that NAFTA acts as an *economic external constitution* of primary importance to North America enterprises.

Once the above examination of the three entities taken under consideration has been developed, the comparative analysis begins. The first experiment will be the EU-Canada comparison. Following an introduction (4.1), the reasoning will be divided into three parts. Part one (4.2) will compare the nature of both political systems by first analyzing their common poly-ethnic nature and then how their power is divided between the different levels and under the same principles. In the second part (4.3), I will compare the institutional and procedural environment for policy making in the entities. As both the EU and Canada are characterized by similar paths

and they also share the same kind of criticism, I will thus focus on the intergovernmental governance and the democratic deficit the latter generates in both entities. Finally, in the last (4.4) part I will compare the paths both entities have followed with regard to constitution making: the challenges they have faced and how they dealt with them.

The second comparison, between the EU and a regional economic organization –NAFTA – requires analyzing the EU as regional organization as well. This chapter, therefore, highlights those elements found in both the EU and NAFTA. Following a brief introduction (5.1), the analysis will begin (5.2) with a comparison of the policy scopes of both entities by using the analytical framework elaborated by Balassa (1961). Then (5.3), I will give a comparative analysis of both entities' institutional structure first, and the dispute settlements then. In the following sub-chapter (5.4), the comparison will be focused on the asymmetries characterizing the entities, and how they face them. Lastly (5.5), I will compare both organizations' historical processes from the very beginning of their economic integration.

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1

The European Union

1.1. Introduction

Firstly, sub-chapter 1.2 will deal with the EU historical integration process, explaining its evolution from the Rome Treaty to the Lisbon Treaty. Then, the following sub-chapter (1.3) will be related to the institutional structure of the EU. It is divided into two parts: the first one will be an analysis of the horizontal level and the second one will deal with the vertical level, examining the division of competences and subsidiarity principle in particular. This reasoning will lead us to the question addressed by the fourth sub-chapter (1.4): is the EU a federation? By analyzing its peculiar governmental federal architecture and structure, the answer will move to the *sui generis* concept of federal union. Lastly, the final sub-chapter (1.5) will examine first the challenge of constitution-making the EU faced and then how it dealt with it by embracing intergovernmentalism, which has been developed over time into a specific constitutional model and decision-making regime in the EU.

1.2. From Rome to the Lisbon Treaty

The end of the Second World War left a torn situation in Europe. New states relationships had to be defined, in particular regarding their economic and political ties. Europe needed to be redesigned in order to leave behind old conflicts and to stabilize the region, but the building of a new Europe entailed a radical change. If it is true that “people only accept change, when they are faced with necessity, and only recognize necessity when a crisis is upon them,”¹ the combined impact of the economic and strategic situation in post-war Europe, and the growing confrontation of the two global superpowers emerged victorious from the war (the USA and the Soviet Union), provided the exact conditions for launching a project towards a new Europe.

It was in that context that Jean Monnet began to push his blueprint forward. He thought that the economic integration was the only means to avoid future conflicts, and European countries “must form a federation...which will make them a single economic entity.” (Monnet 1978, 222)

In 1950, Monnet convinced the Foreign minister of France, Robert Schuman, to announce a Declaration of his government, what has become known as the Schuman Plan, for promoting a coal and steel community with Germany. The Schuman Declaration was made public on May 9, 1950 and it stated, *inter alia*:

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity. The coming together of the nations of Europe requires the elimination of the age- old opposition of France and Germany. Any action taken must in the first place concern these two countries.

¹ Aphorism from Monnet, Jean. 1978. *Memoirs*. Garden City, NY: Doubleday, p. 109.

² Schuman, Robert. *The Schuman Declaration of 9 May 1950*. available at: <http://www.robert->

With this aim in view, the French Government proposes to take action immediately on one limited but decisive point. It proposes to place Franco-German production of coal and steel as a whole under a common high authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the *federation of Europe*, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible....

In this way there will be realized simply and speedily that fusion of interests which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions. By pooling basic production and by instituting a new high authority, whose decisions will bind France, Germany, and other member countries, this proposal will lead to the realization of the first concrete foundation of a *European federation* indispensable to the preservation of peace (italics added).²

The Schuman Declaration aimed to build a new Europe by a process of concrete steps that would create solidarity. French and German coal and steel industrial productions, the two key sectors of war making potential, would be removed from national management and placed under the regulatory control of a single, supranational authority (Dinan 2010, 18), within the framework of an organization

² Schuman, Robert. *The Schuman Declaration of 9 May 1950*. available at: <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf>

open to the participation of the other countries of Europe. The High Authority, the institutional embodiment of shared sovereignty in the coal and steel sectors, would make binding decisions and spearhead the process. Indeed, it would be responsible for establishing a common market and for regulating prices, investments, wages, and competition in coal and steel production. During the Intergovernmental Conference that negotiated the Paris Treaty establishing the first European Community, The European Coal and Steel Community (ECSC) in 1952, Monnet made clear that “the supranational authority is not merely the best means for solving economic problems: it is also the first move towards a *federation*” (1978, 328). The new institutions³ should be necessary to spread solidarity among countries, to create a sense of community among the peoples of Europe and to accomplish practical achievements toward the federal union. In other words, the Schuman declaration put Europe on a new trajectory.

In order to move towards a future European Federation, Monnet pressed French Prime Minister René Pleven to propose a supranational organization for European defense, analogous to the coal and steel community. The idea to form a pan-European force, reintegrating West Germany into the European system of defense, would have entailed a supranational military procurement with common armies, budget, command, and institutions. Notwithstanding, the project of a future European Federation started with the Paris Treaty, moving away from the nation-state and in the direction of a larger supra-national organization, slackened its pace in

³ The institutions established by the ECSC Treaty were: The High Authority; the Court of Justice, which would adjudicate disputes and ensure member state’s compliance with the terms of the treaty; the Council of Ministers, representing national governments; a Common Assembly, consisting of delegates of the national parliaments.

1954, when, paradoxically, the French Assemblée Nationale rejected the European Defense Community (EDC) Treaty.⁴

Notwithstanding the failure of the EDC, the idea of a common security proceeded outside the European project through a new defense organization aimed at facilitating German entry into the North Atlantic Treaty Organization (NATO), the Western European Union (WEU). Together with France's approval to Germany's entry in May 1955, the military security of Western Europe was thus allocated to NATO. However, having marked the high point of European federalist aspirations, the EDC quickly acquired the aura of a great opportunity lost, and it also left an engaging legacy (Dinan 2010, 21).

Even when the ECSC began to function in 1952 and it served a vital purpose in the post-war context in terms of both economic reconstruction of the continent and peace treaty between Germany and the Western Europe, Monnet knew that coal was rapidly losing its position as the basis of industrial power. The readily identified alternative was the atomic energy, which had already started to revolutionize military strategic doctrines and seemed to replace coal and oil as the key sector of war making potential. Accordingly, in order to promote the federation that would gradually emerge through limited achievements, Monnet proposed an atomic energy community –to be structured along the lines of the ECSC and to go along with the integration process. The two objectives of atomic energy and wider economic integration had to be realized in separate treaties –as recommended by the 1956 Spaak Report. Thus, governments began negotiations on what then became the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC).

⁴ The EDC, officially proposed in 1950 by René Plevin, was to include West Germany, France, Italy and the Benelux countries. When the EDC went for ratification on August 30, 1954 to the French Assemblée Nationale, it was voted down 319 to 264 by the Gaullists and the Communists opposition.

With the 1957 EEC and EURATOM, the founding treaties signed in Rome, the EU came to be based on interstate treaties in order to create a supra-state polity that fosters the growth of a common market on a continental scale (Fabbrini 2015, 7). Indeed, the intergovernmental agreement needed to be protected from interstate rivalries by supra-national institutions and actors. As Küsters (1987, 230) observed, the Member States wanted to retain the ultimate powers of decision, while accepting “the necessity for an independent organ, representing the will of the Community, to ensure the application of the Treaty provisions at the supranational level.” To this end, he adds, “an institutional system was set up with the aim of doing justice to both the intergovernmental and the supranational concepts.” The institutional architecture of the Rome Treaties mirrored that of the ECSC, but it included a stronger Council and a weaker Commission.⁵

Thus, the founding treaties established an institutional model that combined two different interests (Fabbrini 2015, 10): the national interests represented by the intergovernmental Council (the decision-making body) and the Community interest represented by the Commission (with the initial legislative and control of implementation powers). The Assembly, later renamed the European Parliament (EP) –representing the people of the States reunited within the Community– played a limited role in the founding period because of its indirectly elected nature. In this institutional context, the European Court of Justice (ECJ), established by the Rome Treaty in order to provide a juridical basis to the EU, assumed an increasing important role in adjudicating disputes between the Union institutions and the member states (Fabbrini 2015, 11), and especially in attributing primacy and direct effect to Community law in the 1960s. With this regard, between 1962 and 1979, the

⁵ The 1967 Merger Treaty combined the independent institutions of the ECSC and EURATOM with those of the EEC. From then on, the High Authority ceased to exist and the Commission of the European Communities took on its duties.

Court developed the core constitutional principles of supremacy and direct effect: the 1962 *Van Gend en Loos* decision established that the European law has a direct effect on individuals and firms; and the 1964 *Costa v. Enel* recognized the principle that European Law is superior to national law. In other words, Community law enjoyed “internal primacy”, meaning that national courts themselves were obliged to set aside national provisions which were in conflict (*Simmenthal* 1978). Moreover, on the basis of the Article 177 of the Rome Treaty, any court or tribunal of a Member State may ask the ECJ to resolve disputes arising over interpretations of Union law (Stone Sweet 2000). As a result, the ECJ decisions shaped the Community into “a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory” (Stone Sweet and Caporaso 1998, 102). The supranational institution of the ECJ was thus paramount for providing the assurance to respect the agreements reached by the member state governments within the intergovernmental body, the Council.

Once the EU’s institutional architecture was set up with the Rome Treaty, the project reached the prerequisites of moving on another stage of economic integration. The 1986 Single European Act (SEA) underpinned the single market program that had to be achieved and completed by the end of 1992. The European single market had to be designed on the “four freedoms”: the free movement of people, goods, services and capital. Although the SEA seemed to be only a device to launch the single market program, it played a vital role in improving decision-making, strengthening democracy, achieving market liberalization, and at the same time promoting economic and social cohesion (Dinan 2010, 73). Indeed, the SEA introduced new institutional provisions. Decision-making rules within the Council were changed from unanimity to qualified majority voting (QMV). The new cooperation procedure

formed a legislative dialogue between the EP, directly elected from 1979, and the Council. The Parliament thus granted the right to a non-binding second reading as well as the “assent procedure”, which required the EP’s consent to pass legislation related to some important steps such as enlargement and association agreements. There was also a limited expansion of Community competences. Policy areas that were traditionally under the national domain shifted to the EU level: environment, research and development and cohesion were now formally included. The process of institutionalization that took place from the Rome Treaty to the SEA proved to be particularly important in creating a trilateral institutional decision-making system (Fabbrini 2015, 14). The process of integration led to the establishment of a concrete supranational system driven by the Commission, and with the Council and the EP working as a sort of bicameral legislature. This institutional framework was then supervised by the ECJ, which, in a manner, played a constitutional role.

At the beginning of the last decade of the twentieth century, Europe was facing thunderous changes (the end of the Cold War, the fall of the Berlin Wall in 1989, the implosion of the Soviet Union) and the new emerged scenario consisted in the “geopolitical opening up of the European Union” (ibid.). The EU members had to deal with these new issues far from the single market cooperation solely.

Table 1.1. The three Maastricht pillars

The European Communities	Common Foreign and Security policy	Cooperation in Justice and Home Affairs
<p>EC</p> <p>Customs union and single market</p> <p>Agricultural policy</p> <p>Structural policy</p> <p>Trade Policy</p> <p><i>New or amended provisions on:</i></p> <p>EU citizenship</p> <p>Education and culture</p> <p>Trans-European networks</p> <p>Consumer protection</p> <p>Health</p> <p>Research and environment</p> <p>Social policy</p> <p>Asylum policy</p> <p>External borders</p> <p>Immigration policy</p> <p>EURATOM</p> <p>ECSC</p>	<p><i>Foreign policy</i></p> <p>Cooperation, common positions and measures</p> <p>Peacekeeping</p> <p>Human rights</p> <p>Democracy</p> <p>Aid to non-member countries</p> <p><i>Security policy</i></p> <p>Drawing on the WEU: questions concerning the security of the EU</p> <p>Disarmament</p> <p>Financial aspects of defense</p> <p>Long term: Europe's security framework</p>	<p>Cooperation between judicial authorities in civil and criminal law</p> <p>Police cooperation</p> <p>Combating racism and xenophobia</p> <p>Fighting drugs and the arms trade</p> <p>Fighting organized crime</p> <p>Fighting terrorism</p> <p>Criminal acts against children, trafficking in human beings</p>

Source: Fabbrini, Sergio. 2007. *Compound Democracies: Why the United States and Europe Are Becoming Similar*. Oxford: Oxford University Press.

If it is true that the SEA consolidated the process of institutionalization (Fabbrini 2015, 14), the Treaty on the European Union (TEU), also known as the Maastricht Treaty, took this pattern of development much further. It proved to be the means to strengthen supranationalism in some respects and formalize more intergovernmental forms of cooperation in others. The regional and international context brought the member states to think of the EU as more than an economic community. It was now the time to start negotiating “with a view to the achievement of a *political union*.”⁶ By introducing the notion of a common European citizenship as distinct from the national one, the Maastricht Treaty imprinted the EU as a Union of both states and the European citizens. As Laursen and Vanhoonacker (1992) stated “the 1992 Maastricht Treaty created the European Union (EU).”

⁶ European Community. Treaty on European Union, Final Act. OJ C 191, 29 July 1992, p. 95.

The TEU established different decision-making regimes for dealing with different problems. The three pillars (see Table 1.1) institutionalized the two main methods of decision-making adopted by the EU (Fabbrini 2007, 178): the “Community method” regarding the first pillar and the “intergovernmental method” regarding the other two. In this supranational approach, created by the 1992 Maastricht Treaty, decision-making has to be shared between supranational institutions (the Commission and the EP) and intergovernmental institutions (the Council and the European Council, the latter made up of the heads of the state and government). Pillar one –the former EEC, which was renamed the European Community– amended the 1957 Rome Treaty, EURATOM, and the ECSC Treaty. It also incorporated the plans for an Economic and Monetary Union (EMU). The project has been going around since 1988 when the European Council decided to appoint a committee chaired by Delors and made up of national central banker presidents to “study and propose concrete changes” toward a monetary union. This was largely based on the economic arguments that “a single currency is the natural complement of a single market.”⁷ The Delors Report provided a roadmap for reaching the EMU through three stages: *Stage I* aimed at finishing the creation of the single market, liberalizing capital movements and increasing monetary and macroeconomic cooperation among member states and their central banks; *Stage II* with the intention of create close coordination of national monetary policies and a progressive narrowing of margins of fluctuation within the exchange rate mechanism; *Stage III* provided the establishment of fixed exchange rate parities and granted full authority for monetary policy to the European Central Bank –a new institution created in 1998 on the model of the Deutsche Bundesbank. In 1999, the European

⁷ European Commission. 1990. *Economic and Monetary Union*. Luxembourg: Office for Official Publications of the European Communities, p.11.

single currency was born virtually and on January 1, 2002 the Euro began to circulate. The EMU's policies were decided through a mixed institutional model: a supranational approach on monetary policies with powerful intergovernmental features in economic policies (Fabbrini 2015, 16). The Community method introduced by the first pillar recognized a crucial role for the European Commission, the EP, and the ECJ (the supra-states institutions). Indeed, supranationalism was thus mightily advanced, both through monetary union and the introduction of the co-decision legislative procedure. The Parliament gained the role of popular branch of a bicameral legislature with the Council, representing the member state branch. In several policy areas the European Parliament had nearly equal rights of decision with the Council of Ministers, and would, if necessary, negotiate directly with the Council. The second pillar created a Common Foreign and Security Policy (CFSP). The third pillar established cooperation in Justice and home affairs (JHA). Yet, European member states decided not to cede their sovereignty in these two pillars. With this regard, the policy-making process was organized as an intergovernmental model controlled by the governments of the member states.

In essence, the Maastricht Treaty represented the openness of the member states to enlarge the scope of the Union from an Economic Community to a Political Union. With this in mind, the new supranational and intergovernmental decision-making regimes (Fabbrini 2015, 27) were consolidated by the 1997 Amsterdam Treaty. The legislative role of the Parliament has been strengthened through the extension of the co-decision procedure to new policy areas regarding the single market.

A follow-on intergovernmental conference (IGC) was organized in Nice in December 2000. The 2001 Nice Treaty was only noteworthy for helping clarifying

the character of the EU in terms of rights. Member states thus decided to recognize The Charter of Fundamental Rights, which was never included as a constitutional document. Nonetheless, the Nice Treaty did not succeed in defining the contentious issues at stake (i.e. preparing the EU enlargement, voting weights and the composition of the Commission). Anticipating the unsatisfactory outcome of the Nice Treaty (Dinan 2010, 145), EU leaders included in it a calling for another IGC. Moreover, the 2001 European Council held in Laeken, Belgium adopted a “Declaration on the future of Europe,” which had to be discussed “as broadly and opened as possible.” The IGC had to deal with a range of issues such as the democratic deficit, transparency, efficiency, a wider participation in the process of treaty reform, the status of the Charter of Fundamental Rights and the effectiveness of some policies. But even more importantly, the IGC had to define the EU constitutional basis. This was to be achieved by a Convention, which soon became known as the “Constitutional Convention.” The Convention met for the first time in February 2002 with the task of preparing a draft treaty to establish “a Constitution for Europe,” bringing together Union institutions and the representatives of both the member state governments and parliaments. On June 18, 2004 the heads of state and government of the member states reached an agreement on the Constitutional Treaty (CT), then signed in Rome. Its main objectives were to confirm the supranational predisposition of the Union (Fabbrini 2015, 28), to define new institutional provisions governing the new European Union (Part I), to codify the European Charter of Fundamental Rights throughout the EU (Part II), to outline the provisions governing the policies and functioning of the Union (Part III), and to group together the general and final provisions of the Constitution (Part IV). After being signed, it required ratification to entry into force. Most member states adopted the CT through parliament ratification

(in accordance with their own constitutions), whereas other states entrusted the popular referendum. In France, however, a majority of voters (55 percent) rejected the Treaty, as well as in the Netherlands four days later the outcome of the referendum was 62 percent against.

French and Dutch results were such devastating (Dinan 2010, 150) that the European Council agreed in June 2005 to relegate the CT to a yearlong “period of reflection.”⁸ This period was used to analyze the reasons of the failure and discuss possible solutions. It was brought to an end when the Brussels Council of June 2007 came up with the will to define the form and the terms of a new treaty. This seemed to be the right time to reap the fruits of the period of reflection. After a short IGC, lasting from July to October, the Lisbon Treaty was signed on December 17, 2007 by all 27 Member States. The outcome was to “put old wine in a new bottle” (Dinan 2010, 150), while delivering a Europe of results. For this reason, some argued that the Lisbon Treaty was “a decaffeinated version of the Constitutional Treaty” (Fossum 2011a, 1). The Treaty unequivocally defined the principles rooted in the EU such as democracy, the rule of law, and respect for human rights, as well as the organizing principles of conferred powers, subsidiarity, proportionality, and loyal cooperation among member states. The term “Community” has been definitely replaced with the term “Union.” The Lisbon Treaty clearly spelled out the Union competences vis-à-vis member states competences (exclusive, shared, and supporting). The QMV mitigated both the issues of democratic deficit and institutional efficiency. The EP gained additional budgetary authority and finally became an institution of equal standing with the Council representing the ministers of the EU member states’ governments. Indeed, according to TFEU, Art. 289, “the ordinary legislative procedure shall consist

⁸ Declaration by the Heads of State or Government of the Member States of the European Union on the ratification of the Treaty establishing a Constitution for Europe. *Presidency Conclusions*. Brussels European Council, June 16-17, 2005.

in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission.” Some (Fabbrini 2013a) observed that by establishing the co-decision procedure as “the ordinary legislative procedure” (TFEU, Art. 289), the Lisbon Treaty has institutionalized a two-chamber legislative branch, with a lower chamber representing the European electorate (the European Parliament or EP) and an upper chamber representing the governments of the member states (the Council).

The Lisbon Treaty gave legal personality to the EU, by abolishing the institutional distinction between the three pillars, established in Maastricht. However, the EU institutional system has maintained the distinction between different decision-making regimes –the supranational and the intergovernmental. However, a deeper analysis of the institutional structure might be convenient to find all the pieces of the puzzle.

1.3. Institutional structure of the EU

The EU has a singular government structure. It might look like a simple national system of government, with a council, a parliament, and a court of justice, however the similarity is misleading. The idea that that democratic and effective government can only work within a state has remained predominant for long time. It was considered only possible within a hierarchical organization, whose “administrative staff successfully upholds the claim to the monopoly on the legitimate use of physical force in the enforcement of its orders” (Weber 1922: 29, translation). However, this ideal type of political organization has been partly replaced by systems in which power and authority are split between multiple different actors and levels of

government. This is precisely the situation with Europe, where the gradual economic and political integration process has turned the EU into a complex multilevel system of governance. In institutional terms, the EU is a highly complex mixture of supranational, transnational and intergovernmental features (Fossum 2004, 34) where powers are distributed at the horizontal and vertical level.

i. The Horizontal Level

The relationship between the central Community institutions moves on the horizontal level, whereas the relationship between the supranational, national, and subnational institutions lies on the vertical dimension (Fabbrini 2010, 180). At the horizontal level, there is the basic “institutional quartet” (Hix 2005, 3) – the European Commission, the European Council, the Council of Ministers, and the European Parliament. The judicial branch, instead, is in the hand of the ECJ and the Court of Auditors. In addition, there are also several Regulatory (the European Central Bank, the European Investment Bank) and Consultative institutions (Economic and Social Committee, Committee of the Regions) (see Table 1.2).

Table 1.2. The institutions of the EU (after the 2009 Lisbon Treaty)

Governmental	Regulatory	Consultative	Judicial
European Council (27 heads of state and government)	European Central Bank (General Council: 27 members)	Committee of the Regions (317 members)	ECJ (27 judges)
Council of Ministers (27 ministers)	European Investment Bank (Governors’ Council: 27 members)	Economic and Social Committee (317 members)	Court of Auditors (27 members)
European Parliament (785 members)	Regulatory Agencies		
European Commission (27 Commissioners)			

Source: Fabbrini, Sergio. 2007. Compound Democracies: Why the United States and Europe Are Becoming Similar. Oxford: Oxford University Press.

The European Council –constituted by the heads of governments and states– is responsible for delineating the aims of the EU (De Schoutheete and Wallace 2002). After the significant introduction of the Lisbon Treaty, which created the new office of the President of the European Union, its role of strategic direction and external representation of the EU has been strengthened. The purpose of the European Council is to provide strategic direction and to get the EU out of possible impasses by bringing the EU at the highest political level.

Whereas, the Council of Ministers⁹ is the body where member states and EU institutions have to mediate (Burgess 2000). It has to perform the crucial role of ensuring the coordination of the general economic policies of the member states (Hayes-Renshaw and Wallace 1997). Its legislative functions are shared with the EP, from which it requires the approval for passing the EU budget. It has been claimed (Fabbrini 2013a, 8) that the use of QMV in the Council is an essential element in ensuring the effectiveness of this method. Even though it seems to be a single and steady entity, in practice it is divided into considerable different councils attended by diverse type of ministers dealing with different functional issues. In fact, there are various Council formations organized along both horizontal and sectorial lines (foreign affairs, finance, agriculture, *inter alia*). Both the European Council and the Council of Ministers are the intergovernmental bodies representing the executives of the EU member-states.

The European Commission, which can be described as the functional equivalent of the executive of the EU (Fabbrini 2010, 182), is obligated by the treaties to promote “the general interest of the Union” rather than the national ones. Unlike the EP, whose members are directly elected, and the Council, whose members are

⁹ Council of the European Union often preferred to refer to as Council of Ministers, or sometimes just the Council.

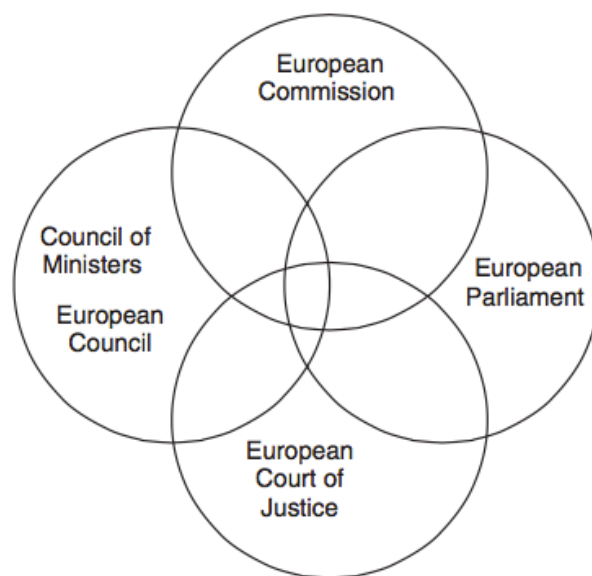
elected on the national level, members of the college of commissioners are unelected. Indeed, the commissioners are appointed by the European Council, together with the President of the Commission, after the approval of the Parliament. The Treaty gives the Commission the power of initiating legislation, by which it may submit to the Council of Ministers and the EP legislative proposals on which these institutions will have to legislate (*ibid.*). Furthermore, the Commission acts as the guardian of the Treaty and represents the Community in international negotiations (Dehousse 2011, 4). Indeed, it has the authority to conduct external relations and negotiate international agreements on behalf of the EU.

The European Parliament is the popular branch of the EU. It is the largest democratically elected assembly in the world, yet it is not a state assembly, but the directly elected parliament of a supranational entity (Dinan 2010, 235). It has budgetary, legislative, and supervisory responsibilities, but unlike most European parliaments, it is not responsible for putting or keeping a government in power (Corbett et al. 2011). Members have been elected every five years by a popular poll since 1979. MEPs are organized and elected on the basis of national constituencies and nation-specific electoral systems (Fabbrini 2010, 185). Even though it cannot initiate legislation, the EP has the power to amend or veto acts on several policy areas, whereas it is only consulted on the remaining policy areas. Furthermore, it has the power of supervising the European Commission. Two such examples are the approval for commissioner appointments and the vote of censure for dismissing members of the Commission. The history of the EP has been marked by the efforts to increase its institution's power and influence. In the end, after some empowerments gained by Maastricht and Amsterdam treaties, the Lisbon Treaty recognized the EP's power of co-decision with the Council of Ministers on several legislative issues. As it has been

noted (Tsebelis and Kreppel 1998), the EP now plays the role of the agenda-setter partnered with the Council of Ministers.

From all this institutional structure it follows that both the legislative and executive powers in the EU are dispersed among different institutions (Fabbrini 2010, 185), and “the spheres of action of each institution partially overlap” (Crum 2002) (see Figure 1.1).

Figure 1.1 Power sharing between EU institutions



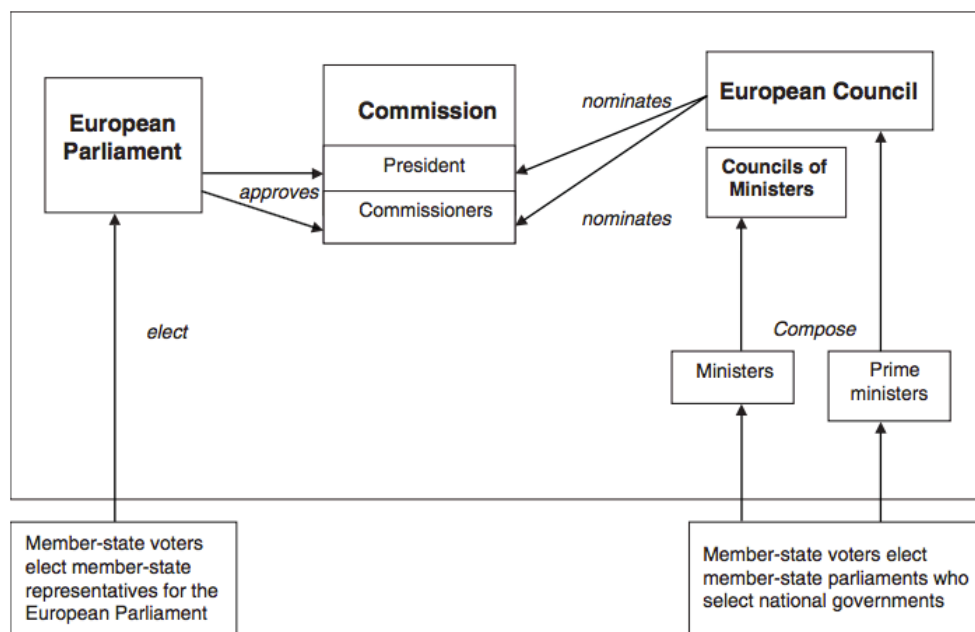
Source: Fabbrini, Sergio. 2007. *Compound Democracies: Why the United States and Europe Are Becoming Similar*. Oxford: Oxford University Press.

To illustrate, the Council of Ministers exercises the legislative function through the deliberation and approval powers together with the EP, which holds a co-decision power in some areas. The European Commission exerts the executive power, which also consists in its monitoring duty together with the EU regulatory agencies. Yet its executive function is checked by the Council of Ministers, which influences the internal work of the Commission through the process of comitology.¹⁰ This practice is

¹⁰ In the early 1960s when the Council had some troubles to implement a number of regulations on the Common Agricultural Policy, the first comitology committees were established. The reason behind it was that the Council did not want to delegate the implementation power to the Commission without

about the monitoring check made by several committees or group of expert gathering together representatives from EU member states. Their purpose is to create a dialogue between the Commission and national governments. Moreover, the Council has also the power to propose issues to be taken into consideration for Commission legislative proposals. Last of all, the European Council influences other institutions' decisions by discussing current global concerns and issuing important statements. Considering how the legislative and executive powers are shared among the quartet¹¹, the system strongly seems to tend toward the independence of each institution. As Fabbrini (2010, 186) noted, each institution is obligated to find an agreement with the other institutions, because they all play a role in the legislative or executive process. Also, “the different source of their legitimacy” (ibid.) guarantees their independence one from the other (see Figure 1.2).

Figure 1.2 Election and appointment of the Members of the EU institutions



Source: Fabbrini, Sergio. 2007. *Compound Democracies: Why the United States and Europe Are Becoming Similar*. Oxford: Oxford University Press.

keeping some control. Since this initiative, the total number of comitology committees has grown exponentially. The Council officially recognized the procedure in Council Decision 87/373/EEC on 1987.

¹¹ The term “quartet” refers to the Commission, the Council, the European Parliament (EP) and the European Council (Hix 2005, 3).

This is to say that, in the words of Fabbrini (2010, 186), “the EU is a system of separated governmental institutions sharing powers.” Hence, institutions with different sources of legitimacy need to cooperate in the decision-making process. The cornerstone of this system is the internal mechanism of checks and balances, which it has been seen to exist between the various European Union institutions. In sum, in the EU, powers are diffused, institutions overlap, and the multiple separations of power system is characterized by the fundamental device of checks and balances.

ii. The Vertical Level

In the EU institutional system, the horizontal separation of powers between the central Community institutions of the supranational entity is intertwined with the vertical separation of powers between the supranational, national, and subnational institutions. In order to guarantee a fair distribution of power at the vertical level, the Union has to act within the limits of the competences conferred by the member states in the Treaties. To illustrate, Articles 2 to 6 of the Treaty on the Functioning of the European Union (TFEU) outline the competencies of the EU according to the level of powers accorded in each area. TFEU Article 3 identifies the exclusive competences of the Union, whereas TFEU Article 4 defines the competences the Union shall share with the member states. In a like manner, Article 4.1 of the Treaty on European Union states that “competences not conferred upon the Union in the Treaties remain with the Member States,” whose limits are “governed by the principle of conferral” (TEU Article 5.1). This remains the basic principle of the vertical distribution of power, due to its fundamental role to prevent the Union from intervening on issues

not assigned by the Treaties. Furthermore, the principle of subsidiarity and the principle of proportionality govern the exercise of the EU's competences (TEU Article 5.3). In fact, "in areas which do not fall within its exclusive competence," the principle of subsidiarity defines the circumstances in which it is preferable for action to be taken by the Union, rather than the Member States. Thus, it seeks to protect the capacity of the Member States to take action, but authorizes the intervention by the Union when "the objectives of the proposed action cannot be sufficiently achieved by the Member State," and added value can be provided if the action is carried out at Union level. In this case, "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" (TEU Article 5.4).

In this context of multiple levels of governance, aggregation between *former* independent states, and separation of power on different orders, it seems easy to see how the EU might remind a federal entity. It is now the time to investigate whether this label fits the EU system.

1.4. A Federation *sui generis*?

In order to clarify the nature of the EU as a polity, analysts rely on different vocabularies. Some see the EU as "a compound democracy" (Fabbrini 2010, 197), or "a new kind of commonwealth" (McCormick 1999, 191), or a "mixed commonwealth" (Bellamy and Castiglione 1997), or *condominio*, *consortio* (Schmitter 1992; 1996); others think of it as a "partial polity" (Wallace 1993, 101) and "uncompleted polity" (McKay 1999; 2001), or a "post national entity" (Curtin 1997; Habermas 1998) or "post-modern entity" (Ruggie 1993); and others have described it

in globalist terms, such as cosmopolitanism (Held 1993; 1995; Linklater 1996; 1998). Bearing the EU complexity and institutional novelty in mind, it seems right to assert that the EU is “an essentially contested project, in polity terms” (Fossum 2004, 18).

As noted above, the EU has been analyzed under different forms of political orders. Yet the form most often used is the referring to federations or federal states. If it is true that:

“A Constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere” (Riker 1964: 11),

it also seems true that the European Communities created a federal system. Indeed, the constellation of multiple level of government, separation of power, overlapping institutions, and the autonomy of each level in its own specific areas brings the EU closer to a federal system. Thus, it is asserted (Tömmel 2011, 42) that as in many federations, “the relationship between the government levels of the EU is marked by both cooperation and conflict,” a system that requires a continuous “balancing act” (Sbragia 1993). Pursuing this further, the EU may be regarded as a federation due to its multi-level structure as well as the relationship between the levels characterized by a continuous system of checks and balances.

In order to evaluate whether the EU can be considered a federal polity, it is useful to first briefly analyze the core features and characteristics of such entities. Watts (1998, 121) defines the federation as:

“A compound polity combining constituent units and a general government, each possessing power delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the

exercise of a significant portion of its legislative, administrative, and taxing powers, and each directly elected by its citizens.”

In addition, Hueglin and Fenna define the characteristics of federations as follows:

“In a federal system of government, sovereignty is shared and powers divided between two or more levels of government [...] each of which enjoys a direct relationship with the people” (2006, 32-33).

Following this further, it seems that the EU has some elements of Watts’ definition and perfectly fits with the second and third criterion of the Hueglin and Fenna’s definition. However, the EU falls short of fulfilling the first criterion because “sovereignty is not formally shared in the Union as it primarily rests with the member states” (Tömmel 2011, 43). This outcome might suggest that the EU is not a federation, but would better fit the definition of a confederation. However, always with the words of Hueglin and Fenna (2006, 34):

“In confederal arrangements [...] member states remained the locus of sovereignty and retained the bulk of their powers, assigning a minimum of powers and responsibilities to their common government.”

At first glance, bearing this definition of confederal polity in mind, the EU seems to be a case in point. Indeed, according to Burgess (2000, 262) “the basic structure of the union resembled more an economic confederation than anything else.” Yet, as the same author notes, “these elements in practice coexisted with distinctly federal features” (ibid.). Thus, it is clear that the EU is more than a confederation, because of the transfer of significant powers to a European level of governance (Hueglin and Fenna 2006, 35). Following this further, scholars have described the EU as “a combination of a confederal institutional arrangements and a federal legal

arrangement” (Weiler 2001, 58); others place the EU in between a federation and a confederation (Burgess 2000) by noting an evident “incomparable admixture of confederal and federal principles in the EU” (Burgess 2006, 245; Fabbrini 2005, 10; Watts 2008).

In sum, already a quick examination of a few basic characteristics shows that the EU shares some elements with the federal system without, however, fully fitting into the basic concept of a federation. A deeper analysis of the federal features compared to the EU characteristics is considered useful to define whether it is a federalized polity, or whether the EU lacks and is likely to continue to lack the fundamental competences that would make it federal (Moravcsik 2001).

On the one hand, the multiple levels of government, the vertical division of powers among different territorial levels, the two overlapping jurisdictions, the degree of division of powers between these jurisdictions, and the relative autonomy and capacity the European institutions enjoy show several features that fit with the idea of EU as a federal entity.

On the other hand, the EU also displays some differences compared to existing types of federations.

Scholars often argued that federations are based on constitutions with the role of regulating the relationship between the government levels and distributing powers between them (Riker 1993; Hueglin and Fenna 2006; Watts 2008). Conversely, it has been noted that the EU political system is only defined by intergovernmental contracts – the Treaties. Although some authors (see Weiler 1995, 1999; Grimm 1995; Eriksen et al. 2004) stress that the EU has a constitution, it is clear that the treaties only roughly “define the competences of the European institutions in terms of decision-making and procedural provisions” and, in addition, “they allocate

competences in certain policy areas (...) to the European level” (Tömmel 2011, 43). Hence, some might argue that they do not create a clear division of powers between the Union and the national level.

Another important feature is about the federal level jurisdiction in certain areas over the lower level. In this regard, most of the European legislation is a two-level process, which leaves to the member states large space for maneuver to implement European policy objectives, according to their own possibilities and preferences (Falkner *et al.* 2005). In other words, member states still play a significant role in adopting the laws of the EU, especially in those cases where integration into national law is required. One such example regards complex issues regulated through the instrument of the directive. Directives require member states to achieve a particular result without dictating the means of achieving that result. Then, they have to be transposed into national law, leaving the substantial choices to the legislative process at the national level. In sum, jurisdiction at the European level is rarely independent, as all legislation is yet dependent on the consent of the member states.

Lastly, some scholars (Watts 2008) noted that a fundamental criterion for a federation regards the system for adopting and amending a constitution. Usually, as described by Hueglin and Fenna (2006), this process requires the involvement of both government level of the federation and the consent of the lower level. However, in the EU, the only actors entitled to decide the adoption or revision of the treaties are the governments of member states, only by unanimous vote. Thus, acting through the Council or in the framework of an IGC, “member states continue to hold the exclusive powers to decide on adopting, amending or rejecting the Convention proposals” (Tömmel 2011, 46).

In conclusion, it seems reasonable to argue that, although the Union shares some basic characteristics with the principle of federalism, it cannot be properly considered a federal polity. The EU, as shown above, lacks some core features of such a form of political order. This brings up to the question of what kind of federal-alike polity is the EU, if not a classical form of federation. The EU “ambiguous case” (Hueglin and Fenna 2006, 35) has stimulated several attempts to capture the specific federal nature of the Union. As perfectly observed by Tömmel (2011, 44), some scholars used the term of “unachieved federation” (Harbo 2005, 141); or “confederal union” (Burgess 2000), “transnational type of federalism” (Nicolaidis 2006, 60), while others defined it a “hybrid type of federalism” (Hueglin and Fenna 2006, 240), or “quasi-federal entity” (Sbragia 1992; Murray and Rich 1996, 13) without achieving a broader acceptance in the scientific debate on EU federalism.

With the aim of finding a fitting definition of the EU “ambiguous case,” some authors proposed to conceptualize the European Union as a federation *sui generis* (Tömmel 2011; see also Sbragia 2006). This term classifies the EU as a federal type of polity, which has not been found elsewhere yet. Such a system is characterized by a multi-level structure where relationships between the supranational and national levels “are not *a priori* defined by constitutional norms,” but they are “flexibly balanced by complex interactions between both the institutions at the European level as well as between the European and the national government levels” (Tömmel 2011, 54). According to the author, this permanent “balancing act” (Sbragia 1993) qualifies the EU as a federation, yet the institutional structure and the peculiar modes of decision-making qualify it as a federation *sui generis*.

In light of this analysis it seems easy to argue that the EU is evolving beyond the concept of classical federal systems. Indeed, it is more than a federalized polity. As

Fabbrini (2010, 191) successfully states “federalism is not sufficient to capture the defining nature of the EU.” To illustrate, the author points out that none of the federal European nation-states of the post World War II period (such as Germany, Austria, and Belgium) and none of the non-European federal nation-states (such as Canada, Australia, and India) are characterized by a horizontal separation of powers as the Union is. This only counts for Switzerland, which has an institutional structure similar to the EU. However, the limited geographic and demographic size of the country makes it an unlikely comparative reference for the EU (Fabbrini 2005, 11; 2010, 191).

In conclusion, it is clear that the EU is indeed an unusual species of federal state and in many respects remains *un objet politique non-identifié* (McKay 2001). As Burgess (2006, 39) states:

“There is no historical precedent for the creation of a multinational, multicultural and multilingual federation composed of fifteen to twenty established national states...with mature social, economic, political and legal systems.”

The European member states are keen to act in common inside the Union framework, however they are not willing “to transfer to a far-reaching degree formal powers to the European level” (Tömmel 2011, 54). This constellation created a new type of federation, in which sufficient powers are empowered at the upper level, yet “remains subject to intergovernmental control exercised by the lower level” (ibid.).

1.5. Constitutionalization and Intergovernmentalism

i. Constitution making in the EU

Using the term constitution requires a prior distinction between “formal” and “material” constitutions. Formal constitutions are written, and they are deemed as a single document expressing the will of a sovereign people. A formal constitution is a contract drawn up by the people setting out the terms on which they are to be governed. Given that the constitution is a written agreement, it requires formal amendment and elaborated procedures to be changed. These processes are different among countries embracing this type of document, such as the United States, Italy, and France. Although these countries adopted the same kind of constitution, there are important differences among them. Indeed, the US formal constitution firstly frames the government architecture, and then acts as a protector of rights. On the contrary, the French and Italian formal constitutions start with a definition of fundamental rights, yet setting the specific distribution of powers and institutional procedures lately (Fabbrini 2015, 66).

By contrast, material constitutions consist of social practices, usage, court judgments or ad hoc fundamental laws recognized as an equivalent status to a constitution. Therefore, constitution is considered the product of an organic development. A prime example of material constitution is the British one. It is an uncodified constitution in the sense that there is no single document that can be classed as Britain’s constitution.

The majority of the entities started with a constitution. The EU did not follow this way, as it is the “outcome of intestates treaties” (Fabbrini 2010, 243). However, it is a shared vision that the EU possesses a material constitution, consisting of both the

ECJ's role as a trustee of the treaties and "the juridical expression of high-order principles (...) established by the ECJ on the basis of the treaties interpreted as quasi-constitutions," such as the Union law supremacy and the direct effect on individual citizens (*ibid.*, 67). Thus, constitutional arrangements have been developed over time through two main vehicles (Fossum 2007, 346): formal treaty changes made through IGCs and the ECJ legal interpretative work. In fact, many scholars (Fabbrini 2015, 67; Craig and De Bursa 1998; De Witte 1999) noted that the ECJ has interpreted the intergovernmental founding treaties as constitutional documents, thus promoting a supranational legal order. Moreover, the member states transposed its ruling into national constitutions. This process marked the EU treaties compared to other international treaties, as the former have established a legal order that goes beyond the governments binding by international treaties. As asserted (Curtin and Kellerman 2006; Weiler 1999), the EU treaties also influence directly the citizens of the European member states.

The EU involvement in constitution making has been witnessed since the early 1980s. It started with the Single European Act, the Maastricht Treaty, the Treaty of Amsterdam, the Nice Treaty, the defunct Constitutional Treaty, and the late entrant Lisbon Treaty. However, the significant turning point regarded the Maastricht Treaty, as it "redefined the EU as a polity with a constitution-type foundation" (Fossum 2007, 355) by equipping European citizens with rights (including citizenship). Despite this, the Treaty did not embrace a constitutional status under the will of European elites forging it.

However since the beginning, the process of constitutionalization in Europe has been considered a contested concept in terms of openness and accountability. In fact, if it is true that the European constitutional issue has been increased since 1980s,

it is not possible to argue that it appeared close to “the notion of open, democratic constitutional conversation” (Fossum 2004, 28). The EU constitution-type settlement seems to be very reminiscent of the international treaties negotiations. As a result, the process key actors have been member state officials coming together in intergovernmental *fora* and deciding on the constitutional nature in a closed manner, similar to interstate diplomacy (Moravcsik 1991; 1993; 1998). Thus, in the EU, treaties were negotiated through a system of summitry by the executive heads of member states and governments, rather than in specific constitutional conferences. Only when the high tensions were marking the Nice Treaty process in 2000, it became clear that “the executive-led and intergovernmental approach to constitution making (...) was no longer tenable” (Fossum 2004, 33). Following a democratic alternative further, the European Charter of Fundamental Rights was drafted by a deliberative body –the Charter Convention –, marking the first time that a body made up of a majority of parliamentarians partook in a process of constitutional nature at the EU level. The European Charter, considered the most explicit commitment to individual rights ever presented by the EU (Fossum 2004, 19), played a crucial role to propel the process of constitutional clarification and legitimacy. It marked a serious commitment of the EU to embark an exhausting constitutional conversation through an open, accountable and democratic process. In addition, the Convention mode was adopted for the preparation of the further round of Treaty change.

As a result, member states, gathered at the Laeken European Council of 2001, decided to call for a Convention on the Future of the European Union –to be debated by the Brussels Convention. It represented the first time member states adopted the term constitution in an official EU document. The Brussels Convention was an indirectly elected assembly consisting of 105 members from the European and

national parliaments (plus 13 observers from the candidate states) representing both the member states and the supranational Union institutions. It was set up as a deliberative and consultative body based on openness and transparency. In this regard, Kokott and Ruth (2003) defined it as “the most explicit and visible instance wherein the terminology and normative standards of democratic constitutionalism were applied to the EU”. The Convention’s purpose was to serve as a preparatory body and provide proposals, including the question of a European constitution, for the 2003 IGC. It was designed on a “particular constitution-making model” (Devuyst 2003), where member states decided to change the EU’s executive-driven approach to constitution making. Yet the Convention’s work was still affected by a system of constitution making dominated by governments. Indeed, in the last stages, the process turned into a bargaining forum, akin to an IGC (Fossum 2004, 35). The reason behind it was the mandatory scrutiny and approval of each member state in the IGC. As a result, this shift deeply affected and shaped the Convention’s aim and success. In effect, once the IGC accepted the proposal of the Constitutional Treaty (CT), it was rejected in popular referenda in France and the Netherlands in May 2005.

Only after the period of reflection from constitutional debate, the Lisbon Treaty (LT) has been adopted by the European member states in 2007. As noted (Fabbrini 2010, 264; Fabbrini 2015, 29), it inherited the institutional part of the CT, without the constitutional symbols attached to it (such as the flag, the anthem and the preamble¹²). Furthermore, Fabbrini in his contribution (ibid.) also suggests that the LT and the approach used for the approval of the CT have transformed the EU from a “constitutional project” (Walker 2004) to a “constitutional process” (Shaw 2005).

¹² In the Declaration No. 52 attached to the Treaties, numerous countries such as: Austria, Belgium, Bulgaria, Cyprus, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia, Slovakia and Spain declared that the flag, anthem, the motto and the Euro currency “will for them continue as symbols to express the sense of community of the people in the European Union and their allegiance to it.”

The latter is defined as a process comprising conflict among different positions, arguments, principles and visions on the future of the EU.

ii. *Intergovernmentalism as a political system*

As illustrated above, intergovernmentalism in the EU has been developed over time into a specific constitutional model and decision-making regime. As Moravcsik (1993; 1998; Moravcsik and Nicolaïdis 1999) observes, the EU governments are the primary actors in the EU political system. EU institutional reforms as well as day-to-day policy outcomes “are the product of hard-won bargains and trade-offs between the interests of the member states.” National governments control and steer the conditions of the EU’s functioning, through both periodical IGCs and the regular formal action of the Council. Pursuing this further, also Fabbrini (2015, 124) takes this view by observing that the intergovernmental union was legitimized by the failure of the CT and then fully institutionalized by the 2009 LT. Indeed, the outcome of the French and Dutch referenda of 2005 marked the end to any other alternative to intergovernmentalism, and then the LT codified this “new fashion.”¹³ As a result, the LT provisions created a Union where the European Council of heads of state or government now makes all the strategic decisions (Van Middelaar 2013, 195). Moreover, the establishment of a permanent president chairing the European Council marked the decision-making imprint acquired by the EU intergovernmental institutions. To illustrate, it seems sufficient to quickly report President Sarkozy’s behavior in the shadow of Charles De Gaulle’s vision of a Europe of nation states, for

¹³ As The Economist’s Charlemagne (2012) wrote, after “the French and Dutch voters killed the proposed EU constitution ... intergovernmentalism [became] the new fashion.” Cited in Fabbrini (2015, 124).

which integration should primarily be controlled by the member states' executives. As Fabbrini (2013a, 14) remarks, in Sarkozy's vision (as in De Gaulle's) there was no room for the EP and the Commission in the decision-making process, not to mention the ECJ. In this view, he pursued the idea that the integration of Europe has to embrace the intergovernmental way, if Europe wants "to make strategic political choices."¹⁴ Following this further, it seems clear that the shared vision has recognized that integration should proceed without going supranational, but by pooling national sovereignties within intergovernmental institutions (Fabbrini 2015, 125). Indeed, following the intergovernmental theory, it is assumed that not only "most of the important substantive areas of modern governance should remain firmly in the hands of national governments," but also that they should be "extended only by unanimous vote of the member states" (Moravcsik 2007: 34). Thus, it seems clear that the only way to manage those substantive areas of policy would be through the cooperation and coordination of member states' governments. Indeed, as a result of this approach, the LT "has assigned the competence on the financial and economic policies to the intergovernmental institutions of the Union" (Fabbrini 2013a, 3).

This approach determines the establishment of a subsection of the EU political system: the intergovernmental union. It has come to be institutionalized when the institutions gathering national governments (the European Council and the Council) became able to control a regularized decision-making process (ibid. 129). A deeper analysis on the intergovernmental union and its implications on the EU legitimacy problem, legal distinction of competences, and policy resources would be useful for this work. The space does not allow a prolonged discussion, though.

¹⁴ Sarkozy in his Toulon speech on December 1, 2011.

In conclusion, it seems clear that the EU has already turned into a polity that embraces intergovernmentalism as a political system. Perhaps, it is possible that this syndrome may be also observed in other federal and multilevel systems beyond the nation state. In this regard, many scholars have observed the strengthening of intergovernmental channels in those entities (see, among others, Simeon 2001, 145–7; see also Hooghe 1996; Börzel 2000; Hooghe and Marks 2001; Peters and Pierre 2001; Kincaid 2003; Benz 2004; Benz and Papadopoulos 2006).

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2

Canada

2.1. Introduction

In this chapter, I will examine the second entity of our comparison: Canada. Part (2.2) will be an attempt to frame Canada into the historical context that characterized its history as a nation. Then (2.3), I will focus on the Canadian federal architecture and institutional structure. This part will be divided into two parts: the first one analyses the federal, provincial, and municipal levels, whereas the second part will illustrate how powers are divided among different levels. In the fourth sub-chapter (2.4), I will provide a deep analysis on the intergovernmental executive mode of federalism that characterizes Canadian constitutional and decision-making systems. Lastly, the final sub-chapter (2.5) will address the constitution-making process by focusing on the democratic constitutional shift that Canada faced in the Post-Charter era.

2.2. Origins and Historical Evolution of Canada

Canada, like the United States, Australia and much of South America, is a colonial country. This means that it was originally founded by “settlers” who moved to a new territory where they declared sovereignty, while maintaining political allegiance to their country of origin. Italian and French explorers were among the first Europeans to arrive in Canada in the 1500s, and a century later, explorers from France settled in New France –the area that is now Quebec. From that moment on, the integration of European settlers to the New World environment increased ceaselessly. Indeed, not long after the first French settlements, the British Hudson’s Bay Company took possession of Rupert’s Land in 1670 and Britain gained control of Nova Scotia and Newfoundland at the end of the War of the Spanish Secession –by the 1713 Treaty of Utrecht. The presence of both bitter enemies –Britain and France, involved in a conflict in North America for one hundred and fifty years, could not have ended up with a different sort but a final war. Caught between two empires, the land and seas from Quebec City to the Bay of Fundy quickly became a theatre of war. In the early 1750s, French expansion into the Ohio River Valley led to the expulsion of British colonists from the territory. This local clash quickly escalated into the Seven Years’ War –the first global conflict. Hostilities spread over, and by 1759 the war raged in Africa, Asia, Europe, North America, and the Caribbean. Beginning in 1756, the British suffered a series of defeats against the French and their Native American alliances. However, in 1757, British Prime Minister William Pitt (1708-1778) recognized the strategic importance of an imperial expansion that would have come out of victory against the French. On September 13, 1759, following the three-month siege of Quebec, British General James Wolfe (1727-1759) effectively defeated the

French at the Plains of Abraham. French forces retreated to Montreal, where they surrendered in the face of overwhelming British numerical superiority. By conquering New France in the Battle of the Plains of Abraham in 1759, Britain established a foothold in Canada, a territory the government was keen to populate with colonists who were loyal to the British crown. The battle proved to be a deciding moment in the conflict between France and Britain over the fate of the later creation of Canada. Thereafter, in addition to Quebec, Britain also gained Prince Edward Island, Cape Breton, and New Brunswick by the 1763 Treaty of Paris. Britain's conquest of Quebec – a fact that Québécois still regret¹⁵ - profoundly changed the history of the colony and led to Quebec's continuing struggle to retain their distinctiveness.

Four years after the conquest, Britain issued the Royal Proclamation of 1763 – the first distinctively Canadian constitutional document– which created the British colony of Quebec, from then on called New France. Quebec's institutional and social fabric was *sui generis*: Quebec was largely made up of French-speaking farmers, clergy, and seigneurs. On the other hand, the British-appointed government was English-speaking, and the non-agricultural economy became soon under British control. However, the Royal Proclamation of 1763 “resisted the idea of imposing the English language and Protestant religion on such a homogenous French-Catholic population” (Dyck and Cochrane 2013, 20). With this regard, it guaranteed that the French and Roman Catholic legacy of Quebec would be preserved rather than assimilated into the English and Protestant cultures, as it happened with the other British North American colonies. Another important change regarded the new settlements established in the lands occupied by Aboriginals, who in facts did not have property rights. Up until this period, colonists simply set up new settlements in the New World,

¹⁵ This is evident in a variety of ways: Quebec license plates no longer advertise ‘le belle province’ but remind driver ‘je me souviens’, “I remember [to be French]”.

without referring to the Aboriginal groups who had been occupying those lands for centuries. A decisive aspect of the Royal Proclamation was in setting the legal rules about the formal treaties through which the future settlers in the British North American colonies were able to acquire land from Aboriginals. In sum, the Royal Proclamation stated, “the old colonialist doctrine of *terra nullius* – which contends that the land could be claimed by a colonial power provided that it was not occupied when the colonial power discovered it – did not apply in the Canadian setting” (ibid.). The following statement provides the basis for the new colonialist British doctrine:

“And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them as their Hunting Grounds (...) And We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.”¹⁶

The British Crown would now have to negotiate with the Aboriginal peoples in order to acquire the lands previously occupied by them. Negotiations led to treaties, which, in exchange for concealing their lands, guaranteed rights to Aboriginal groups. These legal agreements are still in force today, leading to the doctrine of Aboriginal “treaty rights” (see Eyford 2015).

The governments set up in the British North American colonies were far from democracy. Power was concentrated in the office of a governor, who was a British

¹⁶ The *Royal Proclamation* of 1763

appointed by the Crown, thus protecting the interests of the mother country. With the growing of population, also the interests of the colonies were taken into account in the local government structure. As a result, by the 1774 Quebec Act an advisory council has been established to advise the governor in the colony of Quebec. Even though the council was initially appointed rather than elected, the revolutionary aspect was that the governor was now able to choose French-speakers and Catholics as well as English-speakers and Protestants. Nova Scotia has the first elected assembly in 1758, followed by Prince Edwards Island in 1773.

After the 1776 American Revolution, where French Canadians remained neutral in the dispute, Britain rewarded Canadians' loyalty for not joining the anti-British union for independence by passing the 1791 Constitutional Act. That act divided the colony into Upper and Lower Canada (see Figure 2.1).

Figure 2.1. Historical Map of Canada, 1791



Source: Canadian Geographic

Upper and Lower Canada both had the same structure: a governor, an executive council, an appointed legislative council, and a locally elected assembly. Thus, by the Constitutional Act, all the colonies had achieved representative government or rather a political institution with an elected legislative assembly. Although these governments had elected assemblies, they were still far from being democratic because “the government was not obligated to follow the demands of the elected assembly” (Dyck and Cochrane 2013, 22). In fact, the assembly had no real power over the governor and appointed councils. This situation led to the twin Rebellions of 1837 in Upper and Lower Canada. Reformers demanded responsible government, in which advisers of the governor would be chosen from and reflect the views of the elected assembly. In order to investigate the colonial grievances and the critical situation, the imperial Prime Minister Lord Melbourne appointed John George Lambton –named Lord Durham– governor general of British North America. The situation was complicated by the cultural division in Lower Canada, where Lord Durham found “two nations warring in the bosom of a single state.”¹⁷ Due to its francophone majority population, Durham described the problems as racially rather than politically based. As a cultural chauvinist, he sought to assimilate the French Canadians – whom he defined “people with no literature and no history” – through a legislative union of the two Canadas dominated by an English-speaking majority.

The 1839 Durham Report was controversial, and its recommendations progressive for that time. The first recommendation sought to solve the problems of assembly-executive relations, by stating that the principle of responsible government shall be “implemented with respect to local affairs so that the executive branch would govern only as long as it retained the confidence of the elected assembly” (Dyck and

¹⁷ Craig, Gerald M. 1963. *Lord Durham: Report of the Affairs of British North America*. Toronto: McClelland and Stewart.

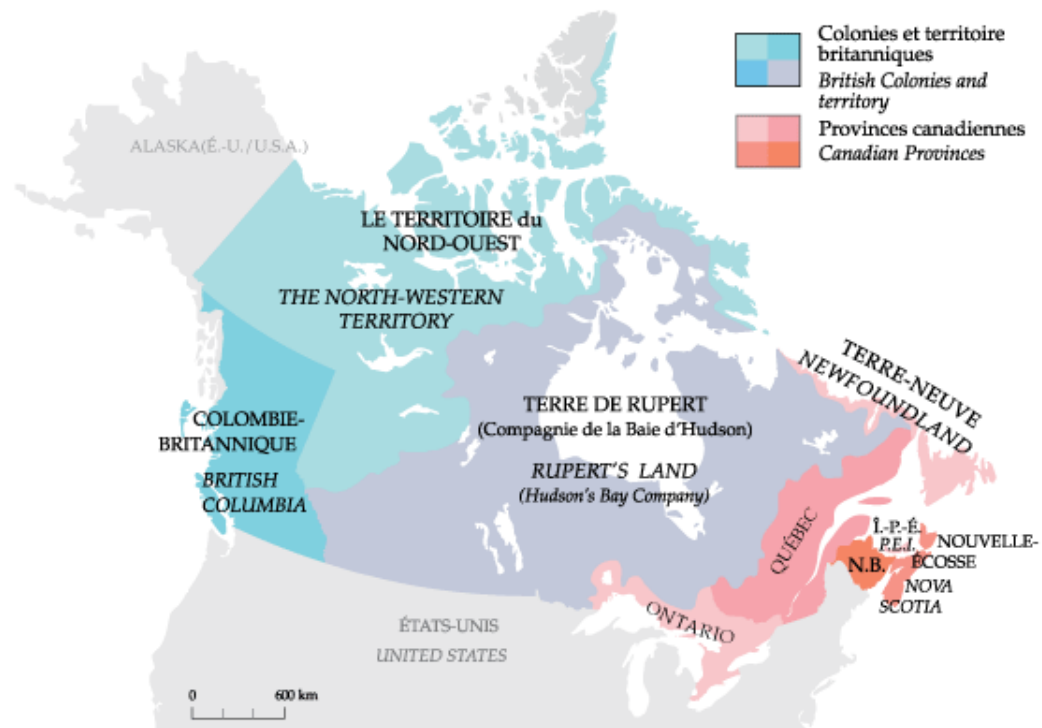
Cochrane 2013, 22). Durham Report aimed at a responsible government in the province, with less British interference. This is to say that the executive council would now have been chosen by the elected representatives of people, not by the Governor, and their decisions would need the support of the majority of the legislative assembly. The idea was based on the principle of division of powers between local and imperial authorities. In local matters, the governor would have followed the advice of colonial authorities, whereas in matters of imperial concern he would have acted as an agent of the British government. Durham thought that this would have satisfied some of the unrest that had caused the rebellions. In 1848, responsible government was embedded in Nova Scotia, New Brunswick, and the colony of Canada; then, in 1851 to Prince Edward Island, whereas British Columbia acquired it once it joined the Confederation, as the other created provinces. In essence, Durham Report has played an important role in the development of Canadian democracy and political autonomy from Britain. Responsible Government is now a sacred principle of Canadian politics that operates the form of government in which the political executive must retain the confidence of the elected legislature and must resign or call an election if and when it is defeated on a vote of no confidence.

The second recommendation aimed at the assimilation of the French Canadians through a union of Upper and Lower Canada into a single colony. Durham thought this would have generated an English majority in government, making English the only official language and easing the decision-making process. This recommendation was accepted and, by the 1840 Act of Union, the colonies were amalgamated. However, the assimilation of French has not been achieved: English did not remain the only language of the legislature; French was even recognized as an

official language of the government operations; and most governors of the period were headed by a combination of English and French leaders.

Soon after achieving responsible government, Canadian colonies began to consider a union in terms of economic, political and military factors (Waite 1964; Gwyn 2007). Economically, since Britain had occasional trading interests and the reciprocity treaty with the United States had expired, the colonies sought to establish a new free trade area among them. Politically, Canada was experiencing an institutional deadlock between its two parts, named Canada East (Quebec) and Canada West (Ontario), as well as between the English and French components of groups. Militarily, the individual colonies felt vulnerable: the British government was no longer interested in providing military protection to the colonies, and the American neighbor was threatening and powerful. Confederation seemed to be the optimal way to address these factors: it would allow creating a large internal market between the colonies; it would grant autonomy to the two parts, through a system in which a central government would deal with problems that the colonies had in common, while provincial governments would handle distinctive internal matters on their own; lastly, by joining together, the colonies would make American aggression more unlikely (Dyck and Cochrane 2013, 23). The London Conference of 1866 offered the chance to fine-tune the agreement and to design the Confederation scheme. The British North America Act (BNA), later renamed the Constitution Act of 1867, officially united Nova Scotia, New Brunswick, and the colony of Canada (now formed by Ontario and Quebec).

Figure 2.2. Historical Map of Canada, 1863



Few years later, in 1870, Canada acquired Rupert's Land from the Hudson's Bay Company, and Manitoba; then British Columbia in 1871 and Prince Edward Island two years later. In 1905, the Northwest Territories were split into Alberta and Saskatchewan, and finally in 1949 Newfoundland was added.

Although some may believe that the BNA Act of 1867 made Canada an independent state vis-à-vis the British, it simply "divided the powers that were already being exercised in Canada between a new central government and the provincial governments" (Dyck and Cochrane 2013, 31). Britain still had a relevant capacity to control Canada, such as: the appointment of the governor general, the power to disallow Canadian legislation, the power to amend the BNA Act, the authority of the British Judicial Committee of the Privy Council as Canada's final court of appeal, the control over Canadian foreign policy and trade. In sum, the BNA Act made the

confederal Canada more autonomous but did not alter the British-Canadian relationship. The way to the independency was still far away from Canada's destiny. Only after some British concessions in return to the colonies wartime efforts, Canada and all the other British colonies, acquired the equal status of "autonomous Communities within the British Empire."¹⁸ The drive to loosen links with Britain was almost achieved when the *1931 Statute of Westminster* granted Canada full legal freedom except in those areas that remained subordinated to Britain. In the post-World-War II period, other forms of disengagement took place, finally ending with the Constitution Act of 1982, which concluded the patriation process that led to Canadians full sovereignty.

2.3. Canadian Federal Architecture and Institutional Structure

Canada is one of the world's oldest, and historically most stable federations (Simeon and Conway 2012, 342). Most observers would consider its federal architecture and institutional structure as highly successful in managing the relationship between French- and English- speaking Canadians, and among the diverse Canadian regions. Canada's 35 million people occupy the second largest landmass in the world, comprising ten provinces and three territories; the provinces are autonomous with powers given them by the Constitution, whereas the territories are constitutionally subordinated to the federal government. Canadian politics works within a framework of parliamentary democracy and a federal system of parliamentary government with strong democratic traditions.

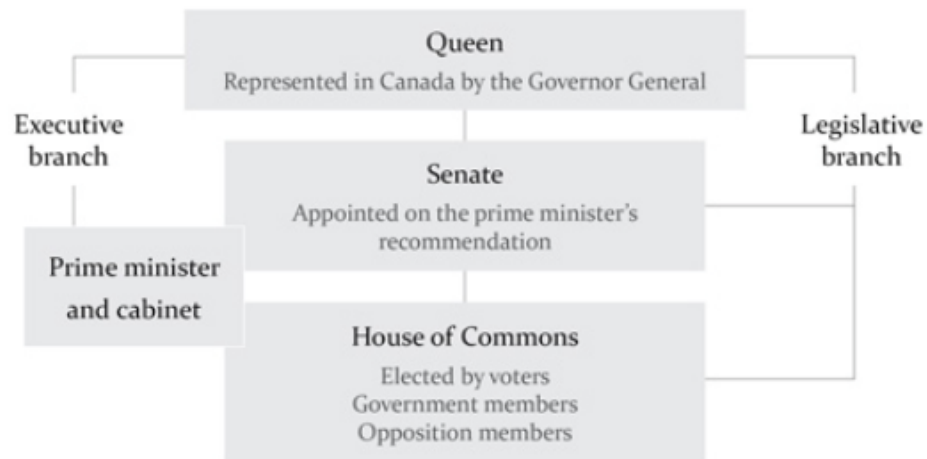
¹⁸ Imperial Conference. 1926. Inter-Imperial Relations Committee: Report, in: TNA, CAB. 32/56 Doc. E 129, p.2

i. *Federal, Provincial and Municipal Level*

Event though it has been observed that Canada is a quasi-federation at best (Wheare 1964), and a potential case of federal failure at worst (Friedrich 1968), its federal character is designated in the Canadian Constitution and can be identified in almost every aspect of the governance and political structure. Undoubtedly, Canada is a huge country, and each community has its own unique needs and interests. In order to service most effectively, Canadian political system is divided into three levels of government, each with its own elective representatives: federal, provincial/territorial, and municipal. As all the federal entities, its key-defining feature is that each order of government is sovereign within its area of jurisdiction. In fact, Canada's federal system follows the classic dualist model in which each order of government has jurisdiction over different legally specified matters, covering both the legislative and executive functions.

At the federal level, there is the federal government, which is authorized to enact legislation across the entire nation, and enjoys its own powers and areas of responsibility. The federal government structure employs the British Westminster model of government. Specifically, the 1867 British North American Act stated that the colonies had adopted a "constitution similar in principle to that of the United Kingdom" (Corbett 1998). This is to say that the Canadian federal government is based on the parliamentary system of government, to which there are two parts (see figure 2.3).

Figure 2.3. An outline of Canadian Political Institutions



Source: Parliament of Canada, <http://www.parl.gc.ca>

The legislative part consists of an elected lower house, the House of Commons, and an elected Upper House, the Senate, with its members being appointed by the Prime Minister. The second part of the parliamentary system is the monarch or the Crown; a position occupied by the Queen and her representatives, the Governor General. In a like manner, for every province there is an elected lower house¹⁹, the legislative assembly, with a lieutenant-governor representing the Queen.

At the federal level, there are three parts of government: The Crown— the Queen and the Governor General, her representative in Canada; the Parliament — consisting of the Crown, the House of Commons and the unelected Canadian Senate; the Prime Minister and the Cabinet— the head of the government and its ministers representing the political executive of the government. In order to pass legislation at the federal level, the approval of all parts of the system is necessary. Indeed, the process requires the bill to pass through both houses of the legislature and also receive the approval of the Crown. This is why every federal act begins with the words: “Her

¹⁹ Originally, most provinces did have also an Upper House, known as legislative council, but these were subsequently abolished: Quebec’s being the last in 1968.

Majesty, by and with the advice and consent of the Senate and the House of Commons, enacts as follows....”

Canada is a constitutional monarchy, which means that the Queen is the head of state, but she reigns according to the Constitution. The Crown represents the entire state and embodies “what belongs to the people collectively” (Dyck and Cochrane 2013, 516). It also plays a central role in the legal system: for instance court cases against the government refer to it as *Smith v. The Queen*, and court cases initiated in the name of the Queen referred to as *R. (for Regina) v. John Doe*. In speaking of the powers of the Crown, it might be argued that they are in the possession of the Queen, but exercised by the prime minister and Cabinet. Indeed, Canada is also said (ibid., 515) to have a “dual executive –the formal and largely symbolic executive powers are given to the Queen or governor general, but the effective executive is made up of the prime minister and Cabinet.” As regards the Governor General, he or she is the Queen’s local representative, as Queen Elizabeth II is also Queen of other countries and normally resides in Britain.

As noted above, in addition to the Queen, Parliament includes the House of Commons and the Senate. Historically, the basic principle of Canadian government was the supremacy of Parliament –that is a system where there is no review by any other organ of government beyond the Parliament, including the courts. However, the principle was transformed with the adoption of the 1982 *Charter of Rights and Freedoms*; the courts are now able to review both federal and provincial legislation. The principle functions of the Parliament are: the legislative function; to represent the national and provincial interests through the elected Members of Parliament (MPs) and unelected Senators; to hold the executive accountable through questions, committees, and debates; to review the financial initiatives. While the House of

Commons is the popularly elected component of Parliament consisting of 338 members,²⁰ the Senate is the unelected Upper House of the government. It represents a bicameral legacy, equivalent to the British House of Lords. It is an organ of regional representation and it has been described as “a place of sober second thought” by Canada’s first Prime Minister, Sir John A. Macdonald. However, its role has been at the centre of the debate over the Canadian political reforms. That is because of its unelected nature –Senators are appointed by the Governor General for each province and territory on the recommendation of the Prime Minister; unlimited terms–Senators hold office until age 75; vague responsibilities; and insufficient accountability.

The Canadian system of government has been traditionally called Cabinet government, as the British one. Yet such label does not represent the modern pre-eminence of the prime minister. Indeed, most observers (Savoie 1999; Malcolmson and Myers 2012) agree that the Canadian regime is moving away from Cabinet government towards “prime ministerial government,” and no one doubts that he has gained enormous power in recent years. To show *inter alia*, the Prime Minister is the “Cabinet-maker” (Pross 1986); he is the central player in the House of Commons; he leads the party and the government itself; the prime minister personally advises the governor general on the prorogation or dissolution of Parliament.

At the provincial level, the Lieutenant Governor represents the Queen locally²¹. The Legislative Assembly has the legislative power over the matters of competence and within the particular provincial boundaries. It is made up of elected Members of Provincial Parliament (MPPs). The head of government of each province

²⁰ At the time of writing, the next elections will be held on October 19, 2015 to elect members to the House of Commons of the 42nd Parliament of Canada. For the first time, the number of electoral districts was increased to 338, compared to 308 of 2011 elections.

²¹ In the three territories (Yukon, Northwest Territories, and Nunavut) there is an analogous Commissioner, but he or she represents the federal government rather than the monarch.

is called the premier. The premier leads the government and chooses MPPs to serve as ministers in the cabinet, which sets government policy and introduces laws for the legislative assembly to consider. Provincial and territorial legislatures have no second chamber like the Canadian Senate.

Finally, there are municipal governments, which represent the interests of cities and towns. They receive their powers from the provinces, and they are responsible for local matters.

ii. Division of powers

As discussed above, Canada is a federation. Thus, the work of governing the country is shared by the federal and provincial/territorial governments. The provinces are autonomous within the power given them by the Constitution, whereas the territories are constitutionally subordinated to the federal government. In a federation, the division of powers between the federal level and the provincial level aims at guaranteeing the effective governing. Additionally, in Canada it reflects the country's unique history, social and economic makeup, and institutional design.

The division of powers between the two levels, federal and provincial, has to be examined in three respects: through the constitutional provisions, the formal constitutional amendments, and through the judicial decisions and interpretation that altered the division of powers.

The often-called "Confederation Settlement" (Smiley 1967), incorporated into the 1867 British North America Act, intended the new country to be a highly centralized federation. Regarding the division of powers, it gave 16 specific enumerated powers to the provinces in Section 92 (such as hospitals and municipal

institutions) and left the residual powers to Ottawa (Section 91). The act also provided a list of 29 exclusively federal powers, such as trade and commerce and national defense. Also, two concurrent powers –agriculture and immigration –were listed in section 95, and section 132. In addition, the Act also provided the federal government with special powers for controlling the provinces. The *power of reservation* allowed the federally appointed lieutenant governor of a province to reserve provincial legislation for the consideration of the federal Cabinet. The federal Cabinet could then approve or reject the legislation. Even if the lieutenant governor gave assent to a piece of provincial legislation, however, the federal Cabinet could subsequently disallow it through the *power of disallowance*. Then, the federal government could use its *declaratory power* to declare any local work or undertaking to be for the general advantage of Canada, and thus place it under its control. While the federal government has used these powers in the past, it is now an unwritten norm that these federal powers are not to be used over the provinces legislation.

Starting from a centralized federation with the federal level dominating the provinces, the evolution of division of powers went toward a process of decentralization. In fact, with the 1982 Constitution Act, five formal constitutional amendments have been adopted affecting directly the division of powers. Then, the most transforming impact on the decentralized process has been pursued by the Canadian Court²². First, the Peace, Order and Good Government clause (POGG), which stated that all powers not given to the provinces in section 92 were to be left with the federal government, was reinterpreted in favor of the provinces' realm. The Judicial Committee decided that the list of 29 matters constituted the real federal powers (Dyck and Cochrane 2013, 437), while the POGG was ignored except in time

²² Before 1949, Canada's final court of appeal was the Judicial Committee of the Privy Council (JCPC) in London.

of national emergency. However, in most recent cases, such as *Crown Zellerbach* in 1988 and *Oldman River* in 1992, the Court seemed to have concluded that POGG should be used to cover single, distinctive issues that have reached national dimension and that a province would be unable to deal with properly on its own; thus, establishing an akin *principle of subsidiarity*.

In sum, the combined effect of formal constitutional amendments, judicial decisions on the POGG over time, and judicial interpretations of the constitution in numerous cases²³, significantly reduced the intended dominance of the federal government and substantially increased the scope of provincial powers (see Table 2.1).

Table 2.1. An outline of Federal-Provincial Division of Powers

Federal powers	Concurrent Powers	Provincial powers
Peace, order and good government Any form of taxation International/interprovincial trade and commerce, communications & transportation Banking and currency Foreign affairs (treaties) Militia and defense Criminal law and penitentiaries Naturalization Weights, measures, copyrights, patents First Nations Residual powers Declaratory power Disallowance and reservation Unemployment insurance and old age pensions	Immigration Agriculture Pensions	Anything local or private in nature Direct taxation Crown lands and natural resources Hospitals (health sector) Education Welfare Municipalities Local works Intraprovincial transportation and business Administration of justice Property and civil rights Cooperatives and savings banks

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²³ *Inter alia*, 1881 *Parsons case*; 1882 *Russels v. the Queen*; 1883 *Hodge v. the Queen*.

With this in mind, many observers (Russell and Leuprecht 2011; Cairns 1977) agree that the Canadian decentralized federalism is “in fundamental harmony with the regional pluralism” and “the regional diversity of a land of vast extent and a large, geographically concentrated, minority culture.”

2.4. Intergovernmental Executive Federalism in Canada

It is plausible to argue that the Canadian case is quite interesting in that it combines both federalism and a Westminster parliament. As observed (Savoie 1999), Canadian parliamentary system concentrates decisional powers in the hands of the executives and, thus, cabinet members play an important role in federal-provincial relations. In the post-World-War-II period, the Canadian parliamentary system faced an increasing need for coordination of economic policies. This constellation saw first ministers and finance ministers gaining increasing legitimacy in decision-making (Simeon and Robinson, 1990). In the absence of intergovernmental institutions, federalism has been practiced by members of the executive rather than the legislative branch. It was made operational by “a great deal of federal-provincial interaction at all levels” (Dyck and Cochrane 2013, 447) –first ministers, premiers, departmental ministers, deputy ministers, and even lesser bureaucrats. Whether Canadian federalism has been described as colonial, imperial, classical, administrative, cooperative, collaborative, constitutional or competitive (Simeon and Robinson 2004), the form of federalism that has been institutionalized after the post-war era has been labelled “executive federalism” (Watts, 2008, 1989; Smiley, 1980; Smiley, 1987; Simeon, 2006; Dupré, 1988). This form of federalism refers to “the relations between

elected and appointed officials of the two orders of government in federal-provincial interactions and among the executives of the provinces in interprovincial interactions” (Smiley 1980, 91). In other words, two main implications of the executive federalism are that: legislatures, political parties, and the public do not play much role in decisions that emerge from the secrecy of meetings of executive officials; and federal-provincial conflicts are not handled by the courts but negotiated in those conferences.

From a broad comparative perspective, unsurprisingly one might note that “executive federalism” is a key feature of Canadian federalism. Indeed, American federalism is described as judicial federalism, thus based on the constitutional division of powers (LaCroix 2010, 172). As observed by Smiley and Watts (1985, 4), it is possible to distinguish two ways of organizing negotiated compromise in federal systems. In contrast to the Canadian model, American federalism lays only on *intrastate* federalism, meaning that the constituent members of a federation participate in federal legislation: in this case, the classical model for this is the American Senate. The directly elected American senators, indeed, represent the interests of their constituencies and, on occasion, may defend whatever is considered to be the national interest. On the contrary, because Canada does not have an elected, equal and effective senate, Canadian federalism had to turn to *interstate* federalism, meaning that compromise depends on the relations between the two orders of government. In other words, given that the *intrastate* elements of the national institutions are weak, Canadian provincial governments rely heavily on intergovernmental relations. For instance, Canadian senators are, indeed, appointed by the Governor General based on the advice of the prime minister; a provision that potentially weakens the link between senators and the regions they supposedly represent, with the provinces having poor representation and influence within the national institutions of the federal

government. As Atkinson *et al.* (2013, 7) explain: “the weakness of the Canadian Senate has, over time, produced a dynamic in which provincial governments end up performing the regional representation role through intergovernmental processes.” These ongoing processes of intergovernmental contracting take place primarily outside of central government institutions, and have turned over years into “the main political venues in which most major agreements are negotiated” (Bakvis et al., 2009; Simeon and Robinson, 2009).

The major national intergovernmental bodies in Canada are the exclusively horizontal Council of the Federation (the former Annual Premiers’ Conference), the vertical-national First Ministers’ Conferences (FMCs), in which the federal prime minister and the premiers meet, and a diversity of nationwide ministerial conferences and councils (of which some include the federal government, some do not). On the regional level, there are the Western Premiers’ Conference and the Council of Atlantic Premiers (see Table 2.2).

Table 2.2. Intergovernmental Arrangements in Canada

Type of IG bodies	Canadian IG bodies
Multilateral/national (generalist)	First Ministers’ Conference (vertical) Council of the Federation (horizontal)
Multilateral/national (policy-specific) Regional (generalist)	Ministerial councils (vertical or horizontal) Western Premiers’ Conference (horizontal) Conference of Atlantic Premiers (horizontal)

own work

The FMC is an elitist institution, with membership limited to the prime minister and the provincial premiers (also territorial premiers are invited since 1992), all of whom enjoys significant authority to make decisions on behalf of their governments (Bernier et al. 2005; Savoie 1999; Simeon 2006). It has long been representing the peak of Canadian intergovernmental system by combining the horizontal and the vertical dimension of the federal system. Such federal-provincial-territorial forum has become institutionalized as site for the negotiation of accords, for resolving conflicts on the highest level, for concluding agreements and *communiqués* across a broad number of policy areas, and for giving direction to the network of lower level meetings. Although it has been suggested several times that these meetings be held annually and that they be given constitutional status (Bolleyer 2009, 71), actors do not want to be constitutionally constrained by intergovernmental cooperation, but rather prefer to follow extra-constitutional and informal mechanisms of reaching intergovernmental compromise. In this regard, the FMCs often take the form of negotiation in the same way that international negotiations would, leading Simeon (2006) to use the term “federal-provincial diplomacy.”

The following years saw a multiplication of political meetings between provincial and federal executives, so that Brock (1995, 99) talked about a “nuclear explosion of intergovernmental meetings.” FMCs have long been used by federal and provincial executives to negotiate solutions to a wide variety of the country’s most pressing political, social, economic and constitutional problems (Meekison et al. 2004; Simeon 2006), country’s major policy orientations, from welfare to health care to environmental standards. Indeed, the FMCs have been the federal-provincial negotiating forum for the elaboration of a series of constitutional proposals and economic arrangements, including the patriation of the Canadian constitution from

Britain in 1982, the 1987 Meech Lake Accord, the 1992 Charlottetown Accord, the 1994 Agreement on Internal Trade; and more recently, the implementation of the Social Union Framework Agreement in 1999, the Health Accord and the Accord on Equalization in 2004.

In sum, in a federal system characterized by weak *intrastate* elements of national institutions and thus, an unelected, unequal and ineffective senate, the presence of a central point for managing the relationship between both federal and provincial levels is vital. As a result, the executive federalism and the intergovernmental meetings became a crucial mechanism for governing the Canadian federal system. In this situation, FMCs have been the exclusive realm of federal and provincial first ministers for dealing with a variety of pressing national problems, including constitutional reform (Dupré, 1985; Simeon, 2006; Smiley, 1976: 54).

2.5. Patriation and its Consequences: Constitution-making in Canada

Unlike the United States and many other countries, Canada does not have a single document named “the Constitution” and, in a like manner, it does not ground only in precedents and court judgments either. Its constitution is a great hodgepodge of written and unwritten provisions. The principal components are: the 1867 Constitution Act; formal amendments to the Constitution Act of 1867; British statutes and orders in council; organic Canadian statutes; the 1982 Constitution Act; judicial decisions; and finally, constitutional conventions. However, the following analysis focuses on the actors and practices that characterized the mega-constitutional change

process, starting from the major turning point in Canadian constitutional history: the constitutional “patriation.”

The demands for mega-constitutional change dominated Canadian politics from the 1960s to 2000s. Canada had to face several unresolved issues such as: the domestic amending formula, a constitutional charter of rights, a clear general division of powers between the two levels of government, and Quebec’s place in the Canadian federation. The latter primarily emanated from the Quiet Revolution in Quebec between 1960 and 1966. Consequently, a critical window was open in May 1980, when the Parti Québécois (PQ) government, with the aim of moving towards a form of autonomy for Quebec, asked the people for a mandate to negotiate *sovereignty-association* with the federal government –that means Quebec as a sovereign state but with economic ties to the rest of Canada. The referendum failed –with a vote of only 40 per cent in favor of the option to seek sovereignty. As a consequence, Canadian Prime Minister Trudeau immediately embarked on a round of federal-provincial constitutional discussions. After days and nights of tough negotiations, the amended package was passed by the Parliament and signed by the Queen on April 17, 1982. The constitutional patriation –literally the bringing of the constitution home– had thus been achieved through an act that in a double move marked the end of British sovereignty and the adoption of a new constitution (Fossum 2011b, 193). In addition, central components of the act were the *Canadian Charter of Rights and Freedoms*, a domestic constitutional amending formula, a section on Aboriginal rights, a provision for the financial federalism, and an amendment to the division of federal-provincial powers.

While the Constitution Act was favorably voted by most of Canada’s democratically elected provincial officials, the provincial government of Quebec

refused to sign it (although 70 out of 75 elected members of the Quebec delegation in the federal Parliament supported it). The reason lies on the fact that the 1982 Constitution Act did not respond to any of the demands of constitutional change requested from Quebec, so that the PQ and nationalist intellectuals considered the constitutional pack as a “great betrayal” (Cairns 1991, 23). Following this further, Quebec separatists also argued that the Canadian Charter was unnecessary, as Quebec passed its own *Charte des droits et libertés de la personne* in 1975. The Charter was also blamed to be in-sensitive to the diversity of Canada, as it did not offer explicit protection for Quebec’s cultural or national distinctiveness (Fossum 2007, 10). Lastly, because the Constitution Act was introduced without the province of Quebec’s explicit consensus, it was also deemed to be illegitimate. The Quebec government then sent a reference to the Supreme Court asking to recognize by convention Quebec’s veto on constitutional amendments. However, given that the Supreme Court stated that Ottawa could legally patriate the constitution unilaterally without the assent of Quebec, the province was legally bound to the document. As noted (Fossum 2011b, 195), considering that the patriated constitution was rejected by “the provincial government representative of Canada’s most important minority,” it seems clear that the patriation event did not qualify as a democratic constitutional moment.

The 1984 change in both federal and provincial leadership in Canada and Quebec gave new impetus to constitutional change. New Prime Minister Mulroney was determined to obtain Quebec’s signature on the Constitution Act so as to include Quebec in the constitutional family “with honour and enthusiasm” (Cairns 1988, 223). On April 30, 1987, the prime minister of Canada met with the ten provincial premiers at Meech Lake, Quebec. The “French province” proceeded to make several demands as to recognize their particular contribution to Canada and their

distinctiveness, through the insertion of the “distinct society” clause –although it was not clear what implications the clause would have for the federal-provincial division of powers, leaving it for judicial clarification on an issue-by-issue.

The negotiation and signing of the Meech Lake Accord is considered to be the highest point of Canada’s executive federalism system (Alcantara, 2013). Indeed, the key constitutional stakeholders were only government executive officials in charge of constitution making: the final agreement was thus negotiated by the Prime Minister and the ten provincial premiers of Canadian provinces. Indeed, as in previous FMCs, negotiations and decision-making were conducted behind closed doors without adequate public and stakeholder consultation. In this regard, Simeon’s question “what right do eleven men in suits, locked in a room, have to change my Constitution?” recaps the critiques: the process was seen as elitist and unaccountable and the participants were seen to be unrepresentative. However, after the signing, the accord needed to be ratified by each of the eleven (federal and provincial) governments through the legislature approval within three years –as stipulated by the 1982 amendment rules. Due to the strong popular opposition to the elite-based secretive manner and its classical intergovernmental fashion in which it had been negotiated, and because Newfoundland and Manitoba refused to sign it on time (within three years), the Meech Lake Accord failed.

With the Meech Lake perceived failure in mind, the next constitutional round had to be more open and consultative, privileging a more inclusive notion of democracy over the previously dominant elite accommodation model (Milne 1992), and thus going beyond negotiation between government only (Fossum 2007a, 371). The process perceived for this round aimed at mitigating some of the criticisms leveled at the failed Meech Lake Accord, and as a result, the governments of Canada

engaged in one of the largest public consultations in Canadian history (Brock, 1995: 100). The Charlottetown process started with a constitutional debate also involving parliamentary committees, regional constitutional summits, and citizens at all levels. The intergovernmental negotiation was preceded by more than a year of public discussion and popular consultation in citizens' forums, five regional mini-conventions, and "a myriad of panel discussions, study groups, and town-hall meetings" (Russel 1993, 177). However, after the series of meetings and public consultation, the package went in the hands of the key actors in constitution making: the heads of federal and provincial governments who negotiated among themselves in the intergovernmental manner. The result was a pair of referenda held simultaneously in Quebec and the Rest of Canada (ROC). Although the Charlottetown Accord was more comprehensive than its predecessor and the process was more democratic and inclusive, yet it was rejected in both referenda.

In conclusion, as observed by Fossum (2011b, 202), Canadian mega-constitutional process witnessed "the effort to break the intergovernmental logjam by opening a closed system of constitution making to public scrutiny and participation." Yet, he continues, "citizens were only partially let into a process still organized within the general ambit of intergovernmental relations."

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NAFTA

3.1. Introduction

In this chapter, I will assess the third and last entity of our comparison: NAFTA. This chapter is made up of four sub-chapters. The analysis will begin (3.2) with a historical explanation of the process of regionalization that NAFTA has set in motion in North America. In the next part (3.3) I will illustrate the institutional structure and the institutions making up NAFTA decision-making system. Then (3.4), since NAFTA is a regional economic organization, I will focus on the scope, features, and achievements, as these will prove to be useful for the EU-NAFTA comparison. The last part (3.5) will investigate the idea that NAFTA acts as an *economic external constitution* of primary importance to North America enterprises.

3.2. Origins: from U.S. Multilateralism to NAFTA

Between 1990 and 1994, officials from the World Trade Organization were notified of thirty-three new regional trade agreements (RTAs). This meant that the international arena could count a total of sixty-eight RTAs around the world (International Monetary Fund 1994; Frankel 1997). Then in the following years, between 1995 and 2001 an additional one hundred RTAs were formed, covering up much of the world with a dense network of regional agreements. As it has been

observed, RTAs became “almost a craze in the sedate world of economics, springing up here, there and everywhere” (Urata 2002, 21). The most prominent example of experiences of regional integration included the North American Free Trade Agreement (NAFTA).

The North American Free Trade Agreement (NAFTA) signed by the USA, Canada and Mexico came into effect on January 1994. If one judges a free-trade area by the size of its product and territory, North America became the largest in the world. Indeed, it is widely known that the United States has the world’s largest economy, and NAFTA also includes the eighth –Canada –and ninth –Mexico –largest economies as well (Pastor 2005, 37). However, a deeper analysis is required to analyze the process of regionalization NAFTA has set in motion in North America.

For each of the three founding nations of NAFTA, the decision to negotiate and sign the Free Trade Agreement (FTA) represented a sharp turn – almost a reversal – from previous policy. In fact, Canada and Mexico had long “defined their vital interests in terms of autonomy from the great power next door” (ibid. 38). Both tried to keep their relationship with the United States “at arms-length” with the concern that the rich neighbor would suffocate them.

With regard to Mexico, the government has always tried to pursue a political doctrine of non-intervention to keep the United States from interfering in its internal affairs, by constructing trade and investment barriers. Furthermore, NAFTA represented an important break with the Mexican past. In fact, the relationship between Mexico and the United States had always been tense since the Mexican–American War of 1846-48, so that the president of Mexico turned to the United States only after having been rebuffed by both European and Japanese leaders in early 1990 (Grayson 1995, 51). Negotiations between the countries started in 1991 with a

decision that challenged “all previous conceptions of Mexico-U.S. relations” (Vega and de la Mora 2003, 171).

On the other hand, even though Canada considered the possibility to engage a free trade area at several moments in the 20th century, it has retreated for fear that the United States would be dominant inside Canadian market and its companies would purchase the country’s assets. However, by the 1990s together with Mexico, Canada started to perceive the need to ensure trade rules against rising US protectionism. The economic motivations came along with the political hopes of bringing about changes in forms of economic governance within both the Northern and Southern US neighbors (Clarkson 2000).

Concerning the United States, the coming into force of the NAFTA opened a new chapter in American foreign economic policy (Sbragia 2007, 154). To illustrate, the United States has always been adverse to regionalism, as the existence of regional blocs has been often viewed as a threat to the US multilateral trading system institutionalized around the GATT/WTO. Indeed, the USA has been widely considered the bulwark of multilateralism and supporter of multilateral rather than regional initiatives. International trade has been perceived as a means to promote prosperity and, at the same time, to prevent the emergence of the conditions that led to devastating wars. Thus, a position in favor of multilateralism “satisfied both those concerned with the potential emergence of military conflict and those concerned with American economic interests” (ibid., 156). The link between economics and security was clearly spelled out in Secretary of State Cordell Hull’s memoirs:

To me, unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition with war. Though realizing that many other factors were involved, I reasoned that if we could get a freer flow of trade – freer in the sense of fewer discriminations and

obstructions – so that one country would not be deadly jealous of another and the living standards of all countries might rise, thereby eliminating the economic dissatisfaction that breeds war, we might have a reasonable chance for lasting peace (quoted in Ellwood, 1992: 21–2).

With the end of the Cold War and, thus, the remoteness of military conflict among the member states of the European Community the US foreign policy environment changed dramatically: the link between security and foreign economic policy was much more tenuous than it had been before. The reason behind the fact that the United States committed itself to pursue a regional strategy rather than continue to view multilateralism as the only appropriate way to liberalize international trade then lies on two specific grounds. First, as it has been observed above, the shift has its roots in the changed security environment after November 1989. Second, it is also a response to the very success of the European Community, which has led the United States to reconsider its own position in support of multilateral rather than regional arrangements. In this regard, it has been correctly noted (Sbragia 2007; Dominguez 2008) that the EU was instrumental in changing the long-held American belief in multilateralism as the dominant strategy, and that regionalism in North America was in a sense legitimated by the EU. Indeed, by following the European trend, in the 1980s, there were several initiatives that laid the groundwork for the NAFTA agreement (Mittelman 2000). The most important of these was the Canada-United States Free Trade Agreement (CUSFTA), which came into effect in 1989, when the USA decided to commit itself to a FTA with its wealthy northern neighbor – Canada. Later in 1991, the USA opened the way for an RTA with its poor southern neighbor – Mexico.

In essence, the NAFTA has set in motion a process of regionalization in North America started with the US vital shift from multilateralism to regionalism. In such a process, as it has been observed (Dominguez 2008, 133), the pivotal actor is the United States, while Canada and Mexico are reactive partners “who seek to defend their domestic interests as well as accommodate themselves in the regional dynamic led by the United States.”

3.3. NAFTA’s Institutional Structure

Although the NAFTA has a limited institutional architecture when compared to other economic regional organizations, it forms clear institutional boundaries, and the decision-making process is “structured and regularized” (Fabbrini 2015, 115) (See Table 3.1).

The main institution created by is The Free Trade Commission (FTC). According to the agreement, the FTC shall “supervise the implementation of the agreement” and “supervise its further elaboration.” It also plays a fundamental role in resolving disputes regarding the interpretation or application of the agreement, and it act as the supervisor of the various committees and working groups established by the agreement. The FTC is comprised of cabinet-level representatives from the three member states –or their ‘designees’– and meets normally once a year. Since its establishment, its impact has been positive: in the mid-90s, the FTC has been fundamental to accelerate tariff reductions; furthermore, it has contributed to dispute settlements under Chapter 20 of the agreement. Alongside with the FTC, the agreement also prescribes a Secretariat serving as an administrator for the FTC with the duty to care of the day-to-day affairs that are prescribed by Article 2002. It is

organized on a national basis, with each member responsible for supporting its own staff.

As widely known, NAFTA was negotiated under the administration of President George Bush from 1991 to 1992. During the 1992 electoral campaign, candidate Bill Clinton had expressed some reservations about the agreement, as he believed it needed supplementary agreements on labor and environmental issues. After his election, President Clinton seated around the table from March until August 1993 to negotiate these side agreements, which then came into effect the year later bounded to the NAFTA.

One of the supplementary agreements was the North American Agreement on Labor Cooperation (NAALC). It established the Commission for Labor Cooperation, which is formed of a Council of Ministers and a tri-national Secretariat. The Council counts the three labor ministers – or their representatives, who meet with once-a-year-regularity in regular sessions.

The second side agreement was the North American Agreement on Environmental Cooperation (NAAEC), which has established the Commission for Environmental Cooperation (CEC). The CEC consists of a Council, a Secretariat and a Joint Public Advisory Committee (JPAC). While the Secretariat is an independent body in Montreal, the Council meets at the ministerial level at least once a year. As it has been noted (Laursen 2012, 165; McKinney 2000, 109) a potentially important provision is Part V of the agreement, which allows for complaints from a member state about “a persistent pattern of failure” by another “Party to effectively enforce its environmental law” (Article 22). If the Parties involved in the issue cannot solve the dispute, “the Council shall convene.” However, in 2000 McKinney concluded:

“The process involved in sanctioning countries for a persistent failure to apply their environmental laws is by design highly convoluted, with

multiple opportunities for the accused country to escape the sanctions. The clear intent is for environmental disputes among the member countries to be settled through consultation and cooperation. No disputes have yet been filed under Part V, and the likelihood that they will be seems remote. No private party access exists under Part V of the NAAEC, that is, consultations that begin the dispute settlement process under Part V of the agreement must be initiated by a NAFTA member government. Informal consultations among the member governments will likely preclude the more formal proceedings of the Part V dispute settlement process” (McKinney, 2000, 109).

Furthermore, a North American Development Bank, headquartered in San Antonio, had been established to fund infrastructure at the American–Mexican border. Finally, a number of working groups have been set up to negotiate some kind of harmonization in a variety of areas, including the safety of trucks moving from Mexico into the north (Sbragia 2007, 158).

In essence, NAFTA’s institutional structure is limited and minimal. As a consequence, the institutional model results to be exclusively based on loose cooperation between governments. Given its traits of cooperation rather than coordination among national governments, the model of NAFTA is “more transgovernmental than intergovernmental” (Fabbrini 2015, 120).

Table 3.1. NAFTA institutional structure

Institutional Structure		Features	Role	Functions
Free Trade Commission		Intergovernmental body	Policy direction	To agree on dispute resolution
NAFTA Secretariat	US Section Canadian Section Mexican Section	Nation-based Secretariat	Administrative role	To manage the dispute resolution mechanism and to select national panels
Working Groups and Committees		Technical ad hoc bodies	Technical support	To prepare informal resolution of disputes
Side Agreements linked to the NAFTA	Commission for Environmental Cooperation (CEC)	Intergovernmental permanent body	Policy coordination	To promote the enforcement of environmental law
	Commission for Labor Cooperation	Intergovernmental permanent body	Policy coordination	To promote the enforcement of labor standards

Source: Fabbrini, Sergio. 2015. *Which European Union?*. Cambridge: Cambridge University Press.

3.4. Scope, Features, and Achievements

In principle, NAFTA only aimed at commonly benefitting a trade agreement (Milner 1998) and stabilizing economic relations among its founding countries, but due to the disappearance of tariffs across the three countries' borders, the agreements is mainly geared at solving disputes on issues related to trade. More specific, the main provisions of the NAFTA were an attempt to place some limits on the application of American trade policy and to subject it to the logic of a regional agreement. The main mechanism for this is the “dispute settlement mechanism that would resolve disputes between member states or between economic actors and member states” (Fabbrini and Della Sala 2004, 17). As provided by Article 1904 of the NAFTA, the dispute

settlement mechanism is an alternative to the domestic courts to resolve disputes on anti-dumping and countervailing duties. Its procedures and provisions are spelled out by Chapter 20 of the agreement: the dispute settlement begins with a government-to-government meeting. If the states cannot achieve a solution, the matter can be sent to the NAFTA Free Trade Commission (FTC). If the Commission is unable to resolve the dispute, a consulting Party may call for the establishment of a five-member arbitral panel to be formed. The panelists are chosen from a roster of names, with each country choosing two and the choice of the fifth member alternating with each dispute between the two countries. As Fabbrini (2015, 112) points out, the fact that USA has committed itself to have a judicial body with binding decisions that is not part of its formal constitutional structure, but it is rather a formal transnational institution “is not insignificant.” Indeed, one has to remember the US refusal to sign on the Rome Statute of the International Criminal Court, as it would have required the override of the US legal system by an external body.

With regard to the internal features of the ongoing NAFTA, the most evident one has its roots in the discrepancy between the three founding nations. In 1990, when the three North American states were negotiating the free trade agreement, the gross domestic product of the United States was about twenty times larger than Mexico’s and ten times larger than Canada’s. Asymmetry, both in size of the economy and power of the military, “is the defining characteristic of the relationship of North America’s three states” (Pastor 2005, 39). As a result, NAFTA is a highly asymmetrical intergovernmental regional organization and represent a hierarchical model of regionalism²⁴. Indeed, as Fabbrini (2015, 111) noted, it has a very high economic differentiation (one of the most globally dynamic economies and a newly

²⁴ On the distinction between hierarchical and horizontal organizational model of economic regionalisms see Fabbrini (2009).

industrialized country), profound political asymmetry (the global military power together with medium-sized powers with limited military capacity) and unusual geographical features (the longest borders shared by states). In essence, NAFTA is asymmetrical in terms of power relations between the three countries: the predominance of the US is undisputed. To illustrate, in terms of trade patterns, trade with the United States dominates NAFTA, whereas trade with its partners is much less important to the United States:

“Although Canada is the number one trading partner of the United States, and Mexico is number three after Japan, the United States conducts only about one-quarter of its trade with its two North American neighbors. In contrast, more than two-thirds of foreign trade in both Canada and Mexico is with the United States. They have very little direct trade with each other. Put bluntly and somewhat simplistically, foreign trade for Canada and for Mexico means trade with the United States” (Kehoe, 1994: 7).

Moreover, its particular asymmetry is not counterbalanced by the institutional capacity, as it is weak and limited in its structure.

In essence, NAFTA is an intergovernmental economic regional organization with a limited and low-ambitious scope of activity. It is a hierarchical entity in which relations between the three NAFTA countries will always reflect the asymmetries of power.

However, considering NAFTA under the lenses of an intergovernmental organization, which scope consists of creating a free trade area that provides stable relationships and trade-related benefits among the three countries, it has had a relevant success. Indeed, NAFTA has created the world’s largest FTA and increased more trade and foreign direct investments. As described by Laursen (2012, 166), during NAFTA’s first ten years of existence trade among the three member countries

doubled, from US\$306 billion in 1993 to almost US\$621 billion in 2002. With regard to Mexico –the poorest member country –“trade increased even more than for the United States and Canada.” Numbers revealed that Mexican exports to the US grew by 234 percent and exports to Canada grew by 203 percent (data from the Government of Canada). Also the foreign direct investments more than doubled between the three member countries, observing an increase from US\$136 billion to US\$299.2 billion between 1993 and 2000.

3.5. NAFTA as Constitution

When the three countries negotiated NAFTA, they were not concerned only with trade. The agreement also reflected economic interests that went beyond the application of trade law. The other principal feature of the agreements was, indeed, the protection of – both national and foreign – corporations rights. Moreover, NAFTA also created judicial procedures for disputes related to both inter-state and TNC-trade.

Respecting this, some observers (Clarkson 2000; 2004; Telò 2007) suggested that by translating NAFTA’s political economy formulation into more institutional terms, “NAFTA acts as an *economic constitution* of primary importance to North America enterprises.” In fact, the agreement includes rights (national treatment) that give companies more flexibility and mobility by guaranteeing corporate capital pan-continental security. To illustrate, NAFTA provides a multitude of new corporate investment protections and rights that are unprecedented in scope and power. One such example is the provision that allows corporations to sue the national government of a NAFTA country in secret arbitration tribunals, in the situation in which they

claim that a regulation or government decision affects their investment in conflict with the NAFTA rights.

In the same way, these domestic provisions are also addressed to foreign investors. In this regard, in order to protect foreign investments, NAFTA's provides the mechanism of *national treatment*: that is, foreign firms cannot be treated any differently than domestic actors (Chapter 11).

As conditioning framework, it has been noted that NAFTA became an external addition to each country's political constitution. Indeed:

“It limits the power of its governments; it defines rights for (corporate) citizens; it provides adjudicatory procedures for resolving disputes; and it contains means for ratification and amending the document” (Clarkson 2000, 18).

In essence, although some have argued that NAFTA has become something of an “external constitution” (Clarkson 2004, 198–228), and it adds to member states' already existing domestic constitution a supra-constitutional matrix, it seems right to agree with the interpretation that “NAFTA has not been a panacea (...) it must be assessed for what it is (...) a trade and investment agreement that succeeded in its central purpose” (Weintraub 2004, 126).

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4

The EU and Canada in Comparative Perspective

4.1. Introduction

Once the above examination of the three entities taken under consideration has been developed, the comparative analysis begins within this chapter. The first experiment will be the EU-Canada comparison. The reasoning will be divided into three parts. Part one (4.2) will compare the nature of both political systems by first analyzing their common poly-ethnic nature and then how their power is divided between the different levels, and under the same principles. In the following part (4.3), I will compare the institutional and procedural environment for policy making in the entities. Since similar paths characterize both the EU and Canada and they also share the same kind of criticism, I will thus focus the analysis on the intergovernmental governance and the democratic deficit the latter generates in both entities. Finally, in the last part (4.4) I will compare the paths both entities have followed with regard to constitution making: the challenges they have faced and how they have dealt with them.

4.2. Nature and Principles of the Political System

i. Post-National and Poly-ethnic entities

The EU functions in many ways as a single entity, but as previously observed, it is a much more complex shared governance system where a clearly established center of authority lacks. Moreover, its novel supranational arrangement weakens the sovereignty of the European nation-states. Likewise, Canadian decentralized federal system has to deal with deep incompatibilities between the principle of state sovereignty and national self-determination, never resolving where sovereignty is ultimately located.

In addition, the challenge of political identity and nationhood severely marked both the EU and Canada, as each entity aims at creating a sense of being European or Canadian without eradicating national (in Europe) or provincial (in Canada) identities.

On the one hand, the EU is often portrayed as a novel type of entity, also because its complex and supranational structure does not ease a clear classification of such entity, yet it is no doubt neither a state nor a nation. As observed in the previous chapters, the EU has several features that set it apart from any state in institutional terms (Schmitter 1992; 1996; 2000; Weiler 1995). It is considered a complex mixture of supranational, transnational and intergovernmental features. Following this further, it seems clear that the EU represents the most radical current attempt to “depart from the prevailing doctrine of state sovereignty and national identity” (Fossum 2004, 9), posing then a challenge to the precedent international system of the Westphalian state.

On the other hand, the EU has become a poly-ethnic polity in two ways (Behr and Stivachtis 2015, 76): first, by considering that several of its member states or units were already multi-ethnic/national entities; second, by forming the Union, the member states strengthen EU's multi-ethnic/national character. Indeed, in the EU there is no single language, ethnic group or nation that can claim majority. At the time of writing, the EU consists of 28 states and 24 official languages, numerous ethnic minorities, and regional movements. As a result, the EU is nowadays a post-national and poly-ethnic area, composed by multinational states. More specifically, it has been noted, "the Union (...) is to remain a union among distinct peoples, distinct political identities, distinct political communities" (Weiler 2001, 68). In this regards, the EU might be depicted as a community composed of distinct political communities.

In the same way, Canada is a highly complex multinational and poly-ethnic entity, which never succeeded in becoming one nation (Fossum 2004, 2). Indeed, as suggested (Frye cited in Lipset 1990, 6), Canada "has passed from a pre-national to a post-national phase without ever having become a nation." Although Canada is recognized as a sovereign state, there are several internal aspects that make it an entity with weaker territorial control compared to other nation-states. In this regards, many analysts (Bercuson and Cooper 1991; Buchanan 1991; McRoberts 1997) observed that Canada is an unlikely polity model, usually defined a failed nation-state, constantly facing break-up or dismantling. This constellation is the outcome of a great internal uncertainty marked by contestations over national unity and identity. Historically portrayed as "two nations warring within the bosom of one state,"²⁵ Canada is now characterized by four sets of national identifications (Fossum 2004, 13): Rest-of-Canada (ROC), Québécois, Aboriginals, and Canada as it exists today.

²⁵ Craig, Gerald M. 1963. *Lord Durham: Report of the Affairs of British North America*. Toronto: McClelland and Stewart.

Currently, there is none of these national identities that can legitimately claim to be the overarching one. Moreover, as a result of the large-scale immigration from all parts of the world, Canada has become far more ethnically diverse, counting 20.6 per cent of the population as foreign-born²⁶. For this reason, Laczko (1994, 38) notes that it is an *outlier* case of diversity and “it is this combination of types of pluralism that makes Canada distinctive.”

Bearing its highly complex and composite character in mind, it might be reasonable to argue that Canada has been taken outside of the nation-state frame of reference, and thus developed as a post-national entity. Additionally, as suggested by Fossum (2006, 103) Canada’s particular brand of federalism, together with the official embrace of the policy of multiculturalism and bilingualism, its particular sensitivity to the accommodation of difference and diversity (immigration, indigenous peoples and minority nationalisms) have encouraged new discussions on what type of community is. As a result, it has been defined a *cultural mosaic* (as opposed to the American notion of melting-pot), “pluralistic civilization” (La Selva, 1996, 165), and *multicultural and poly-ethnic society*.

However, considering the difficulty of reaching an agreement on one common conception of such a complex identity, Canadians tried to find a model in which every sub-unit could see itself represented; the Section 2.1. of the Charlottetown Accord, 1992:

- (a) Canada is a democracy committed to a parliamentary and federal system of government and the rule of law;
- (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the

²⁶ This figure is far more than the U.S. counting 13 per cent of foreign-born population. Canada appears to have the highest number of foreign-born in the G8 group of rich countries.

integrity of their societies, and their governments constitute one of three orders of government in Canada;

(c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;

(d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;

(e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;

(f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;

(g) Canadians are committed to the equality of female and male persons; and

(h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

As a result, Canada's particular character has been depicted not as one nation or even as one community, but as a complex and composite community of communities, each of which holds equal recognition and respect.

This brief assessment has demonstrated that both the EU supranational entity and Canada clearly deviate from the nation-state template. The EU, on one side, exhibits significant measure of divergence from some of the core traits of the nation state model (Fossum 2004, 15). On the other side, this is also explicit in Canada because of its unresolved constitutional question which affects its territorial integrity and the "very exist of the state" (ibid.). Furthermore, the argument thus far has demonstrated that both entities are poly-ethnic in that they are complex and composite community of communities with multinational and multicultural traits. As illustrated by Fossum (2004, 16), both the EU and Canada "are extremely diverse in cultural terms and neither forms a coherent and agreed-upon nation." Seen from this

angle, what set the EU and Canada apart from the nation-state template is the fact that they lack the bases to form a cohesive entity, since they are confronted with the problem that distinct national communities coexist within them.

However, the degree of diversity within the entities is different. In the EU there are much larger historical, cultural and linguistic differences between member states than between provinces in Canada. Moreover, there is a more evident cultural commonality in Canada than in the EU; citizens in Europe still identify themselves by their member state nationality rather than as Europeans, whereas in Canada, although culturally diverse, people privilege their Canadian identity rather than their provincial one.

ii. Power sharing and Subsidiarity

As a result of the addressed reasoning in the previous chapters, it seems clear that both the EU and Canada are shared governance systems where the query of who takes action and how they are taken is as important as what should be done.

Although the treaty changes over the years aimed at the enumeration of the EU powers, most policy areas still remain concurrent. As shown in the previous particular analysis on the EU, the principle of subsidiarity underlies the operative mechanism of such *supporting* areas. Under the principle of subsidiarity, “in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level” (TEU Article 5.3).

At first glance, this might appear very distant from Canadian federalism. Indeed, as already discussed in this regard, Sections 91 to 95 of the 1867 Constitution Act outlines the distribution of powers between the federal and provincial levels of government. The act provides a list of exclusively federal and provincial powers, along with an extremely short list of concurrent powers, and assign all residual powers to the federal parliament. As stated unequivocally in the Constitution, “exclusivity was thus the main basis for the distribution of powers in Canada” (Brouillet 2011, 614). Moreover, many scholars (Orban 1993; Bzdera 1991) observed that a tendency towards the centralization of powers could be seen to result from judicial review based on the distribution of powers among different levels of government. In Canada, the federative stance of the Supreme Court seeking the protection of the autonomy of both federal and provincial parliaments within their areas of jurisdiction “was gradually eroded by a centralizing interpretation of powers” (Brouillet 2005). However, this institutional set did not prevent the gradual introduction of the principle of subsidiarity into Canadian constitutional law. Some observers (Hueglin 2013a; Brouillet 2011, 614) noted that the adoption of the so-called cooperative federalism in Canadian federation has created numerous zones of *de facto* concurrent jurisdiction. Both orders of government have become active in new policy areas not included or specified in the Sections regarding the division of powers (i.e. Sections 91 to 95 of the Constitution Act, 1867). The attitude they have in those areas is deeply characterized by a process of power sharing through intergovernmental cooperation and agreements between the two orders of government. Following this path, the principle of subsidiarity has “slowly but surely made its way into the legal sphere, initially in a latent form hidden behind the value of effectiveness” (Brouillet 2011, 615).

Although the principle of subsidiarity is completely absent from the Canadian constitution, traces of it can be detected in the Supreme Court's jurisprudence.²⁷ In the *2011 Securities Reference*, the Supreme Court of Canada found itself in agreement with the “dominant tide (...) toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation” (SSC 66: 57). This “promotion of cooperative and flexible federalism” devoted “to ensure that each level of government properly discharges its responsibilities to the public in a coordinated fashion” (ibid. 9), seems to be a relevant allusion to the principle of subsidiarity. Over the last ten years, the Supreme Court of Canada has referred explicitly to the principle of subsidiarity in several occasions. As suggested by Hueglin (2013a, 1), in the first of these, the *2001 Spraytech* decision, the Court held that: “matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity” (SCC 40: 3). Following this reasoning, the Court also stated that federal action is only allowed when “the matter regulated is genuinely national in importance and scope,” and hence regards “something that the provinces, acting either individually or in concert, could not effectively achieve” (SCC 2011: 57,83). In short, the overall purpose of Canadian federalism is that it “facilitates democratic participation by distributing power to the government thought to be the most suited to achieving the particular societal objective” (SCC 1998, *Secession Reference*).

²⁷ As shown by Hogg, a keyword search on the term “subsidiarity” with respect to the Supreme Court of Canada has shown four relevant cases (vs. 313 in the EU and none in the United States).

It seems clear now that Court understanding of subsidiarity very closely follows that officially enshrined in the Treaty on the European Union. The reason behind this stems from the fact that subsidiarity is “neither a centralizing nor a decentralizing principle,” but rather “a dynamic principle that outlines the balance of forces present and the objectives of the entities making up the system” (Mathis-Calvet 2004). Seen from this angle, with the words of Brouillet (2011, 606), “subsidiarity is a principle that adds a degree of flexibility to governance by striking a balance between respect for the diverse entities present and a level of state cohesion.”

In conclusion, it seems easy to argue that, from a comparative perspective, power allocations in the EU and Canada are not so far apart at all and both entities bear a resemblance on how the principle of subsidiarity shapes the distribution of policy authority between the different constituent units.

4.3. Institutional and Procedural Environment for Policy Making

i. Intergovernmentalism

As a result of the analysis on both the EU and Canadian institutional and procedural environment, it might be worth comparing Canada’s intergovernmental federalism with governance in the EU. Although, with no doubt, their institutional political systems are quite different (Canada is a parliamentary federation, whereas the EU is not), the comparability of Canadian and EU federalism particularly lies in the reliance on the institutional and procedural environment of decision-making.

The EU, like Canada, is a multi-level polity where activity is exercised in a range of institutional and geographic settings. As already observed, no single actor, or

set of actors, has a monopoly of political power in these settings. Indeed, decisions are taken on the basis of bargaining among a range of different actors, located in different institutional settings at different geographic levels (Sutcliffe 2004, 86). In other words, the intergovernmental relations (IGR) system is at the heart of governance in both the EU and Canada. It is granted that final decisions in many key areas are made through IGR, dominated by EU and Canadian heads of state, ministers, premiers, and senior officials –not parliaments. In the EU, on one side, the final decision maker on issues that member states decided to delegate to the community level is the Council –which consists of representatives of member state governments. Canada, on the other side, relies on intergovernmental agreements –such as the vertical-national First Ministers’ Conferences (FMCs) and the interprovincial bilateral agreements –in areas of federal-provincial interdependence. As a consequence, it is possible to argue that both the EU and Canada are typical examples of *interstate* federalism where, unlike *intrastate* federalism, IGR play an important role. Indeed, in both entities, diplomatic relations between the federal government and the federated entities coexist with specifically federal –or supranational –institutions (Théret 2003). As for the interstate or intergovernmental federalism, it is not surprising to be found in both the EU and Canada, as it is more likely to occur in “territorial entities [that] are very heterogeneous in cultural terms and inclined to demand a greater share of sovereignty by presenting themselves as nations” (ibid.). This reasoning thus suggests that this kind of intergovernmental bargaining might, in fact, be a singularly appropriate form of governance for complex regionally fragmented and divided societies characterized by a weak national or common identity (Hueglin 2013b). In short, what is mainly concerned here is that governance among highly heterogeneous partners requires negotiating compromises.

With regard to the EU, the evolution of governance followed, in principle, the American blueprint –with the EP representing the people of Europe, and the Council of Ministers as the representative of member state interests. The reality, however, turned out to be different. Although the “ordinary legislative procedure” (TFEU Article 289) gives the same weight to the EP and the Council on a wide range of areas, the former continues to lack political legitimacy for several reasons: *inter alia* the lack of direct control over the Commission; the election of MEPs is a second-order election because of a lack of a truly trans-European party system (Fabbrini 2013b, 3); the presence of diffuse multiparty and multinational loyalties; the elections are characterized by a marked degree of popular apathy; there is no sign of a genuine European ‘demos’ emerging (Menon and Peet 2010). On the other hand, the Council hardly qualifies as a conventional upper chamber, as its members are ministerial representatives of the member-state governments and it is thus characterized by intergovernmental negotiations through formal channels –from member state governments to Permanent Representations, via COREPER and equivalent channels, and the Council itself. Moreover, the qualified majority voting (QMV) is a “relative uncommon occurrence” (Lewis 2010, 151) and a consensus-seeking tradition is driven by the member states, which often use the QMV procedure as a threat to reach consensus. In contrast to the classic framework of the bicameral federalism model, the EU’s upper chamber –the Council –represents member-state population only indirectly, via their governmental representatives, and not directly as in a Senate (Hueglin 2013b, 197).

In short, between its two legislative bodies, the EP, and the intergovernmental Council, it is the latter that steers and gives direction to the political process. Then, it seems clear that national governments “define and control the terms and conditions of

the EU's functioning" (Fabbrini 2015, 127), through periodical intergovernmental conferences and the regular action of the EU's upper chamber –the Council.

With regard to Canada, the case might seem very different at first glance. However, the comparability lies on the Canadian upper chamber –the government appointed Senate– that lacks political legitimacy. In this regard, it must immediately be borne in mind, of course, that since the Senate does not provide legitimate regional input, there is no arena aside of it in which provinces are formally represented at the federal level. Moreover, since the federal government cannot set the national agenda unilaterally in some of the most relevant areas, it has to “take into account provincial sensitivities by negotiating with the provincial governments” (ibid.), through intergovernmental channels. In this situation, as explained by Théret (2003), provincial governments try to escape from federal unilateralism or the veto of certain provinces by using an evasive strategy –the equivalent of European “comitology”– consisting in informal interprovincial ministerial conferences and meetings to negotiate and align on common fronts.

In short, conflicts in key policy areas, between the Canadian federal and provincial governments, are more typically resolved by extra-constitutional and rather informal mechanisms of reaching intergovernmental compromise.

In conclusion, as the outcome of this analysis, both the EU and Canada are comparable cases of procedural federalism, characterized by the fact that policy making depends more on intergovernmental bargaining and agreement than on constitutional power allocations. In this regard, by using IGR to work around the constitution, both entities are two similar cases of intergovernmental federalism. However, there are some differences: IGR is more highly institutionalized in the EU than in Canada, and the direction of the intergovernmental process in the EU is

horizontal, among member states, rather than vertical as between the two levels of government in Canadian federalism.

ii. *Democratic Deficit*

As a consequence of the IGR system, both entities share the same kind of criticism: democratic deficit.

In the EU, the intergovernmental governance is based on national representation. As shown above, here the Council is the central body and the EP and the Commission are on the sideline. At this level, the intergovernmental union is indirectly legitimated through nation-state democracy. Indeed, the EP is a “redundant institution, given that the function of legitimacy is performed by the parliaments of its member states” (Fabbrini 2015, 128). This method, however, especially when pursued for treaty-changing, suffers from the secrecy of the Council’s deliberations, where national government representatives own a considerable leverage to circumvent the mandate given to them by their respective national parliaments, and “national parliaments have no adequate ways of knowing how their representatives behaved in the Council because of its in-transparent procedures” (Fossum 2005, 14). The EP and the national parliaments, as we have seen, seem to be inadequate as means of ensuring popular input and holding the executive accountable. In essence, the lack of a EU-based popular consent produced so-called “democratic deficit” of the EU institutions – meaning a set of deficits of accountability, transparency and public policy (Dehousse, 1998) –which marks the basis for the crisis of legitimacy of the EU (Eijk & Franklin 1996; Norris 1997).

On the other side of the Atlantic, in Canada, the extensive system of intergovernmental relations has weakened the vertical nature of the Canadian federal parliamentary system, with the result that parliaments at both levels are sidelined, and the role of executive officials has been strengthened (ibid.). The problem with consensus-seeking machinery behind closed doors is, of course, accountability. As illustrated by Tanguay, in Canada there has long been “a widespread sense among voters in the industrialized nations that the traditional mechanisms of representative democracy —political parties, elections, and territorially based legislatures — are simply not up to the task of articulating or defending the interests of the vast majority of citizens (...) It is in this sense that Canada can be said to suffer from a democratic deficit” (2009, 223–24).

In essence, both the EU and Canada share somewhat similar democratic deficits, as the result of their intergovernmental systems where governments (national in the EU and provincial in Canada) define and control the functioning of the entities through interstate federalism.

4.4. Constitution-making

i. Constitutional Experiences in The EU and Canada

As clearly noted by many scholars (Wolinetz 2003; Fossum 2011a; 2011b; Hueglin 2013b) a comparative constitutional analysis of both the entities shows that the EU faces constitutional challenges similar to those of Canada and has also dealt with them in a comparable manner. Herein, the analysis is divided between the

features of the initial constitutional impetus first, and then the evolution regarding the constitutional process.

First, both EU's and Canada's constitutional laws have derivative origins. With regard to the EU, the source was the member states' constitutional law; in Canada it was, of course, the British Empire. Second, as a consequence of the first element, both constitutions were characterized by pluralist traits, which relates to their multinational and poly-ethnic character. The EU was set up as a supranational polity above member states that already bore their own constitutional identities. Canada, as illustrated by Fossum (2011b, 192), was set up as a federal state composed of already existing entities with different constitutional traditions: the British constitutional tradition (as adopted by the different provinces); the French influence through the Quebec Civil Code; and elements of the aboriginal tradition through aboriginal treaty rights. Third, the two entities share some common elements regarding the reasons toward the initial integration. European integration was the need to close the long period of dramatic First and Second World Wars and to prevent further destructive wars; Canada's constitutional arrangement was aimed at preventing a destructive experience similar to the American Civil War, as well as to avoid a possible U.S. expansion. In short, both constitutional impetuses represent efforts to learn from and prevent violent catastrophe (Fossum 2011b, 192). (see Table 4.1).

Table 4.1. Features of initial constitutional impetus in the EU and Canada

	EU	Canada
Origins	Derivative (from member states)	Derivative (from Britain)
Character	Multi-national Poly-ethnic (member states)	Multi-national Poly-ethnic (Britain, French Quebec, Aboriginal)
Causes	Stop dramatic period WW I,II / Prevent similar experiences	Prevent American- Civil-War-alike experiences Avoid U.S. expansion

own work

With regard to the constitutional process, there are again important parallels in how the EU and Canada dealt with the fundamental constitutional reforms. In essence, as it has been illustrated in the previous chapters, both entities operated with constitutional systems characterized by strong exclusionary tendency, and in particular in their pre-Charter eras, these systems were marked by traits of “government by negotiation” (Fossum 2007a; 2005). The constitutional process consisted of executive officials –heads of governments and their supportive staffs– gathering together in a system of summitry. In this manner, government leaders adopted an approach more akin to international diplomacy than to constitution making (EU: Curtin 1993; Moravcsik 1991; 1993; 1998; Canada: Cairns 1991; Simeon 1972).

In the EU, treaty changes have been made through the IGC by the heads of governments within the European Council, where every member state had the right

of veto. The Canadian equivalent to the European Council was the FMC, consisting of the Prime Minister and the ten provincial premiers. With this regard, both systems followed similar democratic logics. Indeed, in the European Council, each participating government was to be popularly elected; in the same manner, Canadian PM and each premier was to be accountable by the federal and provincial legislative assemblies, respectively. Moreover, in both cases, government actors could operate as constitutional veto players through a norm of constitutional unanimity (in the EU, this is formalized in TEU Article 45; in Canada, this norm is a *de facto* working arrangement).

As a result, it seems clear that in their practical operations both entities operated with constitutional systems where key executives (heads of states and governments) played a central role in constitution making. As observed by many scholars (Hueglin 2013b; Wolinetz 2003; Fossum 2005; 2007a; 2011a; 2011b) there is a clear parallel between the Canadian system of FMCs within executive federalism, and the EU's system of intergovernmental diplomacy through the "IGC approach" to treaty making.

On top of that, one of the most striking parallel is provided by the shift from the pre-Charter constitution making approaches to the attempt of democratizing the process. To illustrate this, it might be useful to consider the 1987 Meech Lake Accord and the pre-European Charter treaty-making and how both entities behaved toward democratization of the process.

As assessed in the previous chapters, the 1987 Meech Lake Accord is usually presented as the peak of the IGC approach to constitution making in Canada. The Accord, indeed, was forged through negotiations among all the heads of governments and their staffs "in a classical intergovernmental fashion" (Fossum 2004, 31). The

main reason leading to its failure was the popular rejection of the secretive and elite-based manner in which it had been forged. The democratic answer consisted of a more open and consultative process –the 1992 Charlottetown Accord– that privileged a more inclusive notion of democracy over the previously dominant elite accommodation model. With regard to Canada, it might be assessed a relevant shift from an elitist system of organized intergovernmental relations to forge constitution making, to a broad-based popular consultation and comprehensive debates. However, after the series of meetings and public consultation, the package went in the hands of the key actors in constitution making: the heads of federal and provincial governments who negotiated among themselves in the intergovernmental manner. The result was a pair of referenda held simultaneously in Quebec and the Rest of Canada (ROC), where the Accord has been rejected.

The dynamic of the process is quite similar of its European counterpart. Indeed, popular opposition during the ratification of the Maastricht Treaty and high tensions after the Nice Treaty placed the matter that the executive-led and intergovernmental approach was no longer tolerable. Alike Canada, the answer to the critics has been a democratic deliberative body marked by openness, transparency and accountability: the Charter Convention. It represented the first relevant attempt to move from the EU's classical executive-driven approach to constitution making. The Convention success in forging the Charter –as opposed to the dismal failure of the IGC at the parallel process during Nice –demonstrated the superiority of the Convention mode over that of the IGC (Fossum 2004; 2005; 2007a). As a result, this mode was then adopted for the preparation of the next round of Treaty change, initiated at the Laeken European Council Meeting in December 2001 and concluded in October 2004. Yet, in the last stages, the Constitution Convention turned into a

bargaining forum, akin to an IGC. The reason was the mandatory scrutiny and approval of each member state. The final agreement has been then rejected through popular referenda in France and the Netherlands.

The democratic answers in both entities emerged as a result of a previous failure –the Meech Lake Accord in Canada, and the Nice Treaty process in the EU. Both processes (Charlottetown vs. Laeken) resemble each other: the EU and Canada democratic answer to constitution making started out in an open and deliberative manner, and then finished with the heads of governments negotiating in closed settings to achieve an agreement; after that, the outcome was subjected to ratification where all subunits (member states in the EU; provinces in Canada) had veto power; finally, constitution failure through referenda was a common destiny in both entities.

This assessment has revealed that both the EU and Canada shared similar critical challenges to constitution making, and, moreover, they sought to handle these in analogous ways. Indeed, as it has been illustrated, both entities have gone from a highly elitist system of organized intergovernmental relations –an approach akin to that which marks international diplomacy– to more democratic means of constitution making (see Table 4.2).

Table 4.2. Parallels in constitution-making in the EU and Canada

	Pre-Charter EU	Pre-Charter Canada	Laeken Process	Charlottetown Process
Character	Strong exclusionary, executive-led, intergovernmental	Strong exclusionary, executive-led, intergovernmental	Open, transparent, accountable, democratic	Open, inclusive, accountable, democratic
Approach	Interstate/ international diplomacy	Interstate/ international diplomacy	Convention mode (deliberate and consultative)	Convention mode (broad-based popular)
Actors	Executive officials (heads of member state governments and their supportive staffs)	Executive officials (Prime Minister and the ten provincial premiers)	Indirectly elected 105 members from the European and national parliaments (plus 13 observers from the candidate states)	Deliberative bodies, constitutional forums, panel discussions, federal parliamentary committee, study groups
Venue	European Council	First Ministers' Conference (FMC)	Brussels Convention	Belanger-Campeau Commission, Citizen's Forum on Canada's Future, 5 regional mini-conventions, Beaudoin-Dobbie committee, all kind of citizens' forum and organizations
Final stage of negotiation	IGC approach with veto power (TEU Article 45)	IGC approach with veto power (<i>de facto</i>)	IGC approach with veto power (TEU Article 45)	IGC approach with veto power (<i>de facto</i>)

own work

Furthermore, in both the EU and Canada, at first glance, it might seem that “efforts to carry out reforms of explicitly stated constitutional nature have failed” (Fossum 2011a, 1). From one shore of the Atlantic, Canada has never succeeded in forging constitutional agreement among its provinces, in particular the would-be nation Quebec (ibid.). In fact, as it has been noted, the subsequent attempts to bring Quebec in the constitution family –the Meech Lake and Charlottetown Accords –

have failed. In a like manner, the explicit European effort to give Europe a constitution through the open and inclusive Laeken process (2001-2005) was rejected by a significant majority –French and Dutch referenda. Also the following effort –the Lisbon Treaty – was firstly rejected by a majority of Irish citizens, although it was ratified at the end. Yet it does not contain any mention of constitution explicitly. The inability of both multinational entities to forge popular constitutional agreements through a democratic process stems from the “differences of civic allegiance and identity and of constitutional justice [that] are just too deep to yield a popular consensus on constitutional restructuring” (Russell 2011, 25). The reason thus lies on the fact that neither the EU nor Canada has a *demos* that can act positively as a sovereign people. The “no’s” resulted from the French and Dutch referenda as well as the ones from the Charlottetown Accords are notable examples.

In conclusion, it seems reasonable to argue that there is a clear parallel between the EU and Canada, with respect to the pre-Charter process of constitution making, the challenges both entities had to face, and how these challenges have been dealt with. Their inability to produce popular constitutional agreements seems to be found in their most striking resemblance: both entities are multinational political communities.

5

The EU and NAFTA in Comparative Perspective

5.1. Introduction

This chapter will take a comparative look at the two most economically powerful cases of regional integration amongst industrialized countries, the EU and NAFTA. This comparison, therefore, requires analyzing the EU as a regional organization as well. The chapter, therefore, highlights those elements found in both the EU and NAFTA. The analysis will begin (5.2) with a comparison of the policy scopes of both entities by using the analytical framework elaborated by Balassa (1961). Then (5.3), I will give a comparative analysis of both entities' institutional structure first, and the dispute settlements then. In the following sub-chapter (5.4), the comparison will be focused on the asymmetries characterizing the entities, and how they face them. Lastly (5.5), I will compare both organizations' historical processes from the very beginning of their economic integration.

5.2. Policy Scope

i. The Economic Integration

The interpretation of the EU as a regional economic organization has seen an increasing pile of books and publications with the purpose to describe the EU entity of networks in the category of international organizations. As it has been argued (Slaughter 2004, 264-5), the EU “is pioneering governance through government networks in its international affairs” and it is a “distinctive form of government by network exportable to other regions and to the world at large.” Part of the influential international relations literature agrees with this idea of the EU as “a successful and attractive example of regional economic organizations” (Katzenstein 2005). In this regard, scholars have discussed whether or not the EU experiment can be replicated in other regions of the world, and if NAFTA is simply a different degree of the same genus.

As it might appear clear, NAFTA represents a very different model compared to that of the EU. First of all, the policy scope is not the same. Following Balassa’s classic model of “economic integration” (1961), it refers to the creation of formal cooperation between states through five stages that are:

- Free trade area (with the removal of trade restrictions);
- Customs Union (with a common external trade policy towards non-members);
- Common Market (with free movement of factors of production between member states);
- Economic Union (harmonization of economic policies under supranational control);
- Political Union (with binding decisions for member states).

Already at first glance, it might appear that NAFTA is a clear example of free trade area, where member countries committed to removing all trade barriers while retaining their own barriers with non-members. This status represents the first level of economic integration. Without the substitution of national rules (negative integration) with supranational rules (positive integration), NAFTA never achieved neither the second nor the third step, and seems to be light years away from the last stage – political union. As commented by Sbragia (2007, 159):

“NAFTA is a trade and investment union but is definitely not a labour market union. Neither Canada nor the United States would have approved an agreement which would have allowed the free movement of Mexican workers into the rich economies of the north. Nor is it a foreign economic policy union. NAFTA is not a customs union and therefore has no external dimension. A common external tariff is not in force. Nor is there a common commercial policy. Third parties do not negotiate with NAFTA as they do with the EU; they negotiate with the three member states of NAFTA.”

NAFTA’ scope is simply an agreement on a free trade area, with the aims of benefitting from it, without any interest in a deeper regionalism. Indeed, the signatories of NAFTA never intended that this more modest achievement could be transformed into something else (Mace 2007, 7). In essence, NAFTA has created a free trade area but “has stopped short from creating a common market [,] and even less so an economic union” (Fabbrini 2015, 115).

At first glimpse, the level of the scope and harmonization of NAFTA are both very far from those envisaged and achieved in the EU. Indeed, as it has been addressed before, the EU has immediately established with the Treaty of Rome a customs union; evolving then into a common and single market after; thus deepening

into the economic monetary union (EMU), based on a common currency adopted by two thirds of its member states. Compared to NAFTA, the EU has had uniform custom policy since 1993, where “most of the EU nations have already eliminated custom checkpoints along their borders” (Vega Cánovas, 2005, 3). In contrast, in North America, each country retains its own regulations and has not contemplated a common custom policy. In the European Union, by contrast, the integration process has been much wider, leading to a form of regional economic organization that seems to have distinct scope and objectives. As suggested by Fabbrini (2009, 15), the EU is a case of a regional organization with political features, “a supranational polity functioning according to the logic of a compound democracy.” Its scope clearly is much wider than NAFTA’s, as it aims at producing an *ever closer union* toward the final step of integration: a political union.

In sum, as a result of this comparison of both entities’ scopes, NAFTA clearly represents a less ambitious project with a narrower scope. Despite the obvious affinities, the EU as a model provides for deeper integration than does NAFTA. The difference lies on the distinction between political and economic regionalism. The former fits with the EU supranational public authority, whereas the latter concerns NAFTA’s project for benefitting of a free trade area organized by inter-governmental actors and without supranational institutions.

5.3. Institutional Structure and Dispute Settlements

i. Institutional Structure

From the analysis assessed in the previous chapters, NAFTA and the EU might seem to differ considerably when it comes to regional institutions. Indeed, NAFTA clearly does not present the same level of institutionalization as the EU. Its institutional architecture is very limited and completely lacks supranational characteristics. In terms of institutional depth NAFTA is, in comparison with the EU, very thin. In fact, by simply examining the text of the agreement, NAFTA's limited institutional character stands out. The document of some 700 pages contains only one page on the FTC and an additional page dealing with the Secretariat (Mace 2007, 7). Moreover, many scholars (Abbott 2000, 519– 547; Bélanger 2007) agree on the extremely limited political delegation existing in NAFTA's institutional structure in general, and more particularly, when compared to EU institutions such as the Commission, the Parliament, the Council and the Court.

As a result of the previous analysis, one might easily see that NAFTA does not include any equivalent of the European Commission. If we compare the FTC with the EU Commission, it is clear that the FTC has very limited competences. The FTC is not a continuous organization and cannot make proposals on its own. It is only meant to “help resolve disputes rather than to propose legislation or provide NAFTA with the administrative capacity so critical to the EU” (Sbragia 2007, 158). Its meetings are quite informal, and few concrete decisions are reached. As McKinney observes:

“It has no physical location and no staff members of its own (...) As its name indicates, the Free Trade Commission was established to deal primarily with trade facilitation matters as they arise in the context of the NAFTA

agreement. It was neither intended nor designed to deal with the broader issues of economic integration as those that the European commission regularly addresses. The European Union has chosen to pursue a deeper level of economic integration than have the countries of North America, and a more elaborate institutional structure is required” (McKinney, 2000, pp. 31-32).

The same can be said of the Secretariat, which “in fact does not even exist” (Mace 2007, 7). As previously assessed, the Secretariat consists of national sections (Article 2002). Each Section receives funding from the corresponding government with the amount determined through informal discussions. However, the lack of institutional capacity, in Weintraub’s words, “was deliberate. The framers wanted to minimize the political content of the agreement” (Weintraub, 1997, 212).

On the other side of the Atlantic, the EU has an institutional structure independent from that of the member states. It came to acquire a dense institutional and policy making structure, consisting of both intergovernmental and supranational features. The supranational institutions –the Commission, the EP, and the ECJ –are important as the intergovernmental institutions –the European Council and the Council.

On the contrary, in the case of NAFTA, the supranational characteristics are completely absent. Indeed, the delegation of powers to supranational bodies like the European Commission is missing.²⁸ In the EU, supranational institutions, such as the Commission, have played a crucial role as the main engine in the integration process. By contrast, North America integration is characterized by what Grinspun and Kreklewich have called “deficient institutionality” (Grinspun and Kreklewisch 1999, 17-33).

²⁸ Although the possibility of delegation to panels under Part V of the NAAEC, this has not been used.

In essence, NAFTA is an intergovernmental regional organization that has adopted a loose intergovernmental model with a light structure of cooperation (Fabbrini 2015, 121). In effect, its structure does not include a directly elected parliament, which has become a co-legislator with the Council; a powerful Commission with the right of initiative to propose laws for adoption; or an independent judicial body as the ECJ, which established the supremacy of EU law over the laws of its member states. As a result, the institutionally rich environment forming the EU decision-making at the supranational level is simply lacking in NAFTA.

ii. *Dispute Settlements*

One of the most striking features of the EU has been the fundamental role played by the ECJ in the integration process. Although the court was originally included as a means of settling technical disputes, it eventually emerged “as an institution, which constitutionalized the Treaty of Rome” (Sbragia 2007, 163). The gradual constitutionalization has been created by the ECJ’s interpretation of the treaties as superior to ordinary national legislation: such as *van Gend en Loos* in 1962 establishing that European law had a direct effect on individuals and firms; and *Costa vs Enel* in 1964 setting the European as superior to national law.

Although one might easily argue that nothing comparable to the ECJ exists within NAFTA, the dispute settlement mechanisms own certain degree of autonomy and independence. Undoubtedly, it is very interesting that the dispute resolution procedure has become institutionalized within NAFTA to a surprising degree.

Under the NAFTA, the binational panel review system provides an independent review of anti-dumping and countervailing duty determinations made by administrative agencies in one NAFTA country to see if domestic law has been respected. The panel's decision is binding and replaces domestic judicial review. By agreeing on this method, the US committed itself to have trade disputes resolved at the regional level, rather than keeping trade disputes within the national bureaucracy – the International Trade Administration (ITA) in the Department of Commerce and the International Trade Commission (ITC).

In conclusion, although NAFTA has given itself an effective and regularized mechanism of dispute resolution, it is not even close to the independent European judicial body in terms institutional significance, as it is the fabric of European law which member-state courts apply in their adjudication.

As Table 5.1 shows, although both the EU and NAFTA are considered to be economic regional organizations, there are several dissimilarities in relation to both the scope and structure between the entities.

Table 5.1. Comparing NAFTA and the EU

	NAFTA	EU
Founders	USA, Canada, Mexico	France, Germany, Italy, Belgium, the Netherlands, Luxembourg
Joiners	Development of a FTA (USA and Canada)	1973 – UK, Denmark, Ireland 1981 – Greece 1986 – Spain and Portugal 1995 – Austria, Finland; Sweden 2004 – Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia 2007 – Bulgaria, Romania 2013 – Croatia
Member states	3	28
Nature	Inter/transgovernmental	Supranational and intergovernmental
Scope	Free Trade Agreement	An ever closer-union
Policy-making pattern	Structured and regularized (vertical)	Supranational and intergovernmental (dependent of the policies)
Compliance	Binding dispute resolutions mechanisms	ECJ – Highly binding
Operation	<ul style="list-style-type: none"> once a year Cabinet level representatives meeting 	Highly institutionalized
Structure	<ul style="list-style-type: none"> 25 trilateral committees ad hoc working groups 	Dual: 1. intergovernmental: highly institutionalized meetings of the European Council and Council 2. supranational highly formalized quadrilateral system (Commission, EP, Council and European Council)
International status	None	Yes

Source: Own re-elaborated version of Fabbrini, Sergio. 2015. *Which European Union?* Cambridge University Press

5.4. Asymmetries

The EU is a complex multilevel system of governance composed of larger and smaller member states. However, as observed by Wolinetz (2003), even though some members play and have played more preeminent roles than others, no one is in a position to dominate others, as the EU institutions have deliberately tried to minimize such asymmetry, and in general, the *acquis communautaire* has helped promote symmetry. One of the means the institutions have pursued consists in giving small countries a degree of power disproportionate to their size. For instance, the calculation of voting weights for small countries in the Council or in the EP does not represent exactly the population size, and funds have been allocated “to help the poorer members deal with the disruptions inevitably caused by economic liberalization” (Sbragia 2007, 158).

On the contrary, NAFTA is inevitably characterized by undisputed predominance in terms of economic power and trade capability. The current free trade agreement with the poor Mexico and the rich Canada creates a context in which one country –the United States– is able to overpower the other two. Such domination in terms of trade patterns is well explained by Kehoe (1994, 7):

“Although Canada is the number one trading partner of the United States, and Mexico is number three after Japan, the United States conducts only about one-quarter of its trade with its two North American neighbors. In contrast, more than two-thirds of foreign trade in both Canada and Mexico is with the United States. They have very little direct trade with each other. Put bluntly and somewhat simplistically, foreign trade for Canada and for Mexico means trade with the United States.”

The disparity between the member states, with the US playing a dominant role, generates a problem of huge asymmetries in NAFTA. As we have observed, this is not the case in Europe, where the largest country – Germany – contains less than a quarter of the group’s people and earns less than 35 percent of its gross product. In addition, if one considers the GNP per capita disparities among the EU members, such as Germany and Spain, the ratio results 3:1. Compared to the case of NAFTA, where US and Mexico reports a ratio of 10:1, it seems very easy to grasp the difference in terms of asymmetries between both entities.

5.5. Historical Process

i. The Historical Environment

As we have seen, the EU and NAFTA rose out of very distinct historical environments. The EU as a supranational polity is the result of historic agreements addressing the need to close the long period of dramatic First and Second World Wars and to prevent further destructive wars. Its success lies on both the security side, achieved through NATO, and on the economic side, pursued by the establishment of a common market. For this reason, “it would be wrong to see the origins and extension of European regionalism simply as the result of economic pressures” (Fabbrini 2009, 9).

Clearly, NAFTA has not been developed from the same set of reasons. Mexico was congested with high debt payments that it had no choice than to seek outside capital; the US were interested in helping Mexico’s “in order to prevent the negative shocks that would transfer to the States of Texas and California if their southern

neighbor were to continue experiencing economic and political difficulty” (Vega Cánovas, 2005, 75); Canada aimed at preventing the US sole gaining from granting Mexico better trade and financial benefits.

Moreover, also the industrial and economic reasons were different. Factories in Europe needed to find economies of scale to successfully restart from the devastating situation in the post World War II period, whereas the productive plants of United States, Canada, and Mexico have not faced similar destruction since the Mexican Revolution in the 1920s.

In essence, the assessed entities grew out of different eras with different needs and for different reasons. Taking these different historical environments, it seems tough to assume that a post-Cold War economic pact will develop in the same way as a political union that was founded during the Marshall Plan era.

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Conclusion

The trigger of this research is the thought that the most basic question, namely what kind of polity or political system the European Union is, has no ready-made answer. In this thesis, I started from the assumption that the EU is a multi-level system of governance. However, I have demonstrated that the term seems to be insufficient to determine what kind of polity it is. Therefore, I considered the assumption as necessary, but not sufficient though. The reason for this has its roots in the vastness of the *family* of multi-level systems of governance, which is indeed very nuanced and diverse; it contains different *genera*. I noticed then that there was the necessity to examine the *family* and to investigate where the EU could fit. Thus, this researching work is an attempt to answer the following question: what kind of multi-level system of governance is the EU?

Since this work consisted in seeking for comparisons, in order to grasp the similarities and differences among diverse entities, I have identified two alternatives of multi-level systems in order to frame the research. To ease the analysis, I decided to put poles apart a multi-level federal system of governance –Canada –and a multi-level economic regional system of governance – NAFTA (see Figure C.1).

Figure C.1. Thesis' comparative experiment



At the beginning of the research, the EU, as illustrated, stood in-between the two extremes –a federal state and an economic regional organization. The comparative analysis on the *family* of multi-level systems of governance provided us an idea on what *genus* belongs to the EU and in which direction it is heading. Indeed, in this regard, a question to be also addressed was: is the EU more similar to a multi-level federal system rather than a multi-level economic regional organization?

In the first three chapters of the thesis, I analyzed the three entities in all their parts: from historical, institutional, structural, governmental, social, and constitutional perspectives.

The first comparison between the EU and Canada, posed some starting problems, such as the idea to compare a federal state as Canada, to a particular entity as the EU. However, when analyzing them as part of the same family –the multi-level system –the research comes out as an interesting comparative exercise.

At first glance, institutional differences of the EU governance seem to be so significant that one may think that a comparison with Canada is far-fetched. For instance, the constituent units of the EU are sovereign member states, not provinces as in Canada; the EU is not always considered a federal polity in all its parts.

However, when compared, many interesting features appear. First, by analyzing the nature of their political systems, a brief assessment has demonstrated that both the EU supranational entity and Canada clearly deviate from the nation-state template. They are extremely diverse in cultural terms and neither forms a coherent and agreed-upon nation. Second, from a comparative perspective, power allocations in the EU and Canada are not so far apart at all and both entities bear a resemblance on how the principle of subsidiarity shapes the distribution of policy authority between the different constituent units. Third, when comparing Canada's

intergovernmental federalism with governance in the EU, the outcome is interesting. Both the EU and Canada are comparable cases of procedural federalism, characterized by the fact that policy making depends more on intergovernmental bargaining and agreement than on constitutional power allocations. However, they differ from the fact that intergovernmental relations are more highly institutionalized in the EU than in Canada, and the direction of the intergovernmental process in the EU is horizontal, among member states, rather than vertical as between the two levels of government in Canadian federalism. Fourth, with regard to EU's and Canada's constitutional experiences, there are some aspects academically worthwhile. Regarding the features of initial constitutional impetus in the EU and Canada, both their constitutional laws have derivative origins and both constitutional impetuses represent efforts to learn from and prevent violent catastrophe. Moreover, there is a clear parallel between the Canadian constitutional system of FMCs within executive federalism, and the EU's system of intergovernmental diplomacy through the "IGC approach" to treaty making. Lastly, the comparison has also revealed that both the EU and Canada shared similar critical challenges to constitution making, and, moreover, they sought to handle these in analogous ways. Indeed, both entities have gone from a highly elitist system of organized intergovernmental relations –an approach akin to that which marks international diplomacy– to more democratic means of constitution making.

With regard to the EU-NAFTA comparison, it showed some interesting features. First, from a comparative perspective, NAFTA clearly represents a less ambitious project with a narrower scope. Despite the obvious affinities, the EU as a model provides for deeper integration than does NAFTA. The difference seems to lie on the distinction between political and economic regionalism. Second, by

considering the institutional framework of both organizations, it appeared clear that the institutionally rich environment forming the EU decision-making at the supranational level is simply lacking in NAFTA. Indeed, NAFTA does not include a directly elected parliament, which has become a co-legislator with the Council; a powerful Commission with the right of initiative to propose laws for adoption; or an independent judicial body as the ECJ, which established the supremacy of EU law over the laws of its member states. Third, although NAFTA has given itself an effective and regularized mechanism of dispute resolution, it is not even close to the independent European judicial body in terms institutional significance, as it is the fabric of European law which member-state courts apply in their adjudication. Fourth, the disparity between the member states, with the US playing a dominant role, generates a problem of huge asymmetries in NAFTA. As we have observed, this is not the case in Europe where the EU institutions have deliberately tried to minimize such asymmetry, and in general, the *acquis communautaire* has helped promote symmetry. Lastly, the EU and NAFTA rose out of very distinct historical environments. Taking their different historical environments, it seems tough to assume that a post-Cold War economic pact will develop in the same way as a political union that was founded during the Marshall Plan era.

The two comparisons addressed within this thesis gave us the tools to answer the questions we have posed at the beginning of the analysis.

- a. What kind of multi-level system of governance is the EU?
- c. Is the EU more similar to a multi-level federal system rather than a multi-level economic regional organization?

Since our thesis resolved around two interesting questions, we now try to provide two satisfying answers.

With regard to the EU-NAFTA comparison and thus with the multi-level regional economic system *genus*, part of the influential international relations literature agrees with the idea of the EU as “a successful and attractive example of regional economic organizations” (Katzenstein 2005). Pursuing this further, since the EU is considered the first and most prominent experience of regional cooperation (Roy and Dominguez 2005), and since it has played a fundamental role in promoting world regionalism, it has been usually located in a *continuum* with other regional organizations. For this reason, since the existence of a variety of integration processes around the world, scholars still produce a comparative literature on the distinct types of regional integration models, working on the same *continuum* among different entities.

For these reasons, I decided to embark on the attempt to clarify whether the EU clearly belongs to this *genus*, or it is the direction in which it is heading. The difference between the EU and other forms of regional economic organization, as noted by Fabbrini (2015, 96), has been considered to be “a difference of degree and not of kind.” This means that scholars would agree to affirm that the EU and NAFTA belong to the same *genus*, but they are examples of different degrees of integration.

However, as the outcome of the comparison between the EU and a multi-level regional economic organization –NAFTA, it seems clear that both entities do not belong to the same *genus*. As the comparison revealed, the EU and NAFTA differ significantly in their scope, institutional structure, historical process of integration, asymmetries, properties, and features. The idea of pairing them to the same *genus* seems to be an underestimation of their systemic differences. In fact, as Fabbrini (2009) suggests, there is a systemic difference between ‘political’ and ‘economic’ regional organizations. Concerning the nature of the regional aggregation, such a difference, following the thesis reasoning, is not a question of degree or species, but of

genus. The EU is the only existing example of political regionalism: “a project for building a polity with a supranational public authority” (ibid.). NAFTA –together with the other existing multi-level economic regional systems –is a project for simply benefitting from a free trade area organized by inter-governmental governance relations. It is an interstate agreement aimed at dismantling national barriers to cross-border trade or investment.

Thus, looking at the comparison the thesis addressed, it seems clear that the EU and NAFTA belong to a different *genus*, not a different degree or species of multi-level regional economic system.

On the contrary, when comparing the EU to a multi-level federal system – Canada –the experiment results to be more interesting and well fitting. Undoubtedly, the analysis revealed numerous differences such as *inter alia*: in the EU there are much larger historical, cultural and linguistic differences between member states than between provinces in Canada; Canada is a parliamentary federation, whereas the EU is not; there are structural factors (such as the demographic symmetry between the provincial units constituting the federation) that have been lacking in the EU; the asymmetries and differentiations in Canada have been managed by political parties, lacking in the EU; Canada is a federal state by disaggregation, whereas the EU is a union by aggregation; the cultural commonality that characterized Canada is not evident in the EU; citizens in Europe still identify themselves by their member state nationality rather than as Europeans, whereas in Canada people privilege their Canadian identity rather than their provincial one; Canada is a decentralized federal state, whereas the EU is a union of states with some federal and confederal traits.

However, both multi-level systems share some interesting elements and challenges. Throughout this thesis, we have discovered that clearly there are certain

areas where the EU-Canada comparison is not only justified but also academically worthwhile. Indeed, as we have assessed, Canada and the EU are thus more similar than they appear at first glance. By treating the EU as a federal entity, we were able to highlight the institutional and constitutional traits of both entities. The comparative and diagnostic institutional approaches I have used as tools for my comparison revealed to be useful for the aim of this analysis. The comparative institutional method allowed us to focus on institutions (considered as both independent and dependent variables), historical processes, and division of powers among the government levels of the EU and Canada; whereas the diagnostic method allowed us to identify the basic challenges the entities faced –which revealed to be very similar – and to discuss then that both the EU and Canada followed an interesting parallel in how these challenges have been dealt with.

The comparison between the EU and a federal multilevel-system of governance helped the research to increase our understanding of the EU as a multi-level system –which was somewhat this work’s aim.

As a result of this comparative analysis, it seems clear that the EU and NAFTA do not belong only to a different degree or species of multi-level regional economic system, but to a different *genus*. Thus, I surely exclude the EU in *continuum* with NAFTA. Although the entities belong to the same *family*, they do not belong to the same *genus*.

Consequently, the comparative analysis between the EU and a multi-level federal system –Canada, within this thesis – has confirmed that there are some *genetic* similar traits between the entities. Although the evident dissimilarities between both multi-level systems, it might be argued that the EU is more similar to a multi-level federal system than to a multi-level economic regional one. It is not obvious though,

whether this is a case of very same *genus* or a *genus-in-the-making* case. It could be the case, indeed, in which the EU belongs to the same *genus* as multi-level federal systems or, differently, it is part of another *genus* of multi-level systems that is undergoing a transformation toward the federal entities.

In this regard, the experiment I have provided at the beginning of this thesis has now developed into an interesting result (see Figure C.2).

Figure C.2. Thesis' comparative experiment (final)



At the beginning of the research, the EU stood in-between the two extremes – a multi-level federal system and a multi-level economic regional system (see Figure C.1). Conversely, by posing three multi-level systems of governance in comparative perspective throughout this thesis, we are now able to assess that the EU is heading toward the *genus* of multi-level federal systems, moving away from the one of multi-level economic regional systems. Furthermore, we may also argue that the EU, by sharing some –if not most –*genetic* traits, can be described as a quasi-multi-level federal system of governance.

In conclusion, it seems that this thesis revealed the following scenario. The EU and Canada belong to the same *genus*; however, the EU is a different *species* of the same multi-level federal *genus*. The reason behind the belonging to a different *species* lies on the fact that the EU, although sharing some elements with the federal system, however, does not fully fit into the basic concept of a federal entity. In this regard, it can be defined a quasi-federal-multi-level system, due to its uniqueness in terms of history, government structure, institutions, and culture. This scenario is probably

supported by the academic literature that agrees on the *sui generis* nature of the EU, as a special kind of international actor, in this case, a federation *sui generis*.

Although the EU is clearly heading in the direction of multi-level federal systems, his incomplete special status leaves it in-between the two kinds of multi-level systems we have taken into consideration. The question that naturally comes out from this outcome creates three scenarios:

1. The EU remains in-between;
2. The EU fully achieves the multi-level federal system status;
3. The EU “regresses” to the multi-level regional economic status.

A new process of constitutionalization will probably drive the EU closer to fully achieving the federal multi-level status. Stuck where it is now, the EU seems to be nothing more than a stalled entity. However, addressing these scenarios is not the aim of this work. Nonetheless, they will surely give the impetus to other researchers interested in the comparative international politics field.

In the end, with regard to future analysis, the final upshot is that, in order to understand the EU as a polity, we have to compare it to entities that belong to the same *genus*: multi-level federal systems.

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