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The significance of borders : why representative government and the rule of law require Nation States

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CHAPTER FIVE

SUPRANATIONAL ORGANIZATIONS

5.1. *THE WORLD TRADE ORGANIZATION*

The World Trade Organization (WTO) is a supranational organization that is concerned with the rules of trade between its member states. It is based in Geneva and currently has 153 member states. As the successor of the General Agreement on Tariffs and Trade (GATT), it was founded in 1995 at the end of the so-called 'Uruguay Round Agreements'.

The GATT system, in turn, had been part of a series of developments that followed from the international conference on rebuilding the global economic system after the Second World War, held in the first three weeks of July 1944 at the Mount Washington Hotel in Bretton Woods, a village in New Hampshire.

During this conference, special attention was paid to the prevention of what was considered an important cause of the Second World War: the collapse of the international financial and trade system in the Great Depression (from 1929 onwards). Moreover, one of the driving forces behind the initiatives at this conference was the United States, which had an interest in the dissolution of the European empires that offered favorable trade positions to its colonies and client states and in taking over global economic hegemony through worldwide free trade and the establishment of the dollar as the international reserve currency.

In any case, at this conference in Bretton Woods, initiatives for three new international institutions were launched: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD, later becoming part of the 'World Bank Group'), and the International Trade Organization (ITO).

The main functions of the IMF were (and still are) three. The first is the installation of an international system of economic *surveillance*, involving the monitoring of global economic and financial developments, and providing policy advice for states that ask for it, aimed especially at the prevention of financial crises. The second function of the IMF is *lending* to countries with balance of payments difficulties, and advising or imposing economic policies aimed at correcting the underlying problems (the so-called Structural Adjustment Programmes). And the third function of the IMF is to provide countries with technical assistance and training in its areas of expertise, such

as currency devaluations. Thus, however powerful the IMF may be, it possesses no *supranational* powers.¹

The IBRD, now part of the World Bank Group, provides loans to developing countries. It thus differs from the IMF in that it does not lend just to restore the financial stability of a country, but to help it develop. The IBRD thus functions as a form of development aid system. (The first country to receive a loan from the IBRD was France, 250 million US dollars in 1946²). Thus, the World Bank Group does not possess any supranational powers either.³

Thirdly, there was the plan to set up an International Trade Organization (ITO). This plan was not further developed at the Bretton Woods conference, but, as such an organization was considered a necessary supplement to the IMF and the IBRD, talks concerning it continued between 1945 and 1949. The organization was to have been placed under the aegis of the UN, and was to have a broad regulatory mandate, covering international trade as well as national employment regulations and business practices.

The United States Congress, however, did not ratify the treaty that was eventually drafted, and the ITO therefore never came into being (the US of course being at the time by far the most important economy).⁴ At the same time, however, a number of countries that had been present at the ITO negotiations (most notably, at the conference in Havana in 1948) had drafted a provisional program for the regulation of international trade, called the General Agreement on Tariffs and Trade (GATT).⁵ This was not much more than an interim solution, but it turned out to be long lasting.

After the initial round of negotiations, new rounds followed, encompassing more tariff reductions on a wider range of products, attracting more and more states to become a party to GATT. A particularly comprehensive round, that of Uruguay, lasting from 1986 until 1993, established a permanent international organization, the World Trade Organization (WTO). This WTO were to cover a wider range of trade issues and to provide an umbrella institution of which

¹ Cf. <http://www.imf.org/external/about/whatwedo.htm>.

² The Marshall Plan was set up alongside the IBRD, as at that time, IBRD revenues were insufficient to supply all European aid.

³ See also the website of the Worldbank, available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html>.

⁴ See on the ITO for instance: Claude E. Barfield, *Free trade, sovereignty, democracy. The future of the World Trade Organization* (Washington DC: IAE Press, 2001) 20-21.

⁵ There was no separate ratification by the US Senate required for the implementation of the commitments of GATT, because American adherence to it was already authorized under the Reciprocal Trade Agreements Act (RTAA), a pre-war US statute. There were initially twenty-three countries party to these agreements, namely: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, the Czechoslovak Republic, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States.

GATT would now become a part,⁶ together with the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS).⁷

Any member of the WTO would automatically be part of GATT, GATS, and TRIPS. A new round of negotiations was started at the ministerial conference at Doha in 2001, but this round is still in progress.

In some ways, the establishment of the WTO might be seen as the fulfilment of the promise of GATT (and certainly the WTO can be seen as the answer to the expectations that the failure of the ITO had raised). Yet there are two essential changes in the transformation of GATT to the WTO, which make the WTO not only a permanent forum for negotiating trade agreements, but a supranational organization.

Firstly, GATT had been an agreement with – and between – ‘parties’. This meant that every rule that was binding on the parties was necessarily accepted by all of them individually. This had the effect that GATT lacked supranational powers. The WTO, by contrast, is an international organization, with ‘members’. While, like GATT, WTO rulings are also to be accepted by unanimity, and article IX under 1 of the WTO treaty determines that the ‘WTO shall continue the practice of decision-making by consensus followed under GATT 1947’, article IX under 2 reads:

In the case of an interpretation of a Multilateral Trade Agreement in Annex 1 [i.e. the specific trade rules on goods], they [the ministerial conference] shall exercise their authority on the basis of a recommendation by the Council [i.e. the General Council, a governing body of the WTO] overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.

A three-fourth majority vote (each country counting for one) is thus sufficient to re-interpret existing agreements and thus possibly to change their scope.

But not only can the WTO interpret previous agreements, it can also amend them. Article X of the WTO treaty provides that ‘Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement (...) by submitting such proposal to the Ministerial Conference’. It continues that ‘If consensus is not reached at a meeting of the Ministerial Conference within the established period’,

⁶ Until that moment, there had been six rounds, the Annecy Round (1950), the Torquay Round (1951), the Geneva Round (1955-1956), the Dillon Round (1960-1962), the Kennedy Round (1964-1967), the Tokyo Round (1973-1979).

⁷ Since that moment, many additional agreements, for instance the Anti-Dumping Agreement (ADA), and the Sanitary and Phytosanitary measures (SPS), have been added to this.

the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance.⁸

Following this, again a three-fourths majority is needed to make those amendments binding on all members if they are considered to 'alter the rights and obligations of the members.'⁹ States that do not agree with such an amendment, will be offered either the possibility of withdrawing from the WTO, or of accepting it anyway.

In practice, it has so far been impossible to reach this three-fourth majority, and it is unlikely that the WTO, with its 153 members with highly diverging agendas, will do so in the near future. Moreover, as European countries are still among the world's most powerful trading nations, it is unlikely that a three-fourth majority of member states of the WTO will vote against one of the European member states' wishes. Still, it is a fact that the WTO possesses this power, and there can be no doubt it is a supranational power.

The second change in function between GATT and the WTO is in the settlement of disputes between its states. In a situation in which conflict arose over the interpretation of certain trade agreements, GATT rules provided no institution that could pass judgement – and thus did not contain any provisions to place itself above the states that were party to the agreement. GATT functioned as a means to facilitate international trade agreements; it did not have its own mechanism of interpreting provisions and accumulating jurisprudence through precedents.

Article XXIII of GATT stated that 'If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (...) the failure of another contracting party to carry out its obligations under this Agreement (...)',

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

Paragraph 2 of this article of GATT then continued:

If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, (...) the matter may be referred to the contracting parties.

Under GATT, then, the contracting parties – i.e. all the states that were parties to GATT – would have had unanimously to agree that a state had violated an agreement – which meant that a single state, including the state involved in the dispute in question, could block such a declaration. Furthermore, this declaration

⁸ WTO agreement, article X under 1.

⁹ *Ibidem.*

was all GATT could provide. It did not have any means of its own to enforce its agreements, and the ultimate sanction for non-compliance was retaliation from states that felt injured or wronged. This form of retaliation rested on the decision of the states that wished to employ it. There was no supranational decision-making involved.

The WTO system amended this procedure on two points. Firstly, while under GATT, states could only be judged by consensus, meaning that a single objection could block the conviction; the rulings of the arbitration panel were now, under the WTO, automatically adopted unless there was a consensus to *reject* them.

Secondly, a permanent judicial body was installed under the *understanding on rules and procedures governing the settlement of disputes*, to which states could appeal decisions of the arbitration panel: the *Appellate Body* (AB). This AB would not consist of three ad hoc arbiters, appointed by the disputing states (as was the case under GATT), but of seven 'members', appointed by the assembly of states for a period of four years (with the possibility for one reappointment). Member states have agreed not to retaliate if they do not agree with the decision of the arbitration panel (as would have been possible under GATT), but to bring their issues before the AB.

The first important problem this poses, is that it actually places serious restrictions on the exercise of foreign policy, limiting the freedom to install a trade blockade. In history, trade sanctions often played an important role in enforcing foreign policy, coming between mere diplomatic pressure and actual military engagement. As a result of rules governing the WTO, therefore, the possibilities for imposing economic sanctions have been severely limited.¹⁰

But there is yet more. At its very first ruling,¹¹ *the United States – Standards for Reformulated and Conventional Gasoline*, the appellate body declared a standard of review for the provision of article 3, paragraph 2 of the Dispute Settlement Understanding (DSU), that reads:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

¹⁰ It is true that under article XXI (b) 'security interests' may allow such a trade blockade, and that article XXI (c) gives members of the WTO the right to comply with UN trade sanctions. But when no UN sanctions have been agreed and no direct 'security interests' are involved, or when member states in their trade sanctions violate the proportionality test that is included in the AB's *standard of review* (as will be discussed further down this section), member states thus violate WTO rules.

¹¹ The actual first case to be brought under the Appellate Body, *Malaysia – Prohibition of Imports of Polyethylene and Polypropylene*, did not result in a ruling as the complainant, Singapore, withdrew.

According to the AB, these 'customary rules of interpretation of public international law' were also to encompass article 31 of the Vienna Convention on the Law of Treaties, which states that the interpretation of treaties should be led by what is called the 'ordinary meaning' of terms. Indeed, this was declared by the AB to be

a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply ...¹²

The curious thing is not that this rule is thought to be itself problematic. Nor that the application of this article was of decisive impact on the outcome of the dispute. What is curious, is that the United States – which was the defending party in this dispute – had never ratified the Vienna Convention on the Law of Treaties (and still hasn't¹³). In other words, the defendant in this dispute was not a party to the treaty held by the AB to be 'a rule of customary or general international law'. A court that is capable of doing such a thing might very well expand its powers in other cases even more.

An occasion to do so was provided in 1997. India, Malaysia, Pakistan and Thailand brought a joint complaint before the AB stating that the United States had violated article XI of GATT, which is concerned with eliminating import restrictions.

According to the complainants, these restrictions resulted from Section 609 of US Public Law 101–102, enacted in 1989, which obliged shrimp fishers to use fishing nets equipped with so-called Turtle Excluder Devices (TED's), thus ensuring that sea turtles would not get caught (and possibly killed) in the process of shrimp fishing. Additionally, this law prohibited the selling on American markets of shrimp (or of shrimp products) that were caught with nets *not using* those TED's. In its defence of the prohibition, the United States invoked article XX, paragraph g of GATT, that reads:

nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures (...) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

Both the initial arbitration panel, and the Appellate Body, held that the US legislation was in violation of free trade provisions of GATT, because of 'its intended and actual coercive effect'.

¹² Available online at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%40meta%5FSymbol+WT%FCDS2%FC%2A%29&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FDS%2F2%2D10A7%2EWP%2EHTM&curdoc=3&popTitle=WT%2FDS2%2F10%2FAdd%2E7

¹³ The fact that US Courts as well as the US Department of State have routinely invoked the Vienna Convention does not alter the principles at stake here.

The AB went on to say that the American regulation of Section 609 was ‘in effect, an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy ...’¹⁴ This was the case, because, according to the AB:

the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account, in practice, by the administrators making the comparability determination.¹⁵

Ultimately, the AB ruled that the US was allowed to require compliance with certain environmental protection laws of its own, as long as it would not only apply them on a non-discriminatory basis (as is prescribed by the chapeau of article XX), but also as long as the US would perform:

Ongoing serious good faith efforts to reach a multilateral agreement

on the protection of sea turtles. This meant that there was now a positive obligation on the United States to lobby actively (and continue to do so with ‘ongoing serious good faith’) for a multilateral agreement to uphold the same environmental standards as it had legislated for itself. Indeed,

Section 609 of Public Law 101-162 (...) is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied.

It has also become clear that the AB applies the principle of precedent in its rulings,¹⁶ amounting to the accumulation of legislation.¹⁷ The precedent that this ruling concerning shrimp restrictions sets, for instance, is that multilateral agreements set an international standard. This seems to suggest that in fields where such a multilateral agreement *has* been reached, the WTO may actually enforce it – a power of considerable implications, as states might otherwise not have given it a direct effect into their national jurisdiction.

Nor need the WTO hesitate to declare those treaties directly applicable to states that decided *not* to become a party to them (as was the case, for instance, with the US concerning the Vienna Convention on the Law of Treaties). It is

¹⁴ WT/DS58/W, consideration 162.

¹⁵ WT/DS58/W, consideration 163.

¹⁶ For example in consideration 150 of the dispute WT/DS58, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*: ‘As we stated in *United States – Gasoline* ...’.

¹⁷ The momentous importance of precedent has also been discussed in the previous chapter concerning the ICC, the ECHR and the ICJ.

easy to imagine this principle being applied to Human Rights treaties,¹⁸ such as the International Covenant on Economic, Social, and Cultural Rights, to labor standards following from treaties or conventions of the International Labour Organization, and even to the Kyoto Protocol: indeed, consistent application of this principle may ultimately have such wide-ranging effects, that it would make the WTO, over time, almost preponderant in domestic legislation and litigation.¹⁹

This point has even become more real, as the AB allowed *amicus curiae* briefs in the already mentioned shrimp case.²⁰ *Amicus curiae* briefs are requests from third parties, like non-governmental organizations or multinationals, which may contain additional complaints or evidence (or both). By granting locus standi to non-state parties, the WTO opened the door to the more active enforcement of the entire body of international law, and far outgrew its stage of a mere court of arbitration between two states having different interpretations of certain trade agreements.²¹

Several trade disputes have, over the years that followed, caused 'considerable controversy', in the words of expert Peter van den Bossche.²² They in any case clearly show how the existence of a permanent body dealing with trade issues can have the practical effect of speaking out over an increasing number of political questions.

In September 2007, for instance, the WTO's appellate body ruled that EU rules banning genetically modified organisms (GMOs) from their food-markets needed amending. They ruled that

¹⁸ Cf. Elisabeth Burgi, Thomas Cottier and Joost Pauwelyn (eds.), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005).

¹⁹ See on this: Yasmin Moorman, 'Integration of ILO Core Rights Labor Standards into the WTO', in: *Columbia Journal of Transnational Law*, vol. 39 (2001) 555; Robert Howse, 'The WTO and Protection of Workers' Rights', in: *Journal of Small and Emerging Business Law*, vol. 3 (1999) 131; Steve Charnovitz, 'The moral exception in trade policy', in: *Virginia Journal of International Law*, vol. 38 (Summer 1989) 686. A UN advisory body, the International Commission of Jurists, prepared a set of guidelines for implementing the Covenant on Economic and Social Rights in 1997 (the so-called Maastricht Guidelines) which insisted, among other things, that signatory states must 'ensure' that the rights enumerated in the Covenant 'are fully taken into account in the development of policies and programs' of the WTO. The Guidelines were published as 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' in *Human Rights Quarterly*, vol. 20 (Summer 1998) 691-730. Cf. Gary P. Sampson (ed.), *The role of the World Trade Organization in global governance* (New York: United Nations University Press, 2001); Gary P. Sampson (ed.), *The WTO and global governance: future directions* (New York: United Nations University Press, 2008); Lori Wallach and Patrick Woodall, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy* (New York: Public Citizen, 1999).

²⁰ Dispute WT/DS58.

²¹ Although some have argued that allowing *amicus curiae* briefs would make it easier for non-state actors to influence WTO decision-making, and so bring about more balanced legal developments, the fact remains that the WTO is granting weight to non-state actors and so reduces the relative power the member states.

²² Peter van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 169.

None of the safeguard measures at issue were based on a risk assessment.²³

It is not relevant here to examine whether or not the AB was right in ruling that none of the European safeguards was based on such an assessment; nor is the point that restrictions on genetically modified crops ought or ought not to be reinstalled. The point, firstly, is that it is now up to an international court to decide whether or not evidence is sufficient to suggest the danger of certain products.²⁴ Whatever 'risk assessment' may have been felt to be sufficient, is thus no longer up to the national parliaments and governments to decide.

Secondly, it also shows that it is up to such an institution to decide *that such evidence is necessary in the first place*. This is to say, that there might be other arguments, i.e. not evidence based ones (but, for instance, arguments of a religious or ethical nature, that are not 'necessary for the protection of public morals',²⁵ but merely felt to be *preferable* or *desirable*), that might incline a member of the WTO to restrict the entry of certain products into its (food) market. Given the controversy that exists over the use of GMOs, it is not surprising that the question of the legitimacy of the WTO to pronounce on such matters has repeatedly been raised.

Another example of the supranational power of the WTO is the so-called *Gambling case*²⁶ in which the question was examined whether US legislation against internet gambling was in the legitimate protection of 'public morals'. As former NYU professor and clerk for US Supreme Court Justice Sonia Sotomayer argued:

Despite the need to constrain the scope of the public morals exception, *Gambling* went too far. The decision, at least implicitly, suggests that States invoking a public morals defense will be expected to present evidence of similar practice by other states. Taken to an extreme, the *Gambling* doctrine might be read as implying that states cannot unilaterally define public morals.²⁷

Comparable questions can be raised with regards to national legislation that limits the admission of foreign workers. The WTO may easily turn out to present legislation contrary to what national preferences might be.

²³ Dispute WTO/DS291/R, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*.

²⁴ The AB has made it clear that so far, it only marginally tests the undertaken risk assessments. But new jurisprudence may easily increase the criteria of such tests. Cf. Stefan Zleptnig, 'The Standard of Review in WTO Law: An analysis of law, legitimacy and the distribution of legal and political authority', in: *European Integration online Papers (EIoP)*, vol. 6, no. 17 (2002) 24 October 2002. Available online at <http://eiop.or.at/eiop/texte/2002-017.htm>.

²⁵ As is the text from article XX, sub (a) GATT.

²⁶ Dispute WT/DS285/AB/R, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*.

²⁷ Jeremy C. Marwell, 'Trade and Morality: the WTO Public Morals Exception after *Gambling*', in: *New York University law review*, vol. 81 (May 2006) 802-842.

During the negotiations of new agreements in 2005, extensive debate was already devoted to the question whether Western countries should provide extended visa provisions to temporary professionals. 'How did immigration wind up on the table at the WTO?', one commentator wondered. He continued:

Under the global trade body's General Agreement on Trade in Services (GATS), governments can regulate the supply of services performed by foreigners. (...) The wrangling over visas is just one more example of the WTO's mission creep.

Global trade rules are no longer aimed merely at eliminating tariffs on goods that cross borders. (...) And any domestic law, including public interest regulations, can be challenged under WTO rules as 'an unfair barrier to trade.'²⁸

Like aiming for a 'level playing field', the bringing about of which has allowed the EU to realize a virtually boundless expansion of its powers, the removal of 'trade barriers' is theoretically endless in its application, and grants the WTO a limitless pretext for overruling whatever national policy it may find in its way.

Take for instance the WTO's rulings on agricultural and technological subsidies. The Appellate Body of the WTO decided on March 3rd, 2005, in the case on US Cotton subsidies,²⁹ that these Cotton subsidies were in violation of international agreements on agricultural support. Likewise, questions related to European agricultural subsidies may be brought before the WTO some time in the future. With regards to European subsidies for technological industries, this has in fact already happened. On May 18th, 2011, the Appellate Body ruled that some of the European subsidies for Airbus had 'adverse effects to the interests of the United States', and that therefore the European Union ought to 'take appropriate steps to remove the adverse effects or (...) withdraw the subsidy'.³⁰ But surely the WTO's agreements were not subscribed to with such rulings in mind? Moreover, is it in a world dominated by American giants like Boeing and Lockheed Martin – which received structural state-support in years preceding the WTO's existence – not perfectly reasonable that European states support their own aviation industry?

Since it has been in operation, from January 1st, 1995, the AB has in the past 16 years decided on well over 300 cases.³¹ The whole dispute settlement body, including the decisions of the arbitration panels, comprises roughly the same amount. Not all of these cases have stretched the scope of the agreements or

²⁸ Sarah Anderson, 'US immigration policy on the table at the WTO', in: *Global Politician*, 12 March 2005. Available online at <http://www.globalpolitician.com/21446-immigration>.

²⁹ Dispute WT/DS267/R, *United States – Subsidies on Upland Cotton*.

³⁰ WT/DS316/AB/R, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*. Available online at http://docsonline.wto.org/GEN_catalogViewAllBottom.asp?ct=DDF&English%2CDDFFrench%2CDDF&Spanish&c2=@meta_Serial_Num&q2=11-2462&c3=@meta_Symbol&q3=%22WT%FCDS316%FCAB%FCR%22&c1=@meta_Language&q1=E.

³¹ Information from the website of the WTO, available online at http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/introi_e.htm.

increased the power of the WTO. But with each decision or ruling that did, a precedent was created, and the jurisprudence was further tightened.

It is possible and indeed not unlikely that in the future other cases will be brought before the AB. These cases may involve ethical or environmental issues, such as restrictions on bio-industrial cattle, meat or crops from radio-active regions (such as Chernobyl), restrictions on ritually slaughtered meat (Halal), and commodities such as textiles produced by child-labour or by de facto (e.g. economic) slavery, as well as trade issues with countries that perform policies inimical to the values of Western countries that they may wish to install trade sanctions against.³² A policy of cultural protectionism – such as the French law that a certain percentage of songs broadcast on national radio ought to be of French origin – may also easily be found to be in violation of agreements on free trade. Whether or not all these policies are permissible, and whether or not nations have to accept full foreign participation on their national markets and national culture and public sphere is now ultimately in the hands of the WTO.

Now it is not the purpose of this chapter to defend any particular political position. Rather it is to point out that none of the positions claimed by supranational organizations are themselves universal, i.e. free of political choice. Through the WTO, a neoliberal view has been institutionalized, and this view is certainly not undisputed. Protectionism is not indefensible and indeed not without intellectual support.³³ Since the financial crisis of 2008, this point has even become more serious.

While the hostility of the WTO to protectionism may well be a respectable political position, it certainly is not a universal one. The view that protectionism is no longer of this age is disputable. One can argue for it or against it. If it is the purpose of a national government to act in the interest of its population, it is not self-evident that a supranational organization should be allowed to make the assessment of whether the national market should be opened to foreign products or not.

It is often said, that for international trade to flourish, concessions are required, and that ‘we can’t have it all our way’. As Jeremy Rabkin puts it, ‘the claim that the WTO can impose binding “law” rests on the hope that interests within each country will support the organization and its authority, even if they are disappointed in particular rulings.’³⁴ But economic ‘interests’ do not always trump others. There are many things that would, strictly speaking, be in our

³² Cf. Jeremy C. Marwell, (May 2006) 802-842.

³³ Cf. Paul Krugman, *Pop Internationalism* (Cambridge, MA: MIT Press, 1997); Russel Roberts, *The Choice: A fable of free trade and protection*. Third Edition (New Jersey: Prentice Hall, 2006); Tim Lang and Colin Hines, *The New Protectionism: Protecting the Future against Free Trade* (London: Earthscan Publications, 1993), Ralph Nader et al., *The Case against “Free Trade”*: GATT, NAFTA, and the Globalization of Corporate Power (Berkeley: North Atlantic Books, 1993).

³⁴ Rabkin (2007) 229.

economic interests, but that we still do not do. The WTO imposes free trade by unfree choice, irrespective of either national policy or majority opinion, or both.

Whether or not there is a good rationale behind these ethical or cultural modifications of the free-play of merely economic forces is beside the point. The point is that ethical and cultural considerations *can* play a role in the policy of a state, and that it is therefore not always a matter of *evidence* or *efficiency* whether import restrictions should be upheld. Even if a certain measure will make the economy flourish, it can still be against the wish of the population, as could be the case with opening up markets to the products of industrialized farming, or opening borders to the import of cheaper products.

Nor would an alternative to the WTO have to be a return to full protectionism. In 1913, when no supranational organization existed that coordinated national trade barriers, there were proportionally more international investments being made than until well into the 1990s.³⁵ As this shows, any trade agreement drawn by state parties, any form of international deal, might still be made without a supranational organization seeing to it. And there can surely be many middle ways between the global free-market as propounded by the WTO, and the isolationist extreme of the autarkic state.

5.2. THE SECURITY COUNCIL

In 1816, Lord Byron wrote:

The Psalmist number'd out the years of man:
They are enough: and if thy tale be true,
Thou, who didst grudge him even that fleeting span,
More than enough, thou fatal Waterloo!
Millions of tongues record thee, and anew
Their children's lips shall echo them, and say –
'Here, where the sword united nations drew,
Our countrymen were warring on that day!'
And this is much, and all which will not pass away.

This poem, part of the *Child Harold's Pilgrimage* ballad, refers to the battle of Waterloo where in 1815 a coalition of mainly British and Prussian armies defeated Napoleon and his dream of a unified Europe. Referring to this poem, Winston Churchill suggested the term *United Nations* to Franklin D. Roosevelt when speaking of the Allied forces that were combating Nazi-Germany's pan-European ambitions. On January 1st, 1942, at an international conference in the United States, the Allied coalition made a *Declaration by United Nations*, expressing

³⁵ Cf. Paul Bairoch, 'European Trade Policy, 1815-1914', in: P. Mathias and S. Pollard (eds.), *Cambridge Economic History of Europe*, vol. 8, 'The industrial economies: the development of social and economic policies' (Cambridge University Press: 1989) 103-126, 'Colonial trade policies'.

their determination to defeat the Axis powers and restore national sovereignty to the states of Europe.

The allies continued to use the term, and after Germany and Japan had been defeated, a permanent international organization, successor to the League of Nations, was established in New York, and called the *United Nations Organization*.

In many respects, the United Nations Organization (which was referred to from the 1950s onwards simply as 'the United Nations', as if it had 'outgrown' being merely an 'organization') was nothing new. Its main deliberative body, the General Assembly, was an extended version of the Assembly of the League of Nations – and the charters of both confirmed the principles of classical international law (see chapters 1 and 2). Most of the work of the United Nations is concerned with streamlining international diplomacy and creating an arena for discussion in which global issues can be addressed.

There was, however, one very new idea involved at the inception of the United Nations, and that was the Security Council. For the first time since the birth of modern states, they have accepted that an international body can approve or disapprove their military interventions and that it can even call for the undertaking of military interventions in its own right. It was largely through the Security Council that the United Nations 'was intended by its founders to be far more than "a method for carrying on relations between states"'.³⁶ How was this major revolution in international politics possible?

There seem to have been at least two reasons. Firstly, after the devastation of the Second World War, the necessity for international cooperation was felt to exist. In the minds of many, it was at least partly due to the failure of the League of Nations that World War II broke out, and a stronger international governing body would therefore help prevent the occasion of further 'untold sorrow'.³⁷ Secondly, the Security Council provided a uniquely powerful position in world affairs for the permanent five members. Having won the Second World War, they were able to establish their power on a more permanent basis through the Security Council, taking up the role, in the words of Franklin D. Roosevelt, of 'global policemen'.³⁸

If, under chapter VII of the United Nations Charter, the Security Council determines a situation to constitute a

³⁶ Rosemary Righter, *Utopia Lost* (New York: A twentieth century fund press, 1995) 25. The quote is from Alfred Zimmern, *The League of Nations and the Rule of Law, 1918-1935* (London: Macmillan, 1936) 1.

³⁷ As the preamble of the United Nations Charter starts: 'We the peoples of the united nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind ...'

³⁸ Quoted in Rosemary Righter, *Utopia Lost* (1995) 25.

threat to the peace, breach of the peace, or act of aggression,³⁹
 it may, ultimately,
 take such action by air, sea, or land forces as may be necessary to maintain or
 restore international peace and security.⁴⁰

It is important to note that the five permanent members of the Security Council, the United States, the United Kingdom, France, Russia, and China, have a veto power in the Security Council. This means that for those five members, the Security Council does not in fact have supranational powers.

The foundation of the UN's system of international security is the members' abjuration of the right to use force against one another. Article 2, paragraph 4 of the UN Charter states that 'All members shall refrain in their international disputes from the threat or use of force ...'. Since in addition to that rule, the charter recognizes only the 'inherent right of individual or collective self-defense' (in article 51), it must follow that article 42 of Chapter VII vests the Security Council with the only other right to the legitimate use of force.

This means that a foreign policy decision by national executives or parliaments to use force – not dictated by strict self-defense – would from now on be dependent on the approval of the Security Council. And this would include the power of the United States, Russia, China, the UK and France to block a resolution to this effect with a veto.

The emergence of the Cold War soon after the end of the Second World War caused the Security Council to be constantly, and deeply, divided. As Rosemary Righter notes, the United Nations was 'ill-constructed for the actual tensions of the post-1945 world'.⁴¹ That is why most Security Council resolutions were ineffective or simply weren't passed in the first forty years of its existence.

Until the fall of the Berlin Wall, use of force was authorized only one single time by the Security Council, and that was when the Soviet delegate was absent: June 25th, 1950 saw not only the invasion by North Korean troops of South Korea, but also an immediate session of the Security Council resulting in an ultimatum to North Korea to withdraw, and ultimately a UN sanctioned military intervention.⁴²

But after this event, Russia never missed another session of the Security Council, and until the fall of the Berlin Wall, the Security Council did not issue a single resolution approving the use of force under Chapter VII (while considerable military conflict certainly took place during those years). Indeed, there has

³⁹ UN Charter, article 39.

⁴⁰ UN Charter, article 42.

⁴¹ Rosemary Righter (1995) 41.

⁴² UN Security Council resolution 82, June 25th, 1950, available online at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/o64/95/IMG/NR0o6495.pdf?OpenElement>.

been such a great number of military conflicts that it has been suggested that after so many years of disuse, the UN Charter had lost its legal standing (even if formally, the treaty had not been annulled or altered), on the principle of *non usus*, one of the oldest principles of contract law, formalized by the Romans. When a rule has not been practiced for years on end, it becomes customary law to ignore it.⁴³

If we look at the obvious violations of the prohibition to use force that have occurred without the condemnation nor the approval of the Security Council (the Russian interventions in Hungary and Czechoslovakia, the war in Vietnam, the Six Days' War, the Yom Kippur war, the war between Iraq and Iran, the Russian invasion of Afghanistan, the Falkland War, and NATO's intervention in Kosovo, to name but a few), it can hardly be said that throughout the second half of the twentieth century such a thing as 'international law' existed that had anything to do with the Security Council or its Charter.⁴⁴

Nor could it be argued that military interventions since 1945 have always been in direct self-defense. Three clear examples:

First, the invasion of Cambodia by Vietnam in 1978, undertaken while the UN remained incapable of condemning or even of commenting on the mass killings that were being perpetrated from 1975 onwards by the Khmer Rouge in Cambodia (called Kampuchea at the time). The Vietnamese government installed a puppet regime that put a stop to the killings. The only response of the UN was on October 13th, 1980, when the UN General Assembly voted *against* the motion to remove the representative of the Khmer Rouge Regime (which had effectively lost power to the Vietnamese puppet regime) from its seat at the UN.⁴⁵

Second, the pre-emptive strike on Iraqi nuclear plants by Israel in 1981, which were believed by the latter (as well as by many others) to be manufacturing nuclear weapons. Israel was condemned by the Security Council for doing so in its resolution of June 19th, 1981, because Iraq was a signatory to the non-proliferation treaty and the military attack by Israel was 'in clear violation of the Charter of the United Nations and the norms of international conduct.'⁴⁶

⁴³ As the *Encyclopedic Dictionary of Roman Law* defines *Desuetudo*: 'A long continued non-application of a legal norm. Although *desuetude* does not formally abrogate a law, the latter easily falls into oblivion and loses its force in practice. "Laws are repealed not only by the will of the legislator but also by disuse through the tacit consent of all men" (D. 1.3.32.1). In connection with the compilation of the Digest, Justinian ordered that laws which had vanished by *desuetude* should not be taken into consideration – *In desuetudinem abire = to pass out of use*.' Adolf Berger, *Encyclopedic Dictionary of Roman Law. New Series* – volume 43, part 2 (Philadelphia: The American Philosophical Society, 1953, reprinted in 1989).

⁴⁴ Cf. Franck, T.M., 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States', in: *American Journal for International Law*, Vol. 64, No. 5 (Oct., 1970) 809-837.

⁴⁵ Rosemary Righter (1995) 326-327.

⁴⁶ Security Council resolution 487 (1981), Adopted at its 2288th meeting on 19 June 1981. Available online at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/418/74/IMG/>

Third, the US-led invasion on October 25th, 1983, of the small Caribbean Island of Grenada. At the time, Grenada was led by the communist Maurice Bishop, and according to United States intelligence, it was establishing a Cuban military base. A resolution 'deeply deploring' the armed intervention in Grenada, 'which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State',⁴⁷ was adopted in the General Assembly by a vote of 122 in favor to 9 against, with 27 abstentions (a similar resolution was debated in the Security Council, but not surprisingly it was vetoed by the United States).

None of these military interventions were indisputably unjust. One was carried out in part to put an end to genocide; two were carried out by developed, Western democracies on the basis of an assessment of their vital national interests. It is unlikely that countries will refrain from such interventions in the future, while it is equally unlikely that the UN Security Council will carry them out as a collective body. It is therefore unlikely that the half-hearted interpretation of the prohibition of the use of force in the UN Charter will change in the foreseeable future.

However, after the collapse of the Soviet regime, there was a moment of dramatic optimism. On September 11th, 1990, George H. Bush announced a 'new world order', in which international interventions would be sanctioned by the Security Council. Less than a year after the fall of the Berlin Wall, Bush declared in his speech to Congress, that:

Clearly, no longer can a dictator count on East-West confrontation to stymie concerted United Nations action against aggression.⁴⁸

Bush said that 'a new partnership of nations has begun', and that 'we stand today at a unique and extraordinary moment. The crisis in the Persian Gulf, as grave as it is, also offers a rare opportunity to move toward an historic period of cooperation. Out of these troubled times, (...) a new world order can emerge: A new era – freer from the threat of terror, stronger in the pursuit of justice and more secure in the quest for peace'. Bush expected the emergence of

a world quite different from the one we've known. A world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak.

All of this was the case, according to Bush, because:

NR041874.pdf?OpenElement.

⁴⁷ General Assembly resolution 38/7 of 1983, available online at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/443/99/IMG/NR044399.pdf?OpenElement>.

⁴⁸ George H. W. Bush, *Toward a New World Order*. Speech given to a joint session of the United States Congress, Washington DC, 11 September 1990.

We're now in sight of a United Nations that performs as envisioned by its founders.

These words surely reflect a dream that lies at the foundation of much enthusiasm for supranationalism: a community of nations, all equally just, coming together to cooperate for the shared destiny of mankind. But after the 'success' in obtaining UN support for the invasion of Iraq, the aftermath turned out to be as frustrating as in the other operations in which the UN had been in charge. Saddam Hussein continued to flout the conditions of the ceasefire. The organization charged with overseeing the discontinuation of the Iraqi program of weapons of mass destruction, UNSCOM, reported time and again on the obstruction that prevented it from doing its work properly. Yet the UN failed to impose effective sanctions.

Nor did the UN show leadership during the Rwandan genocide in 1994, and though the Security Council admitted responsibility in 2000 'for failing to stop the killings',⁴⁹ and the Undersecretary General responsible for peacekeeping operations at the time, Kofi Annan, later admitted that he 'could and should have done more',⁵⁰ he was nevertheless appointed Secretary General in 1996.⁵¹

But in any case: the Security Council exercises two supranational powers: first, it can begin a war when it believes international peace and security have been threatened, and second, it can condemn the use of force by member states, ultimately by imposing sanctions on them and employing military intervention against them.

A third major power of the Security Council, however, is that it can also decide on the implementation of sanctions when it believes certain countries have seriously violated obligations under international law. An example is the Nicaraguan case before the International Court of Justice,⁵² in which the United States was condemned to pay indemnification to Nicaragua for its aggression in supporting rebels that opposed the pro-communist regime. But the United States had withdrawn from the case, rejecting the ICJ's jurisdiction (see also chapter 4.4). The Security Council then proposed a resolution demanding that the United States comply with the rulings of the ICJ. Of course, the United States was able to veto this resolution. But if a non-veto power had been in the position of the US in this case, sanctions might have been imposed on it. And this is not confined to the deliberations of the ICJ, but may also be applied to rulings of

⁴⁹ Cf. the report of the *Independent Inquiry into United Nations actions during the 1994 Rwanda genocide*, accepted by the Security Council on 14 April, 2000, available online at <http://www.un.org/sc/committees/918/htm/6843e.html>.

⁵⁰ Kofi Annan, *Speech at the memorial conference of 26 March 2004, New York*. Available online at <http://www.un.org/News/Press/docs/2004/sgsm9223.doc.htm>.

⁵¹ Cf. <http://www.un.org/sg/annan.shtml>.

⁵² *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986.

other arbitration mechanisms endorsed or recognized by the UN, for instance, the International Labor Organization, the World Health Organization, or the Human Rights Council. Surely, this places an instrument of enormous power in the hands of its 15 members.

Now, it is highly unlikely that the Security Council will rule against vital interests of Western states. Their veto powers and strong alliances with one another will probably prevent the 'international community' from waging a war against any of them. But this is so only as long as they have their three veto powers (in the hands of the US, the UK and France). Should any of the 'reforms' that are regularly being proposed be accepted, making, for instance, veto powers rotate on a periodical basis upon recommendation by the General Assembly, the Security Council will have supranational powers that will enable it to actually develop dangerously unpredictable policies.⁵³

5.3. THE EUROPEAN UNION

The EU is the most complex of the supranational organizations discussed in this book. It has many different levels of functioning and its internal structure has grown in a somewhat haphazard way, which, like an old city, leads to many surprising shortcuts, meandering pathways, and sudden dead-ends.⁵⁴

There are, moreover, three 'readings' of the EU, of which only the third is the supranational one. First, there are those who argue that the current EU is, however imperfectly, a first step towards a 'United States of Europe', that is to say, a European federal state. They are therefore not, as I have explained, advocates of supranationalism, though of course they may in some cases accept the EU's current supranationalism as a necessary intermediary stage between the old nation states and a new European nation state to come.⁵⁵ They take what I call the 'federal approach' to the EU.

⁵³ Yehuda Z. Blum, 'Proposals for UN Security Council Reform', in: *The American Journal of International Law*, Vol. 99, No. 3 (July, 2005) 632-649; Jacqueline London, 'The reform of the United Nations Security Council: What role for the European Union?', *Conference Working Paper: United Nations and Security Council Reform: Proposals for the future*. (Madrid, INCIPE Assembly Hall, 29th June, 2007) available online at <http://www.incipe.org/UNSCreform.html>.

⁵⁴ See for example Luuk van Middelaar, *De passage naar Europa* (Amsterdam: Amsterdam University Press, 2009); Stanley Henig, *The Uniting of Europe. From discord to concord* (London: Routledge, 1997). An insightful and more general account of Europe's post-1945 political history is Tony Judt, *Postwar. A history of Europe since 1945* (London: Pimlico, Random House, 2007).

⁵⁵ An example is A.A.M. Kinneging, 'United we stand, divided we fall, a case for the United States of Europe', in: *Ibidem* (ed.), *Rethinking Europe's Constitution* (Nijmegen: Wolf Legal Publishers, 2007). Cf. K. Nicolaidis and R. Howse (eds.), *The Federal Vision, Legitimacy and levels of governance in the United States and the European Union*, (Oxford: Oxford University Press, 2001); A.G. Harryvan and J. van der Harst (eds.), *Documents on European Union* (London: Macmillan Press Ltd., 1997).

Then there are those who see the EU as a project of primarily economic intergovernmental cooperation, conceptually not much different from a free trade zone, who desire to minimize its supranational powers, like those related to the single currency and the open borders agreement of Schengen. I call this the confederal approach.

Both the federalists and the confederalists do not advocate supranationalism in the sense that it is understood in this book. Both accept the logic of the traditional idea of sovereignty (as discussed in part I) – the first applying it on a larger scale, the second, though accepting minor supranational powers, attempting to retain it at the level of the member states. Moreover, for both federalists and confederalists the present EU is hardly satisfactory. While the EU does far more than merely streamline cooperation between its member states, and thereby antagonizes the confederalists, it officially professes no ambition to assume the full responsibilities of a federal state (though surely there are steps in this direction even if tentative and unsuccessful).

Indeed, by rejecting both federalism and confederalism – by renouncing sovereignty for itself while simultaneously denying it to its member states – the European Union is the quintessential supranational project. Its official aim, as abundantly described and advocated by the national European elites that support it, is ‘the negation of the concept of statehood’;⁵⁶ the EU exists not to create a European sovereignty, but to dissolve the borders, sovereignty and statehood of its members. Thus in speeches and writings about the European Union, the phrases are often untuned that ‘the EU will never be a state’ and ‘we need a strong, united Europe’, as if there were not an obvious contradiction between the two.⁵⁷

To be sure, there is nothing new or supranational in the acknowledgment of a shared European culture and a common European interest. Historically, the shared lot of the European peoples has been recognized from a very early stage onwards.⁵⁸ In descriptions of the battle of Poitiers of 732, for instance, we already find references to ‘les gens d’Europe’, who see the tents of the invading Sarrazins,

⁵⁶ Karl Jaspers, *Freiheit und Wiedervereinigung*, (München: Piper, 1969) 53: ‘Die Geschichte des deutschen Nationalstaats ist zu Ende, nicht die Geschichte der Deutschen. Was wir als grosse Nation uns und der Welt leisten können, ist die Einsicht in die Weltsituation heute: dass der Nationalstaatsgedanke heute das Unheil Europas und nun auch aller Kontinente ist. Während der Nationalstaatsgedanke die heute übermächtige zerstörende Kraft der Erde ist, können wir beginnen, ihn in der Wurzel zu durchschauen und aufzuheben.’ See also: Wolfgang J. Mommsen, ‘Varieties of Nation State in Modern History’, in: Michael Mann, *The rise and decline of the Nation State* (Oxford: Basil Blackwell, 1990).

⁵⁷ See for example Robert Cooper, ‘Oorlog en vrede: de geboorte van de Europese identiteit’, in: Leonard Ornstein & Lo Breemer (eds.), *Paleis Europa. Grote denkers over Europa* (Amsterdam: De Bezige Bij, 2007) 55–76; Laurens Jan Brinkhorst, *Speech for the European Week Eindhoven*, 27 May, 2009; Glyn Morgan, *The idea of a European Superstate. Public Justification and European Integration* (Princeton: Princeton University Press, 2005), especially chapter 6: ‘A postsovereign Europe’.

⁵⁸ Cf. Rémi Brague, *Europe. La voie Romaine* (Paris: Gallimard, 1992).

or who fear an ambush.⁵⁹ This sense of a common European identity (and not, as the legend has Bismarck say, as a merely 'geographical concept'⁶⁰), continued to exist throughout the centuries – from the coronation of Charlemagne to the crusades and the discovery of the 'New' World. Though the Reformation and the religious wars that followed broke the political power of the Vatican, the battles of Vienna (1521) and Lepanto (1571), and the siege of Vienna (1683), clearly inspired those living in the West to recognize their common Roman-Christian heritage. Pope Pius II wrote a book entitled *Europe* in 1458, describing this cultural sphere, and he advocated a new crusade against the Turks who had conquered Constantinople a few years before.⁶¹ The Duke of Sully, minister of the French King Henry IV, likewise proposed the setting up of a 'High Council' in which the heads of the European states would come together, and which would meet in Venice. The Council would take direct command of troops that would help the members defend themselves against the Ottoman Empire.⁶²

Napoleon went further. During his exile in St.-Helena, he reflected that the terrible and endless wars he had brought to Europe had served the purpose of unifying the several states of the continent. His biographer and companion to St.-Helena, Emmanuel comte de Las Cases, noted that 'what [Napoleon] had wanted for the prosperity, for the interests and for the well-being of Europe was the same principles, identical everywhere, a European legal code, a single European court of appeals, to correct all mistakes like our court of appeals corrects the mistakes of our district courts, a single currency, the same weights, the same measures, the same laws, etc.'⁶³ According to Las Cases, Napoleon expected Europe to

⁵⁹ 'les gens d'Europe voient les tentes du camp (...) les gens d'Europe craignent que, caches le long des sentiers, les Sarrasins ne tendent des embuscades.' Jean-Henry Roy and Jean Deviosse, *La Bataille de Poitiers. ... October 733* (Paris: Gallimard, 1966) 294: 'Extrait de l'Anonyme de Cordoue (Vers 1376 à 1437)'.

⁶⁰ Bismarck, November 1876, as quoted in: Timothy Garton Ash, *In Europe's name. Germany and the divided continent* (London: Jonathan Cape, 1997) 387. Cf. Luuk van Middelaar, *De Passage naar Europa. Geschiedenis van een begin* (Amsterdam: Historische uitgeverij, 2009) 31.

⁶¹ Jacques Le Goff, *The Birth of Europe*. Translated by Janet Lloyd (Oxford: Blackwell Publishing, 2005) 186.

⁶² Cf. Arthur Nussbaum, *A Concise history of the law of nations* (New York: The Macmillan Company, 1961) 113ff.

⁶³ 'Ce qu'il eût proposé pour la prospérité, les intérêts et le bien-être de l'association européenne: il eût voulu les mêmes principes, le même partout, un code européen, une cour de cassation européenne, redressant pour tous les erreurs comme la nôtre redresse celles de nos tribunaux, une même monnaie sous des coins différents, les mêmes poids, les mêmes mesures, les mêmes lois, etc.' As quoted in Marcel Dunan, 'La véritable place de Napoléon dans l'histoire de l'Europe', in: André Puttemans (ed.), *Napoléon et l'Europe* (Paris: Éditions Brepolis, 1965) 152. The classical source for Napoleon's eurofederalist ideas is formed by his conversations on St.-Helena, written down by his companion: Emmanuel comte de Las Cases, *Le Mémorial de Sainte-Hélène. Première édition intégrale et critique établie par Marcel Dunan* (Paris: Flammarion, 1951). For a critical analysis of the historiography on Napoleon's ideas, see Natalie Petiteau, 'Débats historiographiques autour

soon become a truly single nation, and everyone, freely travelling the continent, would find himself always in the same fatherland.⁶⁴

There was a lot of enthusiasm for a united Europe in the 19th century, too, though it has often been dismissed as 'the nationalist century'. From Madame de Staël to Oswald Spengler, from Victor Hugo to Ernest Renan (see chapter 3):⁶⁵ all discussed the cultural unity of Europe and the possible future of the different nations within a common framework. There remained, moreover, a common European aristocracy throughout the 19th century. The major stylistic developments in the arts have been Europe-wide, and there was a European *haute couture*. European royal and aristocratic families routinely intermarried as well.⁶⁶

In 1923, Count Richard Coudenhove-Kalergi published a manifest called *Paneuropa*.⁶⁷ In it, he argued for the political unification of Europe because, after the First World War, the separate European states that together represented the European culture and way of life, were in his view not strong enough to stand up any longer to 'den wachsenden aussereuropäischen Weltmächten'⁶⁸ – and in a conversation with the Finnish foreign minister, R. Witting, on November 28th, 1941, Adolf Hitler was recorded to have said that 'it was gradually becoming clear that the nations of Europe belonged together like a great family of nations' (see also chapter 8).⁶⁹

The strong vision of a unified Europe that the Americans, Churchill, the Alsatian Robert Schuman and the Frenchman Jean Monnet (as well as many others) had after the Second World War was therefore nothing new.⁷⁰ In the original plans – the pre-supranational phase –, the idea of a federal United

de la politique européenne de Napoléon', in: Jean-Clément Martin (ed.), *Napoléon et l'Europe. Colloque de la Roche-sur-Yon* (Rennes: Presses Universitaires, 2002) 19–31, and Roger Caratini, *Napoléon, une imposture* (Paris: Michel Lafon, 1998).

⁶⁴ 'L'Europe, disait-il, n'eût bientôt fait de la sorte, véritablement qu'un même peuple, et chacun, en voyageant partout, se fût trouvé toujours dans la patrie commune'.

⁶⁵ Cf. Oswald Spengler, *Der Untergang des Abendlandes. Umriss einer Morphologie der Weltgeschichte* (Düsseldorf: Albatros, 2007) 196.

⁶⁶ It is worth mentioning here as well the similar styles of dress across Europe, as well as the speed of communication of for instance scientific and other new discoveries.

⁶⁷ The movement that this manifest gave birth to gathered a great number of prominent followers, including Albert Einstein, Pablo Picasso, Sigmund Freud, Thomas Mann, Paul Valéry, and Guillaume Apollinaire. Cf. Christopher Booker and Richard North, *The Great Deception. Can the European Union survive?* Second Edition (London: Continuum, 2005) 11.

⁶⁸ Richard Nicolaus Coudenhove-Kalergi, *Paneuropa* (Wien-Leipzig: Paneuropa Verlag, 1926).

⁶⁹ Walter Hewel, 'record of conversation between Hitler and the Finnish foreign minister, R. Witting, 28 November 1941', in: Walter Lipgens (ed.), *Documents on the History of European Integration* (Berlin and New York: De Gruyter, 1985) 94.

⁷⁰ Although Churchill did not think the United Kingdom would be part of this. In his speech at the University of Zurich in 1946, he declared: 'We British have our own Commonwealth of Nations. (...) And why should there not be a European group which could give a sense of enlarged patriotism and common citizenship to the distracted peoples of this turbulent and mighty continent? (...) In all this urgent work, France and Germany must take the lead together. Great Britain, the British Commonwealth of Nations, mighty America and (...) Soviet Russia (...) must

States of Europe was prominent. Robert Schuman, in his speech on the 9th of May, 1950, had said:

The contribution, which an organised and living Europe can bring to civilisation, is indispensable to the maintenance of peaceful relations.

(...)

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.

(...)

This proposal will lead to the realisation of the first concrete foundation of a European federation indispensable to the preservation of peace.⁷¹

Aiming at a European federation, Jean Monnet is said to have stated in a memo of 3 April 1952: 'The fusion (of economic functions) would compel nations to fuse their sovereignty into that of a single European State'. Already in 1943, Monnet had argued that 'There will be no peace in Europe if states are reconstituted on a basis of national sovereignty (...) Prosperity and vital social progress will remain elusive until the nations of Europe form a federation or a 'European entity' which will forge them into a single economic unit'.⁷²

It was not only an ideal to proceed to a federal structure of a united Europe. It was also a felt necessity. As the Cold War deepened, a demilitarized Germany was gradually becoming impossible to sustain. The re-militarization of Germany was combined with a plan to dilute the sovereignty of Germany, so that a new war between Germany and France would be, in Robert Schuman's words, 'not only unthinkable, but also impossible'.⁷³ The initial plan – the plan for a federal Europe – consisted in the establishment of three institutions: a coal and steel community, a defense community, and a political community.

First, the European Coal and Steel Community (ECSC). It established a common market for the two essential products of a war economy, coal and steel. A 'High Authority', based in Luxembourg, would ensure that the same prices were charged for these products in all member states, with no import or export duties or restrictions.

be the friends and sponsors of the new Europe and must champion its right to live and shine.' Available online at <http://www.peshawar.ch/varia/winston.htm>.

⁷¹ Robert Schuman, *Speech of 9 May 1950*, available online at http://europa.eu/abc/symbols/9-may/decl_en.htm.

⁷² Note of 5 August 1943, Algiers. Reprinted in: Pascal Fontaine, *Jean Monnet. A grand design for Europe* (Luxembourg: Office for Official publications of the European Communities, 1988) 41.

⁷³ Schuman declaration, May 9th, 1950. Cf. <http://www.eppgroup.eu/Activities/docs/divers/schuman-en.pdf>.

Second, a European Defense Community (EDC), to establish a supranational European defense force whose procurement and operations would be united.⁷⁴

Third, a European Political Community (EPC), that would establish a directly elected assembly ('the Peoples' Chamber'), a Senate appointed by national parliaments and a supranational executive accountable to the parliament.

If combined, these three institutions would have formed an almost complete federal structure (thereby, in the terminology explained in earlier chapters of this book, ceasing to be 'supranational').⁷⁵

The least far-reaching of the aforementioned proposals, the ECSC, was the only one to be brought into existence. Though both the EDC and the EPC treaties were drafted, the EDC was discarded after the French parliament – upon initiative by General De Gaulle's patriotic party – began singing the *Marseillaise* in 1954 when the EDC was presented.⁷⁶ The EPC treaty was not even debated further.

The architect of the three treaties was Jean Monnet, an unschooled son of a Cognac producing family. He had dreamed of a united Europe from an early age, and acknowledged that the three treaties taken together would have produced the political integration of Europe (historical research also suggests that Monnet may have received covert support from the CIA⁷⁷). Now that this project had obviously failed, Monnet devoted his energies to economic integration, resulting in the European Economic Community, founded by the Treaty of Rome in 1957.⁷⁸

From then on, the ultimate goal of European integration became blurred. Jean Monnet himself, though he had previously been clear about the final form of the European project (i.e. a federal state), now professed an open future, into which it was even harmful to enquire, and the following quote is typical of the prose thenceforth produced by proponents of the European project:⁷⁹

We want the Community to be a gradual process of change. Attempting to predict the form it will finally take is therefore a contradiction in terms. Anticipating the

⁷⁴ Van Middelaaar (2009) 206ff.

⁷⁵ Stanley Henig, *The Uniting of Europe. From discord to concord* (London: Routledge, 1997) 25ff.

⁷⁶ The position of Winston Churchill towards the EDC may not have been entirely without influence. He was recorded picturing 'a bewildered French drill sergeant sweating over a platoon made up of a few Greeks, Italians, Germans, Turks, and Dutchmen, all in utter confusion over the simplest orders ...'. Dean Acheson, *Present at the creation. My years in the State Department* (New York: W.W. Norton and Company, 1970) 765.

⁷⁷ Christopher Booker and Richard North, *The Great Deception. Can the European Union survive?* Second Edition (London: Continuum, 2005) 87.

⁷⁸ The Treaty of Rome established a wide-ranging package of economic cooperation with supranational governance, to be unfolded in the decades to come. For instance, it arranged for a customs union within 12 years after adoption.

⁷⁹ The vagueness of the prose of proponents of the European projects reminds of Mrs. Gradgrind in Charles Dickens' novel *Hard Times*, who said when asked if she was in pain: 'I think there's a pain in the room, but I couldn't positively say that I've got it'. Cf. for the deliberate manipulation of language for political purposes: Viktor Klemperer, *The Language of the Third Reich* (London: Continuum, 2006).

outcome kills invention. It is only as we push forwards and upwards that we will discover new horizons.⁸⁰

It is no longer the official aim of most advocates of the European Union to move ultimately towards a 'United States of Europe'. Thus Paul de Grauwe, former economic advisor to the European Commission's President José Barroso, for instance said in an interview with the Belgian daily *De Morgen* on 18 March 2006, 'With the exception of a Don Quixote like Guy Verhofstadt (...), I see nobody who is pushing the case for a political union'.⁸¹

Time and again, supporters of the EU argue for supranationalism, not federalism. They go to great lengths to make clear that 'the European Union is not a state and (...) will never be one',⁸² in the words of Robert Cooper, senior advisor to Javier Solana, in 2007; that federalism is not the envisaged endpoint of the European unification or that such an endpoint would be completely unrealistic;⁸³ that, as the Dutch Queen Beatrix has said, 'Europe is a development process of which the contours are not clearly definable in advance, nor even exactly predictable'; and that 'the further unification of Europe does not mean that national culture and national identity lose importance. On the contrary: national language, national culture, in short, singularity and self-consciousness are of vital importance'.⁸⁴

According to those defending the current EU's political arrangement, any country in Europe could become a member of this hybrid, supranational construction since the European Union 'will never become a state'. Thus Tony Blair in his speech to the European Parliament on June 23rd, 2005, spoke of 'the new rules to govern a Europe of 25 and in time 27, 28 and more member states',⁸⁵ and expressed his fear that Europe might stop expanding and confine itself to members that shared a cultural inheritance (thereby excluding Turkey), because, if so, 'Europe will become more narrow, more introspective and those

⁸⁰ Pascal Fontaine (1988) 25.

⁸¹ <http://www.free-europe.org/english/2006/07/the-euro-will-collapse-without-political-union-forecasts-top-adviser-to-commission-president-barroso/>. Cf. Laurens Jan Brinkhorst, 'National Sovereignty in the EU: an outdated concept', in: M.K. Bulterman, L. Hancher, A. McDonnell and H. Sevenster (eds.), *Views of European Law from the Mountain. Liber amicorum for Piet Jan Slot* (Alphen aan den Rijn: Kluwer Law, 2009) 327-333, who writes that the EU 'is not a state, nor a state in the making'.

⁸² Robert Cooper (2007) 55-76.

⁸³ Kemal Dervis, 'Het ene Europa is het andere niet', in: Leonard Ornstein & Lo Breemer (eds.) (2007).

⁸⁴ HRH Beatrix, Queen of the Netherlands, *Voorbeschouwing*, in: Leonard Ornstein & Lo Breemer (eds.) (2007).

⁸⁵ Tony Blair, *Speech of 23 June, 2005*, published on http://news.bbc.co.uk/1/hi/uk_politics/4122288.stm.

who garner support will be those not in the traditions of European idealism but in those of outdated nationalism and xenophobia.⁸⁶

There is even a European commissioner for 'enlargement'. The Finnish economist Olli Rehn, who held this position from 2004 till 2009, perhaps not surprisingly given his job to focus on 'enlargement', expressed a desire that Europe should continue expanding. In his speech of April 28th, 2009, he said:

If the positive experience of the 12 Central and Eastern new member states is anything to go by, then clearly the future potentially holds equally beneficial developments for the Western Balkans and Turkey.⁸⁷

The EU has not taken steps to take over entirely the national sovereignty of its member states, but 'to pool their sovereignty'⁸⁸ (as if sovereignty could be pooled without being destroyed).

Also remarkable in this context is that the 9th of May, the day on which Robert Schuman delivered his speech calling for a 'united Europe', has now become 'Europe day', the annual day of the collective celebration of the European Union. Yet in order to illustrate that the ideal of a 'United States of Europe' – of which Schuman had dreamed – has been abandoned, the slogan of that day is: 'Unity in Diversity' – thereby immediately contradicting the idea of something that would 'unite' the Europeans (as the only thing that unites them is apparently their 'diversity' – a logical impossibility⁸⁹).

Nor is there in the speeches and documents of most European politicians and policy makers much reference to the shared culture, to the shared history, indeed to anything that would provide any kind of new national identity for a united Europe;⁹⁰ the enthusiasm for Turkey's accession into the EU is an excellent illustration of this.⁹¹ Questions of cultural resemblance, social cohesion, sense of belonging, political allegiance, are all brushed aside, for Europe would not become a state itself, nor merely be an international, intergovernmental organization.

⁸⁶ *Ibidem*.

⁸⁷ And he continued: 'So what's next? Even the fastest scenario for the next accession of a new member state, likely to be Croatia, is clearly slower than the slowest envisaged scenario for the ratification of the Lisbon Treaty. Time is on our side: we can pursue deepening and widening in parallel. This has been and still remains the best recipe to build a strong and united Europe. Today Europe is truly whole and free. Let us keep it that way.' Olli Rehn, *Speech of 28 April 2009*, Berlin, available online at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/205&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁸⁸ This has been repeated time and again. For instance: Bruno Waterfield, 'Barroso hails the European "empire"', *The Telegraph*, July 18th, 2007.

⁸⁹ And standing in great contrast with the American slogan, 'e pluribus unum'.

⁹⁰ Striking is in this respect the discussion over recognizing in the European Constitutional treaty of 2005, a reference to the shared 'Judeo-Christian' or the 'Classical-Humanistic' traditions of the European culture.

⁹¹ Roberto de Mattei, *Turkey in Europe: benefit or catastrophe?* Translated by John Laughland (Herefordshire: Gracewing, 2009).

Europe would be something in between, of its own kind: *sui generis*. And so the integration has proceeded, the EU has acquired more members, and new treaties have marked the next steps in this increasingly self-confident project of economic, though allegedly not political, integration.⁹²

Yet strangely enough, the rhetoric of political integration continues to pop up every now and then, as if arising, like the British Empire once allegedly had, in a fit of absence of mind.⁹³ A remarkable conference of the European Council, held in Stuttgart in 1983, amounted to a so-called 'solemn declaration of the European Union', containing such phrases as:

The Heads of State or Government of the Member States of the European Communities meeting within the European Council resolved to continue the work begun on the basis of the Treaties of Paris and Rome and to create a united Europe, which is more than ever necessary in order to meet the dangers of the world situation, capable of assuming the responsibilities incumbent on it by virtue of its political role, its economic potential and its manifold links with other peoples (...)

And:

The Heads of State or Government, on the basis of an awareness of a common destiny and the wish to affirm the European identity, confirm their commitment to progress towards an ever closer union among the peoples and Member States of the European Community.

There is an obvious contradiction between this 'solemn declaration' and the continuous efforts of political leaders to stress that Europe will never become a federal state. The 'European identity' that ought to be 'affirmed', the 'ever closer union' and the 'political role' of a 'united Europe' are irreconcilable with the claim that no such unification was ever on the agenda in the first place.

⁹² As Ernst B. Haas, whose work will be further discussed below, put it: 'Federalism was the initial watchword. European unity was hailed with glowing phrases by Winston Churchill, Léon Blum, Alcide de Gasperi, Salvador de Madariaga. A "European Movement" was formed that sought to achieve federation by stressing the cultural unity of Western civilization and that drew heavily on the misery of Europe, overshadowed by the new giants of East and West. The pan-European ideal first enunciated by Count Coudenhove-Kalergi in 1923, extolling Europe to seek survival in a world increasingly dominated by the United States and the Soviet Union, was hailed once more. The result was failure: no federal institutions were created, no uniform enthusiasm for federation could be mobilized in equal measure on the continent, in Britain, and in Scandinavia. The record of failure stretched from the creation of the far-from-federal Council of Europe through the defeat of the European Defense Community treaty to the burial of the European Political Community project in 1954. Something else happened instead. Not cultural unity but economic advantage proved to be an acceptable shared goal among the Six. The failure of the federalist European Movement saw the rise of the "functionalist" school of technocrats led by Jean Monnet (...). In: Ernst B. Haas, *The Uniting of Europe. Political, social and economic forces 1950-1957* (Stanford: Stanford University Press, 1968) xix: 'Author's preface, 1968'.

⁹³ Sir John Robert Seeley, *The Expansion of England* (1883), 'We seem, as it were, to have conquered and peopled half the world in a fit of absence of mind'.

One explanation for this contradiction lies in the functionalist approach to institutions, which is a philosophy that studies 'processes' and indeed 'functions' rather than accountability and democratic mandates, and is specifically designed to evade questions of legitimacy.⁹⁴ As Ernst Haas, one of the key analysts of this approach, wrote in 1968: '... the fact of the matter is that Europe did not have a Bismarck in 1948 or 1950. In the absence of the statesman who can weld disparate publics together with the force of his vision (...) we have no alternative but to resort to gradualism, to indirection, to functionalism if we wish to integrate a region.'⁹⁵ (Who is the 'we' here, one may ask? And is the whole of Europe implicitly being compared to the German states before their unification?)

Haas continues: 'the functionalist who relies on gradualism and indirection in achieving his goal must choose a strategy that will unite many people and alienate few. He can only move in small steps and without a clear logical plan, because if he moved in bold steps and in masterful fashion he would lose the support of many.'⁹⁶

Though present-day advocates of the EU believe, or profess to believe, that concerns over sovereignty are largely irrelevant, and that there is no essential difference between 'statehood', 'intergovernmental cooperation', 'internationalism', 'supranationalism', and 'federalism'⁹⁷ – because what matters is the goals that are to be achieved, not the institutional structures by which they are achieved⁹⁸ – Ernst Haas nevertheless makes no mistake in the inevitable outcome of the 'gradual' and 'indirect' strategy, and recognizes that following the 'functionalist' path would make integration 'nearly automatic' and culminate from 'a mere customs union to an economic union and a political entity'.⁹⁹

This seems to have been entirely accurate. There has been an exponential growth of EU competencies over the past decades. Protecting the common market has proved an excellent pretext for the most far-ranging rules and harmonization. The EU has issued tens of thousands of regulations and directives concerning such matters as safety regulations for cars, rules for bed and breakfasts, specifications for cheese and wine, social standards for laborers, the maximum sound grass-mowers may make, the kind of warning systems required

⁹⁴ Cf. Ernst B. Haas, *The Uniting of Europe; Political, Social, and Economic Forces, 1950-1957* (Stanford: Stanford University Press, 1958); Ernst B. Haas, *Beyond the Nation state: Functionalism and International Organization* (Stanford: Stanford University Press, 1964).

⁹⁵ Haas (1968) xxiii-xxiv: 'Author's preface, 1968'.

⁹⁶ Haas (1968) xxiii-xxiv: 'Author's preface, 1968'.

⁹⁷ Essential, therefore, in supranationalist writings is the term 'governance', which, in contradistinction to 'government', is used to denote a form of administration that, like the EU, does not have an organized and recognized form of opposition.

⁹⁸ See for instance Thomas O. Hueglin, 'From Constitutional to Treaty Federalism: a comparative perspective', in: *Publius* (Fall 2000).

⁹⁹ Haas (1968) xxv-xxvi: 'Author's preface, 1968'.

to assess swimming conditions in open water, and so on.¹⁰⁰ In the near future, it may even legislate mandatory safety jackets for cyclists all through Europe.¹⁰¹

The trick is that safeguarding a 'level playing field' can be used to declare every field of national policy within the administration's reach.¹⁰² Indeed, similarly to protecting 'fundamental human rights', the wish to establish a 'level playing field' is potentially limitless. Like setting out to achieve absolute 'equality of opportunity' or complete 'non-discrimination', it is endless in its application. Meanwhile, the European Court of Auditors has refused to approve the budgetary estimates of the EU in February 2009 for the 14th successive time.¹⁰³

But it is not only the EU politicians in Brussels that have expanded the power of the EU. As with the rise of state power in the Middle Ages (as discussed in chapter 1), it is to a large extent through law that the EU has tightened its grip on member states. The Luxembourg Court's expansion of power began with the *Van Gend en Loos v. Netherlands* case (1963), when it declared that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign right, albeit within limited fields', and ruled that states must apply community law as if it were national law.¹⁰⁴ In the *Costa v. Enel* case (1964), it ruled that Community law overrides any national law that conflicts with it.¹⁰⁵ In the case of *Simmenthal v. Commission* (1980) the Court then reinforced this ruling. Though under Italian law, only the Constitutional Court can declare a national rule void, it was nonetheless decided by the ECJ that 'every national court must (...) apply Community law in its entirety (...) and must accordingly set aside any provision of national law which may conflict with it (...). A national court, according to the ECJ, 'is under a duty to give full effect to [Community law], if necessary refusing (...) to apply any conflicting provision of national legislation.'¹⁰⁶ In the *Von Colson v. Nordrhein-Westfalen* Case (1984), moreover, the Court held that 'the domestic court should interpret all national laws in the light of directives, even if the law

¹⁰⁰ Hendrik Vos and Rob Heirbaut, *Hoe Europa ons leven beïnvloedt*, 3de geactualiseerde druk (Standaard, Antwerpen, 2008).

¹⁰¹ The report calling for such legislation was adopted by the European parliament on 21 June, 2011. Information available online at <http://www.europarl.europa.eu/document/activities/cont/201106/20110627ATT22630/20110627ATT22630EN.pdf>

¹⁰² While it could also simply have meant opening up the borders between the member states, letting them decide for themselves whether and how to adjust their regulations. The resulting competition would have enabled member states to decide for themselves which measures they would adopt to make it attractive (or unattractive, depending on their interests) for foreign investors and labor forces to move there. The current EU policy of abolishing restrictive measures could in theory mean the abolition of the different languages of the EU member states.

¹⁰³ According to the Court of Auditors the estimates continue to lack transparency to an unacceptable extent. *NRC Handelsblad*, 14 May 2009.

¹⁰⁴ *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62); [1963] ECR 1.

¹⁰⁵ *Laminio Costa v ENEL* (Case 6/64)[1964] ECR 585.

¹⁰⁶ *Simmenthal S.p.A. v Commission of the European Communities* (Case 243/78) [1980] ECR 2391.

in question was not based on the directive'.¹⁰⁷ The examples are endless, and the recurrent theme is the gradual expansion of fields of influence, with little or no institutional developments.

Thus the remarkable thing is that although the European Union started as an attempt at the federalization of Europe, it is now a partial unitary state which micromanages for example the economy, but does not have the essential features of sovereignty, such as an army, or a foreign policy, or powers of direct taxation.

Still less has it developed much of a democratic or even constitutional structure. The Commission's powers are not limited to specific tasks and the principle of subsidiarity has been used to centralize – not decentralize – ever more aspects of policy.

The Court in Luxembourg has interpreted the EU regulations in such a way as to arrogate to itself maximum power, and it has always interpreted such regulations to apply analogically to an ever-wider number of circumstances.

The European Parliament, while formally 'democratic', in reality is completely disconnected from the political debate in the countries it professes to represent. One simple reason for this is that the powers of the Parliament are still severely limited, and that it does not have an opposition. But there is a more structural reason as well, which is that for linguistic reasons if for no others, a European-wide public debate is inconceivable, and the European Parliament therefore operates in a political vacuum. It is odd, to put it no higher, that in the continent of its origin, representative and limited government should be so comprehensively undermined as they are in the present EU.

Nor is this situation even widely noticed let alone criticized by most who involve in discussions on the European Union. Although many claim to be 'severe critics' of the EU's legal expansion, very few actually desire their country to leave this supranational mega-project. Moreover, if we consider the three major spheres in which the EU operates – the common market, the common currency and acting as a bloc on the global scene – it is unquestionably assuming, very gradually, very stealthily, the responsibilities of statehood. This is the case because of at least three reasons.

Firstly, a common market with open internal borders requires, ultimately, a common immigration policy and defense of external borders, as national decisions to allow immigration have direct consequences for all member states. When Spain granted a 'general amnesty' to some 700 thousand illegal immigrants in 2005, or decided to accept former Guantanamo Bay detainees, the whole of Europe had to accept their right to reside anywhere in Europe. In the *R. v. Bouchereau* case (1981),¹⁰⁸ the criteria for the legal deportation of non-EU

¹⁰⁷ *Von Colson and Kamann v. Land Nordrhein-Westfalen* (Case 14/83)[1984] ECR 1891.

¹⁰⁸ *R. v. Bouchereau* (Case 30/77) [1977] ECR 1999.

citizens for an EU country were laid down. From now on, it was declared that 'free movement of persons' ultimately meant that the ECJ decide whether there was 'a genuine and sufficiently serious' threat to public order if states desired to disrupt such free movement of persons.

Secondly, the monetary union has now been shown to necessitate a common budgetary policy and therefore a powerful European ministry of Finance. The financial crisis and the situation in Greece demonstrated this clearly in the first half of 2011. As Christian Noyer, the president of the Bank of France said in an interview with *Le Figaro* in July 2011: 'It is necessary to go further and strengthen integration for the proper functioning of a monetary union'. He continued that the European Commission was working on it at the moment. In other words, a body of functionaries without any democratic credentials whatsoever was preparing a financial government for 350 million people.¹⁰⁹

And thirdly, to act as one on the global scene requires a common foreign policy. Not surprisingly, the EU has begun to establish a diplomatic service and has appointed a 'high representative of the union' on foreign relations. Meanwhile, steps are constantly being taken to increase the possibilities for European armies to operate jointly.

Thus, we may conclude that while most advocates of the EU profess not to be striving for a united, federal Europe, what is in fact coming to pass is undoubtedly just that (if, of course, the project does not fall apart). The EU proves that the idea of supranationalism is untenable if brought to its logical conclusion, and inevitably leads back to sovereign statehood (but translated to a vast conglomerate).

¹⁰⁹ Bertille Bayart and Jean-Pierre Robin, 'Pour Noyer, la crise doit conduire à renforcer l'intégration financière de l'Europe', in: *Le Figaro* (2-3 July, 2011) 22: 'Il faut aller plus loin et renforcer l'intégration pour le bon fonctionnement d'une union monétaire. La Commission Européenne y travaille actuellement'.