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**Fortress Europe or Spillover?:
Immigration Politics and Policy at the European Level**

**Adam Luedtke
Department of Political Science
McGill University, Montreal
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in partial fulfilment of the requirements of the degree of M.A.

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ABSTRACT

Although the evolution of a unified Europe has been unsteady, the immigration policies of member states have nonetheless become increasingly harmonized in recent years. This harmonization has not been without its controversies, however, and is characterized by two inter-linked political disputes that have shaped the progress achieved thus far. The first dispute area is the exclusion of Europe's legally-resident third country nationals (TCNs) from the privileges of intra-EU free movement, contrary to the inclusionist arguments of the European Commission and Parliament. The second dispute area is the political struggle between advocates of intergovernmental decision-making structures, which are not subject to EU law or institutional control, and the advocates of full (supranational) EU competence over policy. Two hypotheses are contrasted to examine these disputes: 1) the "Fortress Europe" hypothesis, which foresees the continuation of exclusionism and intergovernmentalism; and 2) the "spillover" hypothesis, which predicts the inclusion of TCNs through the EU's central institutions eventually winning full competence over policy. It is concluded that although exclusionism continues to hold the upper hand, recent victories for supranationalism have confirmed the optimism of the spillover hypothesis.

Bien que l'évolution d'une Europe unifiée ait été un procédé incertain, la politique d'immigration des membres de l'UE néanmoins est devenue de plus en plus harmonisée dans les années récentes. Pourtant cette harmonisation n'a pas été sans controverses politiques et a deux problèmes unis qui ont influencé les progrès dès maintenant. Le premier problème est l'exclusion des citoyens d'un troisième pays des privilèges de mouvement sans frontières dans l'UE. Le deuxième problème est la lutte politique entre les défenseurs de l'intergouvernementalisme et les défenseurs de la domination de l'UE. Deux hypothèses se contrastent pour interroger ces problèmes politiques: 1) l'hypothèse du "Fortress Europe" qui prévoit la continuation d'exclusivité et d'intergouvernementalisme et 2) l'hypothèse "spillover" qui prévoit l'inclusion des citoyens d'un troisième pays avec la domination de l'UE. La conclusion est que bien que l'exclusion continue à dominer, les développements récents ont confirmé l'optimisme de l'hypothèse "spillover".

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1. INTRODUCTION: CRITICAL PERSPECTIVES ON POLICY HARMONIZATION

Harmonization in the Present-Day Context

The general focus of this thesis is immigration politics and policy in the present-day European Union (EU)¹, and more specifically the "harmonization" of this policy that has been occurring at the supranational level. In summarizing the efforts of the EU's central institutions to achieve harmonization by gaining control over immigration policy in the past decade, Philip (1994) has optimistically argued that the "evolution" of a nascent EU immigration regime has been "relatively rapid" (p. 188). In support of this contentious point, he writes that "despite widespread resistance to EC institutional involvement in immigration matters, national governments once again are finding the EC is being drawn into the evolution of policy for legitimate and practical reasons" (p. 187).

Contrasting with Philip's generous conclusion, however, is the more skeptical perspective of a scholar like Papademetriou (1996), who argues that the pace of the EU's achievements in the field of immigration has been less than impressive. He writes that "despite ten years of feverish activism, Europe has failed to achieve progress toward harmonization commensurate with the amount of effort and resources expended" (p. 105). Den Boer (1995) has echoed this pessimism over the EU's accomplishments thus far, by referring to the development of a harmonized policy as "erratic" She writes that:

The absence of a coherent and long-term strategy towards a European system of immigration control has resulted in an inefficient functional overlap, legal-interpretative discrepancies, and perceived inconsistencies in legal precedents and global conventions. The institutional embedding of asylum and immigration laws and policies in the Community framework and legislative harmonization are still remote (p. 93).

¹ The term "EU" will be used here to describe the three "pillars" of the European Union: that is, the European Community (first pillar), Common Foreign and Security Policy (second pillar), and Cooperation in the Field of Justice and Home Affairs (third pillar). Much of the literature on harmonization was written before the 1992 formation of the European Union (Maastricht), and thus makes use of the older term, "European Communities" or "EC".

Despite the fact that the above citations are only brief assessments of the problem at hand, the contrasting nature of their conclusions gives an indication of the substantial divergence that exists regarding analysis of the harmonization issue. However, in spite of their disagreements over the amount of progress made thus far, all scholars on the topic would agree on one thing: that a great deal of work remains to be done if a truly functioning "European" immigration regime--that is, one which fits with the broader logic of a politically unified Europe--is to be put into practice. And judging from the intensity of the political pressures that have been placed on policymakers when dealing with such sensitive topics as border controls, freedom of movement and political asylum, it is a safe bet that this work will, in the near future, continue in the difficult and unsteady fashion that has characterized it all along.

All of this is not to say, however, that concrete progress on harmonization is at all out of reach. It was with renewed optimism, in fact, that several of the delegations to the Amsterdam Intergovernmental Conference (IGC)², in June of this year, brought forth new immigration-related proposals to be incorporated in a draft treaty on European Union, which would revise the 1992 Maastricht Treaty and pave the way for eventual enlargement of the EU. Although these vanguard forces of policy harmonization did not succeed in meeting every one of their goals at the IGC, there were several meaningful accomplishments during the three-day Conference, which will be explained in further detail as the analysis unfolds. Briefly, the primary accomplishments were: 1) the shifting of immigration issues from the EU's third (intergovernmental) pillar, to the first pillar (under EU competence and jurisdiction) which is a key victory for the advocates of a supranational policy framework; 2) the extension of the intergovernmental Schengen Protocol (on disbanding internal frontier controls) to cover the EU itself; 3) the long-awaited ratification of the 1990 Dublin Convention (on a common political asylum policy); and 4) the establishment of a European

² The Intergovernmental Conference is an EU-wide forum which deals with EU treaty revisions. To carry out changes to EU treaties, representatives of the member states address various proposed revisions articulated by European NGOs and the central institutions of the EU.

Monitoring Centre on Racism and Xenophobia (an EU-level body to collect data for the purposes of anti-racist policy formation). Although these achievements cannot be seen as conclusive evidence that the battle for policy harmonization has been won, it is clear that the apparently stalled process is now on the move again. The implications of this renewed activity at the European level will be immense and far-reaching for immigration policymakers across the continent, although much analysis needs to be carried out before the political ramifications of the recent progress are thoroughly understood. Accordingly, an exploration of the background factors responsible for immigration policy harmonization is the necessary starting point for this analysis.

The Analytical Framework

Following the discussion of the political factors that have shaped the background of harmonization, the thesis will then proceed to its central analytical task, which is an attempt to break down the issue of harmonization by exploring two interrelated debates which have been the primary areas of theoretical dispute: 1) the so-called “Fortress Europe” distinction between relatively open policies of free movement for EU nationals on one hand, and highly exclusionist policies regarding Europe’s “third-country nationals” (TCNs) on the other; and 2) the political struggle between two contrasting *institutional modes* of harmonization, labeled here as “supranationalism” and “intergovernmentalism”, under which EU immigration policymaking has been harmonized simultaneously throughout the previous decade. Although these institutional modes have existed side-by-side in the EU context—with some areas of policy being under the umbrella of each mode—the relationship has been a highly conflictual one, as the defenders of the two perspectives have carried out a protracted legal and institutional battle for control and jurisdiction over all aspects of immigration policy.

These two harmonization-related dispute areas—the Fortress Europe distinction and the two conflicting institutional modes—have been characterized here as “interrelated” because each one has a fundamental bearing upon the other, with a two-way process of causality readily apparent. Accordingly, it will be argued in this thesis that: 1) the prevailing

policies of TCN exclusion (Fortress Europe) have led to the persistence of intergovernmental decision-making frameworks, which maximize national sovereignty over immigrant restrictions; while on the other hand 2) the EU's central institutions and their defenders, in pushing for supranational sovereignty, have also advocated the opening of Fortress Europe through policies of TCN inclusion. In this way, intergovernmentalism is inextricably linked with exclusionism, while supranationalism shares the same kind of linkage with inclusionism. Therefore, the continuing existence of the Fortress Europe distinction between Europe's "insiders" and "outsiders"—both affects and is affected by the particular institutional mode that is taken by EU harmonization.

Because the following exploration of these disputes focuses on politics and policy at the *European* level, it will need to take all 15 member states as its units of analysis, as well as the central institutions of the EU (the European Commission, the Council of Ministers, the European Parliament, or "EP" and the European Court of Justice, or "ECJ"). This undertaking will, by necessity, be a broadly-based one, and will treat the EU both as a distinct political entity in its own right, as well as a supranational forum for the often competing interests of national governments, general publics and NGOs. "For the Community, the debate is more complicated than for one single nation-state: national strategies, interests, history and needs do not necessarily coincide" (Callovi, 1992, p. 370). Although the scope of an EU-wide analysis implies very little specific treatment of the many national and sub-national inputs on policy harmonization, its breadth is more than justified by the fact that immigration issues are increasingly being dealt with at the supranational level, as member states face up to the apparent reality that the goals of European unification demand a long-term plan of common action, in the face of a common range of cross-national challenges. Convey and Kupiszewski (1995) back up this approach by writing that immigration policy changes at the EU level "occur much more slowly as these depend totally upon the appropriate levels of agreement being reached between national interests. In this respect, they are perhaps more reliable for research purposes" (p. 959). This enhanced reliability poses a distinct advantage for the purposes of the present analysis, since it allows

for an understanding of the vastly complex issue of EU immigration policy without excessive reliance upon the overwhelming multitude of national-level factors.

In analyzing the political disputes over immigration policy harmonization, the term "immigration policy" will be used in reference to two distinct categories: 1) the societal integration of settled immigrant populations; and 2) the prediction and control of ongoing migratory flows. These migratory flows (whether legal or illegal) have taken place under several primary (and sometimes overlapping) categories, including employment-seeking, political asylum-seeking, and/or family reunification. In dealing with the issue of political control over immigration policymaking, the widely-used term "competence" will be applied here, to mean institutional control and legal jurisdiction over policy. Within the European context, immigration policy has been formulated under three primary institutional modes, defined here as unilateralism (nationally-based); intergovernmentalism (cross-national cooperation with national competence); and supranationalism (full EU competence). Since the converging nature of immigration-related problems, coupled with the process of European unification, has effectively rendered unilateralism a thing of the past, only the distinctions between intergovernmentalism and supranationalism will be covered by the analysis.

The title of this thesis, by introducing the terms "Fortress Europe" and "spillover", attempts to put labels on two conflicting hypotheses which have been advanced thus far to understand the debates over policy harmonization, including the issues of TCN exclusion and institutional competence (Ireland, 1991; Philip, 1994; Ugur, 1995). While the Fortress Europe hypothesis foresees the continuation of exclusionism and intergovernmentalism vis-à-vis TCNs, the spillover hypothesis instead predicts the eventual inclusion of TCNs through the establishment of full EU competence over immigration policy. Although the general understanding of these perspectives, including their points of contention, is at a premature stage of development within the field (due to the novelty and the complexity of the issue), it is argued here that the contrast between the Fortress Europe and spillover hypotheses is the closest thing that exists, at this stage, to an over-arching critical debate on immigration politics and policy at the European level. Since the defenders of the two perspectives have rarely addressed one another in the literature, it is proposed here that such an interplay would

greatly deepen our understanding of the issues at hand. Accordingly, the divergence between the Fortress Europe and spillover hypotheses will be used here as the major analytical framework, in seeking to gain both a broad understanding of policy harmonization in the EU context, as well as a specific appreciation of the political disputes over TCN exclusion and the competing institutional modes.

Although much of the recent work on immigration policy within the EU has been of an overly descriptive nature, there does exist a small body of literature that seeks to resolve these deeper analytical problems mentioned above. This relevant literature will provide the theoretical background for analysis of the Fortress Europe and spillover hypotheses, but it should be noted that the size and depth of the body of work fails to do justice to the magnitude and importance of the problem. The issues related to immigration make up a crucial aspect of the EU agenda—as evidenced by the prominence of immigration-related topics on the table at the latest European Summit in Amsterdam—and in support of this point it will be argued that the achievement of a harmonized immigration policy is crucial to the very future of the EU as a supranational political entity.

The Salience of the Harmonization Debates

Of all the formidable issues that impinge upon the ongoing political integration of the EU, perhaps none is more controversial than the range of challenges posed by Europe's immigrant populations (both existing and potential) and by the specific policies that are formulated to deal with these populations. While the recent technocratic debates over economic and monetary union have by no means been without their flashpoints and controversies, these issues do not intersect with the deeply-rooted notions of identity, national security, and societal membership to the same degree that the topic of immigration does:

Migration and immigration issues illustrate better than most other subjects the challenge the European Community is facing, both in terms of doctrine and in practice . . . Movement of people, asylum seekers, and issues of immigration and border controls are areas where nationalism tends to survive, not ultimately for technical reasons, but for a 'political culture' and

the fear of introducing surreptitiously the concept of federation (Callovi, pp. 353, 365).

And it is this backdrop of political controversy, including the influential persistence of political nationalism, that has so far rendered the harmonization process a particularly difficult and contentious one.

Most scholars of immigration have contextualized the harmonization process in the European setting by pointing to the existence of several cross-national political and economic factors that have served to create a general convergence of immigration-related *problems* (Baldwin-Edwards and Schain, 1994; Cornelius, Martin and Hollifield, 1994; Papademetriou and Hamilton, 1995). It will become readily apparent in the pages to follow that these converging problems--coupled with the prominence of immigration issues on electoral agendas across the continent--have placed tremendous political pressure on policymakers across national contexts, and have paved the way for a general convergence of solutions. As beleaguered national governments have sought relief in cooperative policy frameworks--whether intergovernmental or supranational in nature--to deal with their common immigration-related challenges.

Although the member states of the EU began their attempts at harmonization at least a decade before the pace of European integration picked up in the early 1990s, this cooperation was largely of the intergovernmental brand, which meant that it took place outside of the competence and jurisdiction of the EU's central institutions. In fact, even in the post-Maastricht push towards European unification, with all of the sweeping institutional changes that were undertaken to bring about this unification, intergovernmentalism has continued to demonstrate its political longevity by surviving as the institutional mode under which a majority of the immigration policy co-operation achieved to date has been carried out. If one looks at the Maastricht Treaty itself for evidence, the ongoing relevance of intergovernmentalism can readily be seen in the post-1992 placement of immigration issues under the Treaty's third (intergovernmental) "pillar", which means that they are not subject to EU law or parliamentary review.

Although it cannot be denied that there has been *some* progress made on harmonization under the auspices of intergovernmentalism, this cooperation has often taken politically impotent forms, such as non-binding declarations and unratified conventions, which are, of course, a common occurrence whenever national governments find themselves pushed reluctantly towards international cooperation on a controversial issue that is deemed crucial to "national interests". Philip reminds us of the political limitations of these frameworks, by pointing out that "intergovernmental resolutions . . . have no standing under international or EC law" (p. 175). Indeed, in the case of immigration policy, it has become clear that most attempts at intergovernmental co-operation have been fundamentally hampered by their own institutional logic, that being the absence of any supranational political body with real legal or political power over policymaking and implementation. But since intergovernmentalism has continued to enjoy strong political support from the more "Euro-skeptic"³ nations, it retains its central relevance in the present-day debate over harmonization.

Although the aforementioned convergence of migratory flows and domestic political pressures that took place in the mid-1970s was sufficient to steer all of the EU's member states away from policies of go-it-alone unilateralism, and towards intergovernmental co-operation, this convergence was not sufficient to persuade European governments to take the additional step of giving up national sovereignty for the purposes of cooperation within the EU's legal and political framework. It was not until the pace of European integration picked

³ "Euro-skeptic" and "Euro-federalist" are the labels commonly used to define the member states—or political elements within member states—which oppose and favor, respectively, increased political unification in the form of a "deeper" European Union. These labels can be applied across all areas of policy, and in the case of immigration policy, the UK has usually been the vanguard of Euro-skepticism, preferring to retain its own control over borders and policy, and preferring only intergovernmental frameworks when it recognizes the necessity of cross-national cooperation. Ireland and Denmark have been the other two key Euro-skeptics on immigration issues, since these two countries, along with the UK, insisted on "opting-out" of the new free movement zone agreed upon at Amsterdam. France and Germany have also drifted towards Euro-skepticism at times, and can therefore be classified as being somewhat neutral on the debates over harmonization. The Benelux countries have been the most Euro-federalist when it comes to immigration, continually advocating supranationalism and full EU competence over all aspects of immigration policy.

up immensely in the late 1980s, with the dawning of the “Single Europe”, that an alternative and more integrated institutional mode of harmonization (supranationalism) was effectively articulated and defended at the European level. And when focusing upon the European level, it becomes clear that the genesis of supranationalism must be located within the larger context of European political and economic integration, including the rise of the EU’s central institutions as a political factor in the struggle for control over many diverse facets of policy and law, including those related to immigration, political asylum and free movement.

Social Policy, Free Movement and Fortress Europe

Within the broader context of European unification, there are two key elements—both taking effect within the past decade—that can provide a starting point in the critical debates over harmonization to be covered here. These twin factors have created openings for the EU to become involved in the development and implementation of immigration policy, and have also provided the two distinct categories under which EU immigration policymaking is presently carried out. The first of these factors is the EU’s present institutional competence over aspects of social policy (the so-called “Social Europe”) which allows for EU involvement in the situation of migrant workers residing within member states. Even the most casual observer of the debates over European unification is aware that the general area of social policy has been one of the most contentious points of dispute between the so-called Euro-federalists (those who favor EU competence over a wide range of issues) and Euro-skeptics (who prefer to handle most issues intergovernmentally, with EU competence being strictly limited). Accordingly, the controversy over social policy as an opening for EU involvement in immigration can be seen as a facet of the larger debate over the Social Europe, involving the same concepts (subsidiarity, sovereignty) and the same lines of argument. The existence of this broader debate will assist us in the understanding of Social Europe’s effects on the harmonization process, by providing us with some established concepts and lines of argument to evaluate the linkages between social policy and immigration.

The second opening for EU involvement is the creation of the European single market, and more specifically its underlying tenet of the free movement of persons across national borders. Mitchell and Russell (1996), frame the immigration-related concerns of free movement as such: "in a situation where border controls are being progressively reduced, the restrictions on the cross-EU mobility of 'illegals' becomes impossible to enforce. It is for this reason that the immigration policy of any single EU member state is now of direct and immediate interest to others within the EU" (p. 55). Indeed, the implications of free movement for immigration policymaking--in a situation where the subjects and the effects of all national immigration policies will overlap to an unprecedented degree--are immensely far-reaching, and are still being widely debated by scholars and policymakers alike. It is fairly clear that the implementation of free movement, more than any other single factor, has shaped the context of harmonization by paving the way for an exclusionary Fortress Europe; that is, for the enduring distinction between open policies of intra-EU migration, and exclusionary policies for TCN immigration/integration.

Indeed, although much progress has already been made in doing away with the EU's internal frontiers and implementing free movement, many analysts have taken a pessimistic view of the goal of free movement as regards its eventual application to the EU's legally-resident TCNs. The fact that the privilege of free movement is dependent upon holding citizenship in one of the 15 member states means that the borderless Europe is in fact an exclusionist system, with migration criteria based solely on nationality instead of on any non-exclusive "European identity" or "European citizenship". The linkage of free movement with nationality-based criteria (the "nationality principle") has obviously been widely criticized on charges of xenophobia--with EU nationals enjoying movement privileges and other political rights which are not held by legally-resident TCNs--and it is this development

that has brought about the negative connotations attached to the concept of Fortress Europe, as the term is applied to immigration policy.⁴

Although Fortress Europe has been a popular catch-phrase to describe the EU's immigration regime—since it neatly summarizes the stark distinction between free movement for EU nationals and exclusion for TCNs—Mitchell and Russell voice caution that the Fortress Europe label might be too simplistic in its implication of a distinct frontier between “Europe” and the outside world. The authors argue that the existence of “overlapping systems of cooperation . . . through a variety of transnational organisations implies the need for a more complex model to represent the attempts to regulate and control migration into Europe in recent years” (p. 56). While Mitchell and Russell are probably correct in calling for a more sophisticated model to represent Europe's immigration regime, it cannot be denied that the Fortress Europe metaphor both contains and emphasizes an undeniably fundamental distinction, which has influenced virtually all EU immigration policy. This is what Ugur has called the “insider-outsider divide”, which he asserts “has been and still is the major aspect of the EU's migration policy” (p. 964). In other words, this stark dividing line is the one characteristic that has shaped and defined the harmonization process more than any other—in affecting both the nature and the institutional mode of policy—and has therefore been a primary subject of critical debate as the harmonization process continues on its path.

This distinction between free movement and exclusion attracts so much attention because the insider/outsider divide (as long as it exists) will have an inevitable influence upon the scope of harmonized policy; that is, upon the determination of the “subjects” (EU nationals and/or TCNs) of immigration policy. Thus, in the end, the insider/outsider divide has a determining influence upon the extent and nature of the policy harmonization itself. In assessing the implications of the free movement vs. exclusion distinction, two facets of the distinction need to be focused upon. The first issue is the longevity and/or durability of Fortress Europe; that is, the prospects for de-linking nationality from the freedom of

⁴ As opposed to the fairly common use of the metaphor “Fortress Europe” to mean an externally protectionist free-trade zone within the EU.

movement principle, and thereby including TCNs in the promise of the single market. The second area in need of illumination is the range of effects that the insider/outsider divide has upon the institutional mode of policymaking; that is, upon the political logic of policy harmonization and the location of future competence over policymaking.

Two Hypotheses on Harmonization

These interrelated problems continue to plague the literature on immigration policy within the EU, and are far from being resolved by scholars on the topic. Thus, it is at this point where the critical perspectives introduced earlier (the Fortress Europe and spillover hypotheses) can be brought to bear upon the debate. Ugur has provided the most articulate summary available of the Fortress Europe hypothesis, which can be seen as the more pessimistic of the two viewpoints, since it finds little hope for the “opening” of Fortress Europe in the immediate future. This perspective sees two fundamental obstacles that block the development of a non-xenophobic supranational policy (under EU competence) that could open the concept of free movement to include TCNs. The first of these obstacles is the actual nature of immigration as a European policy issue, which Ugur describes as being “nondivisible” and “nontransparent”. Immigration issues have been rendered nondivisible because they have been inextricably linked with citizenship and nationality, while they have been rendered nontransparent because of their linkage with the non-technical issues of identity, culture and national security (as opposed to easily quantifiable issues that can be explained through “transparent cost-benefit analysis”) (p. 973). The implications of this situation for policymaking are that “Without such transparency/divisibility, the parties perceive of the cooperation process as a zero-sum game either because cost/benefit analysis is based on nontransparent criteria or because the nondivisibility of the issue makes it difficult to construct package deals based on trade-offs” (p. 970). Because of this perception, the resulting policy frameworks are expected to be intergovernmental or unilateral in nature.

Ugur’s second obstacle to TCN integration and supranationalism can be called the “nationality principle”, which implies that as long as the privilege of free movement is

dependent upon *nationality* (citizenship in one of the EU nations), the resulting immigration policies will remain fundamentally closed and therefore subject to a xenophobic logic of exclusion. While the actual process of harmonization itself is not necessarily blocked under this logic, the nature of the harmonization that does result will continue to be fundamentally split between a liberal openness when regulating the movements of EU nationals and an overriding exclusionism when closing the doors to TCNs. Xenophobic public opinion (what Ugur refers to as "centrifugal societal tendencies") will serve to reinforce this "exclusive club" mentality by reinforcing the nationality principle, and the advocates of TCN integration will find it extremely difficult to have any substantive impact on the mode and direction of policymaking.

However, Ugur's Fortress Europe hypothesis can easily be contrasted with an alternative approach that contains an undeniable optimism towards the opening of Fortress Europe through the establishment of supranational policy frameworks. The proponents of this approach, most notably Philip, have labeled their perspective as the spillover hypothesis. The actual term "spillover", although it has never been adequately defined, ostensibly refers to the possibility that a wide range of immigration-related policy issues can eventually "spill over" into the EU's area of competence because of the radical political changes resulting from implementation of the single market.

The spillover hypothesis, in contrast with Ugur's pessimism, sees two main areas in which hope can be found for a harmonized policy that is based upon the logic of supranationalism, and which stretches across all facets of the immigration debate (from intra-EU migration, to external admissions, to the societal integration of TCNs). Philip explains the two facets of the "spillover effect" as: 1) "the need for the Community to resolve issues usually well outside its reach in order to deliver the single market promise"; and 2) "the slow, albeit reluctant, association of EC institutions with more and more issues . . . which national governments had previously dealt with separately or intergovernmentally" (p. 187). These related points contain an obvious optimism regarding the possibility of full harmonization--which would most likely extend the privilege of free movement to legally-resident TCNs--because in predicting a kind of inevitable role for the EU's central institutions in the

formation and execution of immigration policy, they foresee the eventual abandonment of intergovernmentalism, along with its reliance upon nationally-based policies of exclusion.

The existence of the spillover hypothesis shows us that Ugur's distinction between free movement and exclusion, while it certainly mirrors the prevailing reality in an accurate fashion, cannot be taken as the final word on policy convergence in Europe. Indeed, the possibility does exist for a wholesale shift in the Fortress Europe mentality, but this radical shift would primarily be dependent upon the success of the EU's central institutions and their allies in winning competence over key areas of immigration policy. The moves towards full EU competence over immigration at the latest IGC, although facing several key obstacles of implementation, are a significant step away from intergovernmentalism, and signal new hope for the advocates of TCN rights within the EU. To be fair to Ugur, he does acknowledge the possibility that an integrated European immigration policy *can* work towards the inclusion of TCNs, which he says will come about only through addressing the transparency/divisibility issue, as well redefining the concept of nationality in order to ensure that TCNs enjoy the full benefits of membership (free movement, political rights, etc.) within the European "club". Although such a redefinition would obviously be politically controversial, Ugur does appear to be correct in his assertion that any sweeping change in the logic of European immigration policymaking will be based fundamentally upon a reworking of the concepts of nationality and membership. Thus, while it does seem obvious that the spillover hypothesis has gone too far in its apparent characterization of the policy convergence process as "quasiautomatic" (Ugur, p. 973), it cannot be denied that the issue still remains open, and that the goal of full EU competence over immigration matters is by no means an impossible one.

It is obvious that the interplay between these conflicting hypotheses is extremely complex in nature, and will require further detailed explanation, but one thing is clear for the purposes of this thesis. Only the divergence between the Fortress Europe and the spillover perspectives can provide us with an adequate theoretical background for the two critical debates to be covered—the debate over free movement vs. exclusion and the debate over the

institutional mode of policy harmonization. While the Fortress Europe hypothesis foresees the continuation of the exclusive club mentality—and its accompanying institutional mode of intergovernmentalism when dealing with matters of TCN immigration—the spillover hypothesis predicts the eventual termination of Fortress Europe by a fully harmonized, supranational immigration policy. The cases made by the proponents of each hypothesis are well argued, but have not been adequately addressed by one another, as previously mentioned. Accordingly, the critical task will in essence be to “square off” these two perspectives against one another. By analyzing the evidence and the logic by which they make their cases, as well as factoring in several pieces of important new evidence that have come to fruition since Ugur, Philip and other relevant scholars published their arguments, this paper can point the way towards a much-needed resolution of the harmonization debate.

The resolution of this debate, however remote a possibility, is crucial to the future of the EU for several reasons. The European single market has often been referred to as the driving engine of integration, and as long as the fulfillment of its requirements for free movement are hampered by disagreements over criteria, implementation and institutional control, the process of political integration remains fundamentally incomplete. Until the EU and its member states can agree upon the means of guaranteeing free movement to all of Europe’s legal residents (TCNs included), providing uniform asylum and visa policies, and agreeing upon common standards for the societal integration of legally-resident TCNs and for their protection from xenophobic discrimination, the march towards policy harmonization will remain in the chaotic, contradictory and confused state which has characterized it all along. Papademetriou has provided us with a thorough summary of this critical task at hand for the EU:

At issue is whether the European Union can deliver on its promise of full European integration without reconciling the incongruity between the unfettered access to EU physical, economic, social, and, at the local level, political space enjoyed by Union nationals with the severely restricted rights and privileges of non-Union or ‘third-country’ nationals (TCNs) who reside legally within that space (p. 16).

In this respect, the debates over policy harmonization hold a political relevance that goes far beyond their immediate ramifications at the national level. “The Community faces

a challenge arising from necessity if not from political will" (Callovi, p. 354). Indeed, if the architects of European unification intend to make the single market a reality for all of Europe's denizens, then the outcome of the battles between freedom of movement and exclusion, and between supranationalism and intergovernmentalism, are crucial not only to the future of the European project, but also to the future of Europe's immigrant populations themselves, who have been the primary victims of the ongoing dispute, wallowing in a kind of status limbo while the Euro-skeptic nations quarrel with Brussels over matters of institutional competence.

Thesis Overview

The next chapter of the thesis will outline the cross-national convergence of immigration-related problems and political pressures that has already taken place, thereby providing the reader with a historical background for understanding the recent harmonization debates. Following this contextual illustration, the chapter will proceed to a discussion of the early attempts at policy harmonization--intergovernmental structures that existed outside of the EU framework--which dealt primarily with security-related issues such as illegal immigration.

The third chapter will then move the context to the most recent decade, by exploring the extent and nature of the harmonization that has taken place under the EU's framework. While the ongoing influence of the early security-obsessed intergovernmentalism upon the present-day harmonization debates will be demonstrated here, it will also be shown that the more recent factors of intra-EU free movement and social policy harmonization are the elements that have launched these debates into political prominence, since the EU's social policy and free movement provisions have both created the Fortress Europe distinction, and provided the opening for the EU's central institutions to become involved in the policy process under the broader logic of supranationalism.

The fourth chapter emphasizes the shortcomings that have characterized this EU involvement so far, however, by articulating Ugur's argument that the ongoing persistence

of intergovernmentalism—which has been enforced by the nationality principle and the nontransparency/nondivisibility of the TCN issue—has consolidated the Fortress Europe distinction, and therefore served to exclude Europe’s legally-resident TCNs from the privileges of free movement, contrary to the efforts of the European Commission and Parliament. To redress this wholesale exclusion, these forces of supranationalism, backed by immigrant advocacy groups, have attempted to pursue a “linkage strategy” of inclusion: that is, attempting to link the societal integration of Europe’s legally-resident TCNs with the ongoing emphasis on border controls. It will be shown, however, that this linkage strategy has had little success in promoting inclusion, because of the institutional weakness of supranationalism in the EU’s current balance of power.

The fifth chapter, though, shows that this balance of power is now changing somewhat, and that there are new signs of hope on the horizon for supranationalism and inclusion, with the successes of the EU’s central institutions at the Amsterdam IGC opening the way for new policies of inclusion. However, the influence of these successes is somewhat minimized by the continuing existence of a “two-speed” Europe, in which certain Euro-skeptical nations are allowed to opt-out of the harmonization process whenever it suits their interests.

2. CRISIS, CONVERGENCE AND SECURITY-OBSESSED INTERGOVERNMENTALISM

A Common Dilemma for the Member States

It would be useful at this point to step back from the critical debates over free movement and exclusion, and begin to sketch the historical and contextual background of policy harmonization, in order to ascertain the extent and nature of the progress made thus far. One way to gain this background perspective is to take a theoretical look at the evolving politics of immigration at the global level. Cornelius, Martin and Hollifield have advanced what they term the “convergence hypothesis”, which sees a growing similarity among all developed nations, including those of the EU, across a wide range of factors: 1) the policies formulated to deal with immigration flows; 2) the effects that these policies have had in controlling the ongoing influx of migrants; 3) the policies formulated to bring about societal integration of immigrant populations; and 4) public reactions to ongoing immigration flows and immigration-related policy developments. In concordance with the convergence hypothesis, the authors have also pointed to the existence of a growing divergence (their “gap hypothesis”) between the strategic goals of immigration-related policy and the actual results achieved. It is this troublesome gap, primarily, that has catapulted immigration to the forefront of the “hot” topics in the present-day political (and electoral) realms, and has resulted in what Baldwin-Edwards and Schain term the “crisis of immigration”. The primary feature of this crisis is the fact that European governments have found themselves in apparently untenable positions on immigration, pushed in one direction by xenophobic general publics demanding restrictions, but confronted with continuous and apparently inexorable migratory flows nonetheless (Weiner). It is this political quandary that has lent such an urgent tone to the debates over immigration in the present European context, and which makes the analysis of harmonization particularly relevant.

One need take only a cursory glance across the national contexts of the EU to find that the convergence hypothesis of Cornelius, Martin and Hollifield is indeed an accurate one. While significant differences do exist--most notably between the traditionally labor-

importing countries of the North and the “new” immigration countries of the South—it cannot be denied that policymakers in all EU member states face increasingly similar immigration-related challenges, which can be broken down into four main categories: 1) the existence of permanently settled immigrant populations, comprised largely of legally-resident TCNs, despite the legacy of so-called “zero-immigration” policies; 2) the ongoing influx of new migrants, including political asylum-seekers, refugees, and labor immigrants, many of whom are illegal or “unauthorized”; 3) the “exclusionist” political pressures created by widespread anti-immigrant sentiment among the general public and political elites; and 4) the “inclusionist” pressures created by the defenders of humanitarian obligations, such as the right to political asylum and the right of family reunification.

This converging crisis of immigration, made up of the four factors listed above, has been a crucial determinant in the quest for policy harmonization, and, along with the push towards intra-EU free movement, was the main causal factor behind the creation of intergovernmental bodies to deal with immigration policy. As European governments began to identify mutual interests in the areas related to immigration—especially in areas of national “security”, such as border controls and illegal immigration—intergovernmental forums were developed to share data and strategy among the relevant branches of national governments. Accordingly, the evolution of harmonization in the supranational EU context cannot be understood without first analyzing the early intergovernmental initiatives that developed in the pre-Maastricht era. These early attempts at cooperation will be referred to here as policy “convergence” instead of the more recent term “harmonization”, which implies at least a limited degree of EU competence. And the primary impetus for this early policy convergence was the increasingly common plight faced by Europe’s immigrant-receiving societies.

Immigrant Settlement and the Politics of Exclusion

In exploring the nature of this plight, one basic fact becomes clear. All Western European nations have now become *de facto* “countries of immigration”, despite a long history of assurances to the contrary by politicians responding to public perceptions of Third

World migrant hordes flooding across national borders. This prevailing attitude of official denial and escapism appears naive and even preposterous in the present-day context, given the reality of permanent immigrant settlement across the continent. In the postwar era, the more highly developed nations of North-West Europe have been consistently receiving substantial immigrant populations ever since the “thirty glorious years” of booming economic growth, and the new countries of immigration in Southern Europe are now quickly catching up. At this point, it cannot be denied that labor immigration is an undeniable fact of life in modern-day Europe, and it is the shared legacy of these labor immigrant populations (especially the legally-resident TCNs who have not been fully integrated into European societies) that poses the greatest challenge for European immigration policymakers today.

In the rush to identify a cross-national convergence of immigration pressures and problems, however, it should not be forgotten that there was initially a great deal of cross-national diversity over the degree to which the new migrant communities were recognized as constituting permanent settlements. While the colonial powers, such as France and Great Britain, were willing for a time to confer full membership rights, as befitting colonial “citizens” (or subjects), upon their respective immigrant communities, other nations, such as Germany and Austria, utilized the so-called “guestworker” model, importing immigrants as nothing more than a temporary supply of labor to be periodically rotated as long as employers continued to face the types of labor shortages that were experienced throughout Europe’s postwar boom (Cornelius, Martin and Hollifield, 1994; Soysal, 1994; Weiner, 1995). The architects of the guestworker model, however, eventually found their optimistic predictions to be confounded by two factors: firstly, the realization that most employers preferred a permanent supply of labor (to minimize retraining costs), and secondly, the simple fact that guestworkers themselves showed little desire to return to the homelands where economic opportunities remained minimal. In short, the prevailing socioeconomic reality led to the permanent settlement of Europe’s immigrant communities.

It was not until the turbulent economic slowdowns of the mid-1970s that worried politicians began to gain political mileage by earnestly denying the reality of permanent settlement, in line with the new politics of xenophobic exclusionism that went hand-in-hand with economic recession and unemployment. During this time period, European political elites began the tradition (which is still operative in the present-day) of pandering to xenophobic politics—in response to their own declining legitimacy and electoral support—in proclaiming their nations to be “zero-immigration” countries. However, by pursuing this strategy of denial, governments left themselves unable to formulate coherent strategies to deal with the existence of settled and legally-resident immigrant populations, as well as the consequences of immigration flows certain to take place in the future (Layton-Henry, 1990: Cornelius, Martin and Hollifield, 1994). The dangerous ramifications of this denial are well illustrated by Papademetriou, who writes that “by declining to acknowledge this ‘new’ reality and not devising policies to address it, Europe’s leaders essentially ceded the immigration issue to demagogues of the right and sowed the seeds for a troubling resurgence of Europe’s anti-immigrant voices” (p. 13).

It was during the origins of this crisis of immigration (the mid-1970s) that the process of policy convergence began to take place, as all of the former colonial powers—beset by the same economic recessions and public xenophobia that were sweeping the continent—took blatant action to restrict the entry and settlement of their colonial subjects. As Soysal writes, “although colonial workers had a legal right to permanent residency and a more privileged status in general, they, too, were treated as temporary” (p. 19). In carrying out these restrictions, the colonial nations joined the general trend of exclusionism that was already being practiced by the guestworker countries, which had taken steps to cut off the supply of immigrant labor and even carried out futile efforts to return the already settled guestworker populations to their homelands. Hence, a general converging trend can be pointed out here, in which “the normative model of migration . . . is essentially an ‘exclusionary’ one, supported by the ideologies of nationhood and citizenship” (Soysal, p. 21).

Humanitarian Obligations as a Counterweight to Exclusion

The next essential factor that paved the way for policy convergence among the so-called zero-immigration countries (which had by the 1970s become permanent homes for settled labor immigrants) was the range of common humanitarian obligations that were faced by all labor-importing countries of North-West Europe, and that stood in the way of the exclusionary attempts to limit both permanent settlement and the entry of new migrants. Aside from the basic acceptance of guestworker settlement, which (along with employer demand) allowed for temporary labor populations to gain legal residence and avoid any form of forced repatriation, there are two important humanitarian forces at work which have fundamentally shaped present-day EU immigration policy. These twin inputs on the policy process are the right of family reunification and the right of political asylum, as defined by international agreements such as the Geneva Convention.

Family reunification, as a humanitarian obligation, has been the most relevant aspect of immigration policy for the former guestworker and colonial populations, since it has allowed these immigrant groups to bolster their own communities (in concurrence with natural population growth) through the "sponsorship" of relatives from the homeland. Indeed, it is the ongoing effects of family reunification that have led Thranhardt and Miles (1995) to remark that "the migration patterns that were built up during the 'guest worker' period in the growth years before the oil shock of 1973 are still operative, although in a modified form (the migration of 'family dependents' often being more important than migrant labourers)" (p. 7).

However, when looking at Europe's immigration policy convergence in a more recent context, it becomes clear that the right to political asylum has now surpassed family reunification as the EU's most salient humanitarian obligation. As evidence of this point, one only needs to witness the widespread attention that was given to Germany's recent security panic, political debate and subsequent legislative wrangling over its once-generous

“open-door” asylum criteria.⁵ Although much work has been done to tighten asylum criteria since the collapse of communism sent waves of Eastern Europeans knocking at the doors of their neighbors to the West, these policies of exclusion can only advance so far against the entrenched right of political asylum. As Soysal puts it, “despite restrictive regulations, asylum remains a privileged form of migration. Attempts to stop or repatriate asylum seekers receive international attention, and are heavily debated within and outside Europe” (p. 24).

Political Asylum and the Security Panic

Thus, the issue of political asylum made vast gains in political prominence beginning in the late 1980s, not only because of labor immigration’s declining relevance, but also because of “the migratory pressures created by the disintegration of the communist regimes in Eastern Europe and the escalation of the conflict in the former Yugoslavia” (Mitchell and Russell, p. 55). As policymakers in EU nations began to worry about the possibility of being swamped by a flood of Eastern European refugees, a general “security panic” swept through both political elites and the general public. This security panic, in the context of the asylum issue, was characterized by three societal perceptions: 1) the widespread belief that European nations were not structurally able to support the presence of numerous asylum-seekers; 2) a growing perception that substantial portions of the asylum-seeking population were actually “bogus” refugees, motivated more by economics than by the threat of political persecution; and 3) concern over the perceived “abuse” of the asylum system. Santel (1995) describes this third perception by writing that “the increasing number of multiple or successive asylum applications has become an ‘idee fixe’ of European governments” (p. 88).

⁵ Weiner provides an excellent summary of the German asylum problem: “No industrial country has faced as severe a crisis over international migration as Germany . . . the collapse of Soviet control over Eastern Europe . . . [made] Germany a front-line state . . . against a flood of refugees and migrants. The major crisis in Germany, as defined by German authorities, has been the problem of manifestly unfounded claims by asylum seekers” (pp. 52-53). After finally buckling to heavy political pressure from the Right, the Christian Democrats in 1993 changed the German Basic Law to remove its guarantee of a political asylum hearing.

In attempting to characterize the nature of this security panic, Den Boer has identified three “cornerstones” of the relationship between perceived security threats and immigration issues, which are the linkages between immigration and: 1) crime; 2) the exploitation of social welfare benefits; and 3) the political instability caused by racism. It is the third of these linkages that is the most troubling for Europe’s TCN populations (illegal or not), since this line of reasoning (excluding immigrants to “protect” immigrants) has been effectively used by governments to justify crackdowns and restrictions in the name of anti-racism. Past analysis has shown, however, that the logic of this dubious justification rings hollow, and only serves to mask the less “humanitarian” motivations of exclusionist sentiment. “The causal link claimed by politicians between tight immigration controls and an absence (or low rate) of racist attacks cannot be established” (Den Boer, p. 97).

Due to the overt political and electoral influence of the security panic, which shows few signs of diminishing in the near future, the new asylum-seekers from Eastern Europe—as well as their counterparts from the developing world—have in effect been “criminalized” by societal perceptions of illegality, and thereby lumped in with the growing number of illegal immigrants seeking entry into Europe. Additionally, the general tightening of asylum and refugee policy that has accompanied the security panic has served to increase the rate of rejection for asylum applications. This increased rejection rate contributes to the problem of illegal immigration, because as Rogers (1992) has estimated, more than 75 percent of rejected asylum applicants remain in the receiving country. Although substantial debate exists over the degree to which restrictive policies of control have served to stimulate illegal immigration, the fact remains that a substantial (and apparently growing) portion of Europe’s immigrants are now “unauthorized” or “clandestine”, two of the less stigmatizing labels that have been employed to describe this substantial migratory flow that endures across all the national contexts of the EU. Therefore, if we are seeking to uncover the origins of harmonization, it becomes clear that the influence of the security panic was a determining factor in the development of pre-Maastricht intergovernmentalism, and continues to hold a great deal of relevance for the present debate over harmonization. Because it pushed the

intergovernmental agenda towards security issues, which are by nature issues of exclusion. the security panic has hindered later attempts to shift the emphasis towards inclusion and the societal integration of TCNs.

The Beginnings of Intergovernmentalism

While many scholars have located the origins of security-obsessed intergovernmentalism in the late 1980s period of single market preparations, the story actually begins somewhat earlier. Prior to the implementation of the single market and the accompanying entrance of the EU's central institutions in the policy process, the first example of security-related policy convergence is the 1970 creation of the intergovernmental European Political Cooperation (EPC) Group⁶, the agenda of which "corresponds to a number of border-related matters" (Papademetriou, p. 33). A further security-related initiative took place with the formation of the Trevi Group⁷, in 1975, whose competence covered cross-national issues of law enforcement. Trevi's range of issues was expanded in 1980, when the mandate was broadened to cover illegal immigration and asylum policy. "The formation of the Trevi Group . . . enabled officials and ministers from the interior and justice ministries of the EC . . . to concentrate upon issues demanding co-operation between governments and enforcement agencies dealing with internal security" (Philip, p. 175). So if we are to analyze the ongoing implications of Trevi's linkages between immigration and security, it is apparent that the continuous framing of immigration as a security problem brings about the blatant criminalization of immigrants, which has been a key point of debate between the Euro-skeptical proponents of security-related intergovernmentalism and the supranationalists who seek to shift the focus from security to the inclusion of TCNs.

⁶ Papademetriou writes that the EPC was created "as a forum for regularizing the meetings of member states' Foreign Ministers" and that this creation "was the result of a desire to establish a harmonized approach to Community foreign policy" (p. 33).

⁷ The Trevi Group was created by the Ministers of Home Affairs of the member states, originally to discuss cross-national security issues such as terrorism and organized crime. In 1980 this mandate was expanded to cover security-related aspects of free movement, such as asylum abuse and illegal immigration (Pulli).

Indeed, although their hands are tied by an unfavorable institutional arrangement (the institutional entrenchment of intergovernmentalism), the central institutions of the EU--in attempting to moderate the exclusionist effects of the early security panic--have entered into the security debate, by criticizing the security/immigration linkage as detrimental to the status of Europe's legally-resident TCNs. In one example of this criticism, the EP Committee on Racism and Xenophobia highlighted the criminalization of immigration that is brought about by the security focus, accusing Trevi "of an 'unacceptable amalgam' across the various Trevi Groups, which deal with criminals on the one hand and with migrants and refugees on the other" (Den Boer, p. 97).

The EU's central institutions have had little success, however, in lessening the influence of the security panic upon the process of harmonization, due to the strong support among the more security-minded member states for nationally-competent intergovernmentalism. Indeed, it will become clear at a later stage in the thesis that the security issue has been one of the key rallying points for intergovernmentalists in the current debates over free movement and institutional competence. Thus, while many would downplay the relevance of the pre-single market intergovernmentalism for looking at the later harmonization, it cannot be denied that the strong linkage between the security panic and this early intergovernmentalism has done much to hinder the forces of supranationalism in their later attempts to include TCNs in the privileges of free movement.

For these reasons, the institutional legacy of the security panic, in such forms as the Trevi Group, will be kept in mind as the analysis unfolds. However, the debates that are covered in this paper do not become active until the the mid-1980s push towards European unification. And the most important facet of this push, for the issue of immigration policy, is the advent of the European single market and its requirement of free movement, which has created an irreversible linkage between immigration policy and the drive for a unified Europe.

3. FREE MOVEMENT, TCNs AND THE ORIGINS OF SUPRANATIONALISM

Free movement in the Single Europe

The mid-to-late 1980s witnessed a vast proliferation of intergovernmental frameworks for dealing with immigration. While the impetus for this increased cooperation was the aforementioned convergence and crisis of immigration-related problems, the immediate goal was the preparation of Europe for the reduction of internal border controls required by the implementation of free movement. While the original Rome Treaty had laid some of the groundwork for free movement, by establishing the rights of EU nationals to equal access, establishment and employment in all member states, the goal of free movement made an additional leap towards full realization with the mid-1980s proposals for a "borderless Europe". The ideal of a borderless Europe formally joined the EU's agenda in 1987, with the implementation of the Single Europe Act, which set up an institutional framework to realize the "four fundamental freedoms" (freedom of movement for goods, services, capital and persons).⁸

Since the four freedoms, including free movement of persons, are a crucial requirement of the European single market, it is at this point in the analysis where we can re-introduce the critical perspectives of Fortress Europe and spillover, which take as their starting point the linkages between free movement and immigration policy. In looking at the dawning of the single market, the pessimistic defenders of the Fortress Europe hypothesis would argue that the tradition of security-obsessed intergovernmentalism remained operative throughout the single market's implementation, as evidenced by two factors: 1) by the continuing emphasis upon both external border controls and internal security; and 2) by the exclusion of TCNs from the privileges of free movement enjoyed by EU nationals. As Ugur puts it, this exclusion has meant that "non-EU nationals were faced with double

⁸ "Article 8a of the SEA states that 'the Community shall adopt measures with the aim of progressively establishing the internal market'. It defined 'internal market' as 'an area without internal frontiers in which the free movement of goods, *persons*, services and capital is ensured'" (European Communities, 1987, p. 544, cited in Papademetriou, p. 23).

discrimination; they were forced to compete on an unequal footing under given labor market conditions, and they were the ones who would be denied access should these conditions deteriorate" (pp. 976-977).

Papademetriou provides an indication of the thoroughly privileged status of EU nationals under free movement when he writes that "by the early 1970s, the free movement of Community nationals was virtually a non-issue" (p. 16). Indeed, by the time of the Single Europe Act's signing, it was clear that the stated goal of free movement for EU nationals, found in the 1957 Rome treaty, had been safely embedded under EU competence and law, with few political difficulties, in order to prepare for the advent of the single market and its requirement of a frontier-free space.

For Europe's legally-resident TCNs, however, the picture looked bleak. In articulating the national-level reticence implied by his Fortress Europe perspective, Ugur has shown that the EU's member states took early steps to head off the inclusion of TCNs in free movement, with the 1968 establishment of nationality as the legal criteria for free movement. Although the European Commission tried to put the best possible face on this development, by portraying the basing of free movement upon the nationality principle as a step towards the establishment of an EU citizenship (which is one of the fundamental goals of supranationalism), the reality was somewhat less "progressive". Instead, the nationality principle has done more than any other factor to lay the foundations of Fortress Europe. In analyzing the nationality principle, Ugur writes that:

Its definition against non-EU nationals implied the exclusion of third country nationals from the privileges associated with the new social space. In that sense and contrary to what some students of migration would argue, the foundation of the 'fortress Europe' on this new concept of citizenship was laid down in 1968 and not in 1992 when the Single Market was established (p. 977)

Although the nationality principle, and its accompanying exclusion of TCNs, did much to assuage the worries of Euro-skeptics and the security-obsessed, it also launched the "TCN problem"—the struggle to grant TCNs the same privileges of free movement that had been put in place for EU nationals—into a heated political and institutional debate on the EU

scene. Indeed, since the late-1980s entrance of the EU's central institutions into the realm of immigration policymaking, the TCN problem has been the largest sticking point in the struggle for harmonization. Although the Commission consistently interpreted free movement to include TCNs, the weakness of their pre-Maastricht institutional position meant that the advocates of TCN exclusion faced few obstacles: "by the time the Single European Act was signed, all references to freedom of movement for non-Community nationals had been deleted" (Papademetriou, p. 24). Furthermore, Ugur has shown that the nationality principle and its accompanying exclusionism also led to the additional strengthening of intergovernmentalism, by not only causing "the emergence of a European identity defined against non-EU nationals", but also by leading to "the maintenance of intergovernmental procedures in the area of third country immigration" (p. 977).

EU Competence and Inclusion: The Linkage Strategy

While the spillover hypothesis does admit to the setbacks for supranationalism that were caused by the nationality principle, this more positive interpretation of these setbacks predicts that the restrictiveness and exclusionism of early intergovernmental policies will eventually begin to give way to a more open supranationalism, under EU competence, as the logic of European unification, bolstered by the single market, takes hold. Indeed, the proponents of such a supranational EU immigration policy, arguing from a Euro-federalist perspective, have long held that the architects of the Single European Act fully intended all along that the EU eventually be given competence over immigration issues. As evidence, Papademetriou's research has shown that Jacques Delors, the original Euro-federalist himself, believed that "the move to abolish frontiers between EC countries would in turn convince member states of the need to cooperate on admission and other border control measures, thus creating a context for subsequent efforts to bring immigration policy into the institutional framework of the EC" (p. 22).

And within the push for competence over immigration matters, the EU's central institutions had made it clear from the beginning that the inclusion of TCNs was a concrete goal of the single market. And over the years, the EU has pursued this goal by what Ugur

has labeled the “linkage” strategy, which attempts to link the harmonization of external control policies with the integration of already resident TCNs. As Ugur writes, the linkage approach made sense for two reasons:

On the one hand, the drive toward restriction was pointing to a new pattern of convergence in government policies. And this may have been perceived as a condition conducive to the establishment of an EU immigration policy through implied competence. On the other hand, the adverse effects of the pending restriction on the external relations of the Union could be partly alleviated by developing a positive approach to the integration of existing foreign nationals (p. 980).

In line with his Fortress Europe hypothesis, however, Ugur points out that the linkage strategy seemed to be doomed to failure because of the nontransparency and nondivisibility of the immigration issue. Nevertheless, the EU’s central institutions did finally attempt action on the TCN problem, in the mid-1980s, to moderate the prevailing restrictionism of the time. In its 1985 “Guidelines for a Community Policy on Migration”, the first step towards a harmonization process under the logic of supranationalism, the Commission called for “equality of treatment in living and working conditions for all migrants, whatever their origin” (Papademetriou, p. 20). Furthermore, the Guidelines took the radical step (at the time) of acknowledging the reality of permanent TCN settlement and calling for the inclusion of TCNs in free movement. Convinced of the necessity of solving the TCN problem, the Commission authored a 1985 Decision on harmonization of TCN policies which established EU “consultation” in this field; that is, the Decision obliged member states to consult with the EU over any intended changes in TCN policy (Papademetriou).

It was at this point where the first volleys were fired in the battle over institutional competence, since several of the member states immediately struck back against this push towards supranational harmonization by challenging the legal basis of the Decision before the European Court of Justice. Although the Decision was voided under the ECJ’s ruling, due to the fact that it extended the EU’s competence beyond the provisions of EEC Article 118 (the part of the Rome Treaty that spells out the EU’s social policy competence), the

results were neither a clear victory for or against the EU's central institutions. Papademetriou analyzes the results of the case:

The ECJ voided part of the Commission Decision, but this did not completely block the Commission's first significant attempt to 'institutionalize' immigration matters. In fact, the Decision was later revised and adopted, and a consultation procedure was established. This 'success' thus signifies the first instance of explicit Commission competence on immigration matters (pp. 21-22).

Callovi also sees the ECJ ruling as a success for supranationalism:

The Court gave the fullest recognition to the main goals assigned to the consultation procedure, namely: to facilitate the adoption of a common position by the member states; to achieve progress toward harmonization of national legislation on foreigners . . . The Court argued that the employment situation and, in more general terms, living and working conditions in the Community are likely to be affected by the member states' policies with regard to labor from third countries, and therefore Article 118 allowed the Commission to adopt a binding decision in order to organize a consultation procedure (p. 357).

It should be noted, however, that the establishment of a limited consultative competence for the EU—for the purposes of implementing free movement and harmonizing immigration policies—did not take away from the fact that the prevailing arrangements of the time continued to be intergovernmental in nature. By voiding part of the Commission's decision, the ECJ—"the institution which had displayed a well-known eagerness about implied competence⁹ in other areas such as commercial and competition policies—felt it necessary to refrain from establishing such a competence in the area of immigration policy" (Ugur, p. 984). Although significant, the Commission's limited role as an "observer" or "consultant" at the intergovernmental proceedings cannot be taken as a full victory for supranationalism. As will be shown at a later stage in the thesis, it was only at the 1997 Amsterdam Summit that the EU's central institutions finally succeeded in winning increased

⁹ "Implied competence" is a legal term, referring to any ECJ interpretation of an EU statute that grants competence to the EU's central institutions despite the fact that a requirement of EU competence is not explicitly spelled out in the statute.

competence over the range of intergovernmental frameworks. Hence, at the time, it was the mode of intergovernmentalism (and thus the policies of exclusionism) which prevailed.

Philip provides us with a concrete definition of the difference between a highly limited EU competence, such as the powers of consultation within intergovernmental arrangements, versus full EU competence and jurisdiction:

Intergovernmental agreements between all the member states of the Community are . . . governed by international law, and do not use EC institutions for their interpretation or enforcement. Such agreements may however cover subjects that are within the legal competence of the Community but which member states prefer to deal with outside the EC institutional framework. Intergovernmental resolutions . . . have no standing under international or EC law (p. 175).

The AHIG, Spillover and the Persistence of the Security Panic

It cannot be denied, however, that despite the prevalence of intergovernmental arrangements there was a great deal of optimism within the EU's central institutions regarding the possibilities for a spillover brought about by the single market. Callovi characterizes this optimism by writing that:

In the mid-1980s, it seemed safe to sustain that national decisions regarding immigration from third countries had a bearing on the Community, that they had general implications for employment policy within the Community and, finally, that a joint response to a problem of common interest appeared to be feasible, including the Community's legal capacity to explore ways for a Community policy on migration. These developments coincided with an overall new spirit inspiring the construction of the European Community (p. 357).

Boosted by this new spirit, the EU's first ever intergovernmental organization devoted specifically to immigration concerns, the Ad Hoc Immigration Group (AHIG), was created in 1986. This organization "grew out of the work of the European Political Cooperation, the work of the Trevi Group, and an increasing appreciation that the creation of the Single European Market would throw up immigration issues which ministers and their officials could resolve intergovernmentally" (Philip, p. 175). The European Commission was given

a place at the AHIG table, but its role in the proceedings was left to be an ambiguous one. which Ugur has characterized as being a “broker” between disputing member states. And with such a weak institutional grounding, the eventual establishment of full EU competence over the AHIG did not look like a feasible goal at the time.

Philip disagrees, however, and in support of this disagreement he applies his spillover hypothesis to the creation of the AHIG by emphasizing the hypocrisy of Euro-skeptic member states in challenging the competence of the EU in the area of immigration while simultaneously making such competence necessary:

While outwardly denying in the 1980s that there was any need for an EC-wide immigration policy, governments such as the French and the British were laying the foundations for just such a policy, as evidenced in the creation of the ad hoc intergovernmental Working Group on Immigration in 1986. Despite the reluctance to fan the suspicions of those who oppose a deepening of the process of European integration, the governments of the member states have continued to inch their way towards an ever closer union of their immigration policies (p. 174).

In this respect, Philip sees the creation of the AHIG as launching the spillover effect into play, by harmonizing EU immigration policies and by necessarily giving the EU’s central institutions a role in this process, however limited. And the expansion of this role at the latest IGC—from the original consultative competence (a broker) to an initiatory¹⁰ competence backed by full ECJ jurisdiction and European Parliamentary review—shows that the member states do indeed appear to be “inching their way” towards full harmonization.

However, before accepting Philip’s conclusion that the AHIG paved the way for spillover, it should be kept in mind that the mandate of the AHIG was fundamentally representative of the ongoing obsession with security issues, reflecting the priority that was being placed at the time on the strengthening of the EU’s *external* borders, in order to keep pace with the reduction of internal borders. Although the AHIG was replaced—like much of the EU’s intergovernmental framework—by the third pillar of the Maastricht Treaty in 1992.

¹⁰ The term “initiator” refers to the fact that, after Amsterdam, the European Commission can now initiate independent proposals on immigration, whereas before they were granted only the right of “co-initiative” with the member states.

the mandate remains much the same today as it was in 1986, and continues to be focused upon security and external borders. The original AHIG mandate covered: 1) visa policy, including a common list of countries whose nationals would require visas to enter the EU¹¹; 2) improving external border controls and evaluating the implementation of internal controls; 3) aiding the implementation of free movement in a security-conscious way, which can be seen as a kind of "free movement with security" argument; and 4) the harmonization of political asylum policies, focusing, of course, on the elimination of asylum "abuse". Although this emphasis on external border controls--coupled with the ongoing exclusion of TCNs, of course--served to further the idea of Fortress Europe and direct the process of policy harmonization away from supranationalism and inclusionism, it cannot be denied that a new era of cooperation was appearing on the scene nonetheless. Indeed, Callovi points out the subtle long-term benefits of any cross-national cooperation, however exclusionist, by writing that "cooperation should not be conceived of solely in its repressive meaning, but also in its dynamic requirement to have Community regulations introduced that activate immigration policy" (p. 358). And because of the reduction of internal borders that was implied by the Single Europe Act, the late 1980s witnessed a widespread recognition by the EU's member states, however reluctantly, that they were in the immigration game together:

Emphasizing the connections between border controls and immigration, the AHIG insisted that each member state consider measures necessary to compensate for potential security risks to the other members should its own external border policies fail. Thus if member states stopped relying on *national* controls for their internal security, effective compensatory mechanisms for tightening up controls at the Community's external borders would be required (Papademetriou, pp. 28-29).

¹¹ This inclusion of visa policy in the AHIG's mandate was an important step, because visa policy is the only policy area over which the central institutions were granted full competence by the Maastricht Treaty.

The Schengen Group as a Model for the Single Europe

If we are focusing on the issue of free movement, however, there is an additional intergovernmental policy framework, this being the 1985 Schengen Agreement¹², which is even more important to the harmonization process than the AHIG, and which has normally been thought of as the most important achievement yet regarding the goal of free movement. The Schengen Agreement was a joint statement of intent by a group of so-called "fast-track" member states (with more Euro-federalist records) which perceived the political difficulties that would lay in the path of the borderless Europe (coming primarily from the UK's vocal and influential Euro-skepticism) and thus sought to bypass these difficulties by voicing the intent to forge ahead on free movement outside of the EU framework, by dropping internal frontiers and harmonizing external security and law enforcement proceedings.

In this respect, a two-speed harmonization process was created, in which a core group of five countries (Germany, France and Benelux) attempted to push the agenda forward by implementing their own free movement zone. Despite the fact that this agreement was initially reached outside of the EU's institutional framework--although created by EU member states to implement EU goals--it has consistently played a key role in both the process of policy harmonization and the implementation of free movement, and Schengen was finally merged with the EU's institutional framework at the Amsterdam Summit.¹³ As Callovi writes, "the practical results achieved by the Schengen Group show that, once

¹² The Supplementary Schengen Convention, of 1990, spells out measures to implement the free movement goals stated of the original 1985 Agreement, including: "dismantling internal border controls on the movement of goods and persons (irrespective of nationality) between contracting parties; establishment of common external borders; adoption of a common visa policy for short- and long-term stays by nationals of third countries; stronger internal controls (including procedures for the issuance of residence permits, a reporting mechanism for inadmissible aliens, and mutual cooperation and enforcement in criminal matters); and the creation of a common Schengen Information System (SIS) by January 1993" (Papademetriou, pp. 26-27).

¹³ A post-Amsterdam Council press release (June 18 of 1997) details the addition of Schengen to the EU, under the new Draft Treaty on European Union (the Amsterdam revision of Maastricht): "The European Council invites the Council, on the basis of the agreed texts, to take as soon as possible the appropriate measures with a view to ensuring the full functioning of the Treaty as soon as it enters into force: as regards the Schengen Protocol, the adoption of certain measures for the implementing of the Schengen Protocol upon the entry into force of the Treaty and the integration of the Schengen Secretariat into the General Secretariat of the Council" (European Council, 1997).

agreement is reached on the objectives, the goal of abolishing border checks on individuals is politically feasible and the technical problems which have to be solved for that purpose in order to maintain the current level of security are not insurmountable" (p. 363).

For the past decade, most scholars have referred to the Schengen Agreement as a kind of "laboratory" or "microcosm" (Papademetriou) or a "trailblazer" (Convey and Kupiszewski) of free movement, since the intergovernmental framework created by Schengen has existed parallel to the EU's own single market and hence--despite the fact that it did not formally come into being for ten years (border controls were finally dropped in 1995)--Schengen served as a rough model for the EU's efforts to create the borderless Europe. In describing Schengen's status as a model, the European Parliament writes that: "as the Schengen Convention is considered the precursor of or a sort of testing ground for the creation of a European area without internal borders in which people can move freely. the Schengen gains are of capital importance for the extension of freedom of movement throughout the Community" (European Parliament, 1997b). Additionally, Schengen has served as a sort of warning to the broader EU process, by highlighting some of the difficulties that lay in the path of an EU-wide implementation of fully free movement.

The foremost of these difficulties was the continuing existence of delays in implementation, a problem that has consistently plagued the institutional mode of intergovernmentalism throughout the process of harmonization. Indeed, the fundamental optimism of the original 1985 Agreement--which, again, was only a statement of intent to implement free movement--proved to be premature, because the original five members missed the 1990 deadline that had been agreed upon for the elimination of internal frontiers (Papademetriou). And in the story of intergovernmental cooperation on immigration, missed deadlines have been one of the ongoing themes. Indeed, one of the central critiques of intergovernmental arrangements is that political difficulties in any one member state can hold up and potentially de-rail the entire process, collapsing or delaying the often delicate network of policy compromises in one fell swoop. A key example of this derailment, in the context of Schengen, came from the French government in 1995, when the accord was finally

due to be implemented. The French government, because of concern over the flow of "soft" drugs entering the country from the Netherlands, as well as being concerned about "the successes of the far-Right parties . . . decided to reintroduce internal border controls following their elimination" (Mitchell and Russell, p. 61). While the other signatories went ahead without the French, their withdrawal was rightly seen as a setback to the overall goal of EU-wide free movement, as well as an indicator of the difficulties ahead.

One indication of the political contentiousness and controversy over the issue--which has clearly contributed to the difficulties faced by intergovernmentalism through political and electoral pressure upon national-level policymakers--is provided by public opinion surveys on the issues of free movement and Schengen. A 1996 poll found that EU opinion towards the Schengen Agreements is divided between 43 % of EU nationals, who believe that the removal of border controls is "a good thing", and 40 % who think it is "a bad thing". In seven EU Member States (Belgium, Germany, Greece, Italy, Ireland and Portugal), opinion favors the results of Schengen's implementation. In eight others (Austria, Denmark, Finland, France, Great Britain, Luxembourg, the Netherlands and Sweden), public opinion is opposed to the dropping of internal frontiers. The most positive public attitudes towards the Schengen arrangements are found in Spain, where 62% think they are "a good idea", and the most negative public attitudes are in Finland, where this proportion drops to only 22 % (Europinion No 9, 1996).

From the substantial degree of opposition found in these mixed results, we can gain an understanding of why national policymakers have proceeded very gingerly in implementing free movement, and why, in Schengen's case, the provisions agreed upon in the 1985 Agreement were not formally put into place for another ten years. In fact, following the initial implementation difficulties after 1985, further formal action on Schengen did not take place until 1990, at which time the five original Schengen countries, with the addition of Italy, signed a "supplementary convention" to the original Agreement, that planned to drop internal borders by 1993. While the original 1985 Agreement can be seen more as an outline of general goals towards both: 1) reducing internal frontiers; and 2) compensating for the resulting "security gap" by strengthening external controls and cooperation, the 1990 Convention is much more detailed about

the kinds of external controls that were to be implemented, including both police and security co-operation—consisting of the right of pursuit across borders for police officers and the harmonization of laws on arms and drugs—as well as the establishment of a “Schengen Information System”¹⁴ which would allow security and law enforcement agencies to share data cross-nationally.

Schengen and the Harmonization of Border Controls

One salient parallel between the Schengen process and the overall single market/free movement process is the fact that the initially economic motivations of the single market eventually “spilled over” into the more “social” concerns of immigration. This happened with the Schengen process as well:

Initially the incentive for the conclusion of the 1985 Agreement was economic: it was assumed that the abolition of the border controls would ensure the free movement of the objects and increase mutual trade. Nevertheless, the priorities have shifted elsewhere: the 1990 Convention clearly concentrates on the free movement of persons instead of that of goods (Pulli, 1995).

A key example of this focus upon the free movement of persons (and hence the social concerns raised by immigration) is the fact that the Schengen states formally set out to harmonize visa and asylum policies.

In the Schengen context, the harmonization of asylum policy has primarily meant cross-national attempts to eliminate asylum “overlap”; that is, eliminating the possibility of multiple asylum applications by a TCN across more than one member state. Therefore, in the 1990 Convention the signatories agreed upon the procedural framework for determining the Schengen state responsible for the processing of an application for asylum.

¹⁴ The SIS is a “computerised management information system based in Strasbourg and designed to share police intelligence on criminals, refugees and illegal immigrants” (Mitchell and Russell, p. 60). The SIS also provides another example of EU/Schengen cross-over, due to the creation of the European Information System (EIS) which is modeled on the SIS and fulfills a similar function for the 15 member states as a whole.

“Responsibility for the examination of an application includes the obligation to determine the refugee status of the applicant in accordance with national law and in observance with the Geneva Convention on Refugees” (Pulli). In a practical sense, however, harmonization has meant the tightening of asylum policy, and a push towards exclusionism, since the rules for primary responsibility “lead to a reluctance of the Schengen States to receive third country nationals at all in order not to appear as alluring asylum countries for asylum seekers” (Pulli).

In the realm of visa policy, Schengen’s harmonization has meant that after the 1990 Convention, any TCN seeking to enter the Schengen zone is subject to visa arrangements common to all the signatories. The most important element of these arrangements is the existence of a “visa list” of third countries whose nationals require visas to enter Schengen space (approximately 160 countries at the present time). Additionally, these visa arrangements towards third countries can be changed only by common agreement. This harmonization has overlapped into the realm of procedure as well, since the common visas are to follow a uniform format, including the procedures for examining applications. A TCN who has been granted a visa to one of the Schengen states is entitled to free travel across the Schengen area. For this reason, the area of visas can be seen as a success for the implementation of free movement, although again, difficulties are raised by the existence of non-Schengen EU countries preferring to maintain their own controls.

Schengen and the EU: Conflicting Frameworks?

Indeed, the difficulties raised by the two-track single market have led to a great deal of legal ambiguity between Schengen and the EU. Pulli summarizes this ambiguity:

The relationship between the Schengen Agreements and the EC law can be seen as slightly unclear. The Schengen Agreements clearly recognise the authority of the Community. However, the Schengen Agreements deal mainly with the persons who aren’t nationals of the Schengen Member States and the European Court of Justice has stated that measures concerning the third country nationals are partly outside of the Community authority. On the other hand, in that way it is ensured that the Schengen Agreements do not contradict with the Community law (1995).

Because of the contradictions implied by the two-speed implementation of free movement, the parallel existence of Schengen and the single market has caused a great deal of concern among analysts, as many have interpreted the existence of overlapping agendas as a prime example of the functional inconsistencies that have often plagued the process of intergovernmentalism. As Convey and Kupiszewski point out:

There might seem to be some degree of anomaly or overlap . . . even though both are seeking to increase the freedom of movement . . . if both routes towards the same goal are implemented to the letter, a formally illegal internal EU boundary will arise--one which would in the present situation separate Denmark, Ireland and the United Kingdom . . . from the rest (p. 942).

It appears that these concerns have been unfounded, however, due to the supremacy of EU law over Schengen. "This means that there can be no incompatibility between Schengen and Union provisions; on the contrary, Schengen and Union policy share a continuity and a common logic, especially as . . . the Convention requires the text to be adapted to changes in Community law intended to create an area without internal frontiers" (European Parliament, 1997b). Despite the supremacy of EU law as applied to Schengen, the EU's central institutions (before winning competence over Schengen at Amsterdam) had always reiterated their concerns over the difficulties presented by Schengen's coexistence with the single market, and had consistently lobbied for bringing Schengen under EU competence. Indeed, the European Parliament argued that Schengen "can and must be replaced by Community regulations valid for the whole Union" (1997b) because of the problems raised by a lack of parliamentary and democratic control over the Schengen process.

Although the goal of extending Schengen to the *whole* Union was not reached in its entirety, since the two-track borderless Europe continues to exist--with Denmark, Ireland and the UK (the EU's traditional free movement skeptics) being granted "opt-outs" on the frontier-free zone--the fact that the bulk of the EU's member states have now signed on to Schengen means that, in effect, Schengen has "joined" the EU for all intents and purposes. The two frameworks can no longer be thought of as separate, and thus the entrance of "Schengenland" into the EU can be seen as a key indicator of spillover, and hence a

potentially major victory for supranationalism. Once again, however, it is Ugur's Fortress Europe hypothesis that can remind us of the shortcomings in any apparent victory for harmonization:

Because of the emphasis on exclusion of unwanted foreigners and the lumping together of immigrants with terrorism and drug trafficking, let alone dissipating the nontransparent/nondivisible aspects of the issue of immigration, Schengen has only contributed to the stigmatization of immigrants. As a result, its contribution to the development of an integrated and open EU immigration policy can be seen mainly in negative terms (p. 987).

The Pre-Spillover Supranationalist Retreat

And indeed, when we go back to the pre-Maastricht evolution of intergovernmentalism, it cannot be denied that the progress towards supranationalism seemed to be a long way off, despite the gains made by Schengen's formation. "Notwithstanding the enhanced attention to immigration issues, coordination (much less harmonization) of member state actions at the Community level was a far more elusive goal" (Papademetriou, p. 29). The central institutions of the EU at this time realized that the emphasis of the progress being made was focused upon the implementation of free movement for EU nationals, including the tightening of external controls vis-à-vis TCNs. Although the Commission held the inclusion of TCNs into the benefits of free movement as a fundamental long-term goal, Papademetriou has shown that the Commission perceived that the climate at the time was not right for pushing such a strategy (linkage), and thus "opted for a narrower program aimed at the presumably more attainable objectives of harmonizing visa, asylum and border policies. In this way, the Commission was able to sidestep fundamental questions of legal doctrine in favor of more practical matters" (Papademetriou, p. 29). In analyzing this "retreat" by the EU's central institutions (especially the Commission), we can see the decision to put off action on TCN inclusion as a key victory for Ugur's Fortress Europe. Without an active EU push towards inclusion and supranationalism, the more Euro-skeptic and exclusionist forces among the member states were free to dictate the agenda.

The logic behind this national supremacy is the principle of subsidiarity, a key concept for scholars of European unification, which implies that policy should be formulated and implemented at the "lowest" level possible, and should be transferred to the European level only when required by the goal of maximum efficiency:

The adoption by Community institutions of . . . a common strategy, setting up the margins of maneuver for member states, would be in accordance with the principle of 'subsidiarity' whereby the Community acts when the set objectives can be reached more effectively at its level than at that of the single member states. Such safeguards would not prevent the taking into account of particular domestic situations (Callovi, p. 368).

Subsidiarity has been a key argument applied by the Euro-skeptic member states across all fields of EU policy, including immigration, and the Commission, in its late 1980s retreat, acknowledged the applicability of subsidiarity to the immigration issue by proposing that EU legislation in the area of immigration "be applied only to those cases where legal security and uniformity provided by Community law constitute the best instrument to achieve the desired goal" (Papademetriou, p. 29). Although this acknowledgment was a realistic assessment of the limitations facing supranationalism and inclusionism at the time (around 1988), the retreat also implied that "the long-term goal of harmonizing the immigration policies . . . was to take a back seat to the more immediate goal of eliminating border controls . . . by 1992" (Papademetriou, p. 30). In a 1988 Communication, the Commission outlined the nature of its retreat from TCN issues:

While it could be a long-term objective to reach a common policy on the rules governing the status and right of residence of third-country nationals within the Community, the Commission believes that the abolition of frontiers for all persons can and should be achieved on the basis of a more limited program, which could include in particular a common visa policy, a common policy on refugees, and the strengthening of controls at the Community's external borders" (European Commission, cited in Callovi, p. 360).

This retreat was not a total one, however, since the Commission also expressed the longer-term goals of supranationalism by emphasizing the future possibility of an expanded EU competence under the functional logic of subsidiarity:

The Commission would not, however, wish to rule out the possibility of coming forward with additional proposals, particularly if it becomes clear that intergovernmental cooperation is not the most efficient or cost-effective method, or if a consensus were to emerge among member states that further harmonization and coordination would be desirable (European Commission, 1988, cited in Callovi, p. 360).

The Coordinators' Group and the Necessity of Further Harmonization

As the 1980s were coming to a close, and the pace of European unification began to quicken, the EU's central institutions perceived that even the more immediate goal of eliminating border controls "was threatened by inadequate communication and cooperation among the numerous 'free movement' groups" such as the AHIG, Trevi, and EPC (Papademetriou, p. 31). It became readily apparent that the institutional complexities of the issue required some over-arching "co-ordination", and it was for this reason that the Coordinators' Group on the Free Movement of Persons was formed in 1988, with the goal of aiding the implementation of free movement by providing an institutional framework (albeit an intergovernmental one) within which member states could air and overcome their differences. Most of the recommendations that were put forth towards this goal stuck with the common theme of control and security; that is, the goals that had already been articulated by the Schengen process, such as the harmonization of visa and asylum policies.

In analyzing this late 1980s progress towards the harmonization of restrictions, it should not be forgotten that the security panic over asylum seekers was reaching a fever pitch, as the dire predictions of swarming ex-communist refugees grabbed headlines across the continent. In fact, this redoubled security panic created a kind of paradox for immigration policymaking, since the new security threats made cooperation both more difficult and yet more necessary (Papademetriou). Although member states had become more obsessed with national sovereignty and border controls at this time, it was also clear that the immediate goal of harmonizing these border controls was crucial to the political stability of Western Europe, and hence crucial to the protection of national sovereignty itself. Since the national "interests" of all member states coincided quite readily on security issues, this provided room for increasingly "systematic" discussion of harmonization

(Papademetriou). Indeed, the intergovernmental frameworks of the time placed prime emphasis on keeping national sovereignty as intact as possible, through the protection of borders. One example of this is the substantial progress made by Trevi in the late 1980s, in cooperating on cross-national information sharing and law enforcement (Papademetriou). Mitchell and Russell frame the sovereignty-based logic of security cooperation by arguing that “the partial loss of legal sovereignty is the price that must be paid for maintaining a measure of state autonomy in the face of mounting migration pressures” (p. 58).

The first concrete step towards harmonizing asylum policies within the EU itself came in the form of the AHIG’s 1990 Dublin Convention¹⁵, which was signed by all member states including the UK (a rare accomplishment) by 1991. The Dublin Convention is a clear example of the Schengen process leading the way for the EU as a whole, since Dublin essentially incorporates the asylum harmonization that was agreed upon by the 1990 Schengen Convention; that is, the common provisions for eliminating asylum “abuse” by determining which state is responsible for examining an application. Indeed, Dublin goes a long way towards the institutionalization of restrictionism, which Ugur outlines by analyzing the restrictionist implications of Dublin’s provisions for determining which state is responsible for asylum review:

Member states with an already large number of political refugees or the ones more easily accessible will have to examine more asylum applications than others. Consequently, countries like the United Kingdom, which scores well on this count, will be in an advantageous situation: countries with liberal asylum legislation, like Germany, are put under pressure to tighten its asylum policies (p. 988).

Furthermore, the Dublin Convention also provides perhaps the most clear-cut example of the shortcomings of intergovernmentalism’s institutional and procedural logic, since its actual ratification was held up for approximately seven years, and did not finally occur until the latest Amsterdam Summit. During these seven years, the fact that the Dutch

¹⁵ The full name of the Dublin Convention is the “Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community”.

government argued for full ECJ jurisdiction over Dublin, despite the opposition of the more Euro-skeptical member states, highlighted a key facet of the overall debate over institutional control of immigration policy. The Netherlands (always a key proponent of Euro-federalism) has consistently argued for the placement of intergovernmental frameworks under EU law. in order to provide legal recourse for human rights concerns (such as the cases of rejected asylum applications) in addition to strengthening the democratic control and hence the legitimacy of immigration policy. The fact that Dublin went unratified for such a long period gave much fuel to the harmonization skeptics, who argued that full ECJ jurisdiction over asylum was unlikely to occur. "A combination of the culture of secrecy that permeates EC/EU deliberations (energizing those who opposed the measure). numerous legal challenges, and concerns over the absence of legal recourse at the Community level for rejected asylum claimants has prevented the Convention from coming into effect" (Papademetriou, p. 39). However, the final ratification of Dublin at the Amsterdam Summit¹⁶ seems to have revealed these arguments to be premature.

In terms of free movement and the crossing of external borders, another piece of procedural progress came into being with the 1990 External Frontiers Convention (EFC), which sought to define the EU's external borders, agree upon the conditions for the crossing of these borders, and lay down the conditions under which TCNs in one EU country could travel to another *without a visa*. This last piece of cooperation is particularly important, because it can be seen as the first concrete step towards a frontier-free space for TCNs, and hence towards the eventual full implementation of free movement (Papademetriou). One simple fact took away from the impact of this provision, however, and this was the failure of the EFC to give TCNs the right of *settlement* in any EU country, which is a basic condition of fully free movement in the eyes of many of the EU's inclusionists. In the end, the EFC was never fully ratified by the member states, primarily because of an ongoing

¹⁶ The European Council mentioned Dublin's ratification in its post-Amsterdam press release: "The European Council welcomes the completion of the ratification procedures of the Convention determining the State responsible for examining applications of asylum lodged in one of the Member States of the European Community (Dublin Convention), thus allowing the entry into force of this convention by 1 September 1997" (European Council, 1997).

dispute between Spain and the UK over Gibraltar.¹⁷ "Spain feels that it should have a say in controlling persons entering the EC through Gibraltar, while the United Kingdom and other member states argue that the border between Spain and Gibraltar is an internal frontier that should not be subject to the External Frontiers Convention" (Papademetriou, p. 47). And since the ever Euro-skeptical UK has adamantly refused to allow disputes such as this to go before the ECJ, the disagreements over external frontiers have held up the overall process of harmonization:

Failure to resolve the issues surrounding the convention has dealt a severe blow to the decision-making sequence . . . Following agreement on the External Frontiers . . . member states were supposed to shift their focus to the abolition of internal frontier controls. In the absence of closure on these conventions, the goal of creating internal-border-free space remains unattainable (Papademetriou, p. 47).

The Pre-Maastricht 1990s: A Renewal of the Linkage Strategy

Throughout the late 1980s, the triumphs made by security-obsessed intergovernmentalism, coupled with the Commission's retreat from its linkage approach, meant that any resolution on the TCN issue remained a long way off. Indeed, even the prevailing general public sentiment towards TCNs--bolstered by the high unemployment rates of the time--matched the exclusionism of the continent's policy elites:

Responses to a question on whether the rights of immigrants should be restricted or extended show that the proportion of those in favor of

¹⁷ In one of the more bizarre examples of the complexity that characterizes the EU's intergovernmental decision-making procedures, the Gibraltar dispute was finally "solved" at the Amsterdam Summit, when the British government was apparently "tricked" into giving up its opposition to Spanish control over the Gibraltar border, through the addition (unbeknownst to the British) of a unanimity requirement on Britain's "opt-ins" into immigration policy. This unanimity requirement means that Spain, as a full participant, can veto any British opt-in if it objects to the British position on the issue at hand. Once it became clear to the UK what it had unwittingly agreed to, *The Times of London* wrote that "British officials promised they would have the majority procedure reinstated and an angry Mr. Cook said last month that the issue was important to Britain. But this week Britain backed down, accepting the unanimity requirement. The Government yesterday played down the significance of the concession, saying it applied to the 'unlikely event' that Britain should want to join the system. However, Spanish officials were delighted. 'It's clear Tony Blair did not grasp what had been agreed,' a diplomat said (*The Times of London*, July 30, 1997).

restriction increased from 18 percent to 33 percent while the proportion of those in favor of extension declined from 30 percent to 19 percent between 1988 and 1991 . . . the support for a Community framework dealing with the rights of third country immigrants was only 39 percent. This compares poorly with the 51 percent who were in favor of either purely national or intergovernmental policymaking in this area (Commission of the EU, cited in Ugur, pp. 977-978).

It is because of these formidable political obstacles that the EU's strategy of linking the harmonization of external controls to the integration of legally resident TCNs showed few signs of progress. There was one sign of hope at the 1989 Strasbourg European Summit when 11 of the 12 member states at the time (minus the UK, predictably) adopted a Community Charter of the Fundamental Social Rights of Workers which declares the importance of guaranteeing "that workers from non-member countries . . . who are legally resident in a Member State . . . are able to enjoy, as regards their living and working conditions, treatment comparable to . . . nationals of the Member State concerned" (Community Charter, cited in Niessen, 1992, p. 679). However, while this rhetoric of rights sounded impressive, the reality of the situation was only a marginal degree of progress gained by yet another impotent "statement of intent" with very little real backing in the way of institutional competence or legal grounding.

Thus, the situation at the time looked fairly bleak for the advocates of equal treatment and free movement for Europe's legally-resident TCNs. It was clear that the establishment of such equal treatment and free movement ultimately depended on the EU winning competence over harmonization, and as Papademetriou writes, "Measurable substantive (as opposed to procedural) progress toward formal policy harmonization has been rare--even among like-minded states. If anything, one detects a retreat even from intergovernmental principles, as most EC member states have reasserted national prerogatives" (p. 38). These late-1980s setbacks for harmonization occurred despite a plethora of positive statements regarding openness and inclusion. "Optimistic rhetoric such as this typically suggested far greater progress than had been or realistically could be achieved, given the sovereignty-impinging nature of immigration initiatives" (Papademetriou, p. 39).

As the struggle for a harmonized immigration policy entered a new decade, at the 1990 Rome Summit the Coordinators' Group presented two reports which were to evaluate the prospects and the obstacles of harmonization. The first report dealt with the issue of societal integration of legally-resident TCNs, and argued that any EU immigration policy towards TCNs should include "the granting of permanent residence, equal opportunities in jobs, education, vocational training and housing, easier access to naturalization, and tolerance between communities especially by the establishment of structures for dialogue" (Commission, 1990, cited in Papademetriou, p. 45). The second report, which came from the security-minded policymakers of the AHIG, looked at the issue of TCN entry and movement within EU space, and argued that the control of existing and future migratory flows was crucial to the goal of societal integration for TCNs. It is within these two documents that the EU's linkage strategy is clearly outlined, since the push for full inclusion of TCNs is matched with a call for external restrictions. "Not surprisingly, the Coordinators called for joint efforts to: (a) control pressures for new admission and (b) facilitate the social and labor market integration of legally resident TCNs and their families" (Papademetriou, p. 45). These proposals were accompanied by a call for further policy harmonization, stressing the need for member states to think of the "European dimension," but the Coordinators' Group also admitted that the goal of full harmonization was a long-term one, and that the best that could be hoped for in the meantime was the less radical ideal of "co-ordination" (Papademetriou).

Although the Coordinators' proposal for the linkage of TCN inclusion with strengthened external controls was a fairly ambitious one at the time--given the prevailing member state recalcitrance against TCN inclusion and against the entrance of the EU's central institutions into the TCN field--Papademetriou has shown that "it was not particularly politically persuasive when measured in terms of Council receptivity to its recommendations" (p. 49). The 1990 Rome Council only expressed "regret" over the delays in the implementation of free movement, and simply "urged" the ratification of the EFC to strengthen external frontiers in preparation for the borderless Europe. Papademetriou

summarizes the complexities of the political climate which prevented the Coordinators' recommendations from being taken seriously:

A frequently overlooked impediment to the Coordinators' progress may have been their own ambivalence about the viability of full freedom of movement goals. Such underlying ambivalence frustrates the results-oriented analyst. On one level, one detects a clearer and more direct affirmation of basic principles, apparent gains in momentum, definite gains in productivity, and much more integrated thinking across the full array of Article 8a¹⁸ issues--in sum, a certain dynamism that typically sets the stage for real progress. On another level, one continues to observe lack of closure on several critical issues--a function, perhaps, of the member states' (and the entire advanced industrial world's) intensifying political, social, and cultural introspection. Indeed, it seems clear that EC member states were simply not yet willing to commit to tangible forms of coordination (p. 50).

¹⁸ Article 8a, again, is the section of the Single European Act which sets up the single market, by giving the EU the legislative power and jurisdiction to implement the four fundamental freedoms, including free movement of persons (see footnote #8).

4. THE MAASTRICHT TREATY AND THE PERSISTENCE OF INTERGOVERNMENTALISM

The 1990-91 IGC and the Commission's Communications

This member state unwillingness to commit to increased harmonization, however, was put to the political test by the process which led up to the eventual implementation of the Maastricht Treaty. The pre-Maastricht Intergovernmental Conference on Political Union, which was charged with hearing proposed revisions to the Rome Treaty, provided a new forum in which the forces of supranationalism could air their concerns over perceived shortcomings in the nature and extent of harmonization achieved thus far:

On the one hand, the expected elimination of barriers to the free movement of goods and services by the end of 1992 fueled aspirations for even broader European integration, including free movement of persons. On the other hand, the EC's overlapping and inefficient intergovernmental structures, and the almost pathological secrecy of their deliberations, had become targets of intensifying criticism (Papademetriou, p. 51).

The only political solution to these dilemmas, in the eyes of the supranationalist critics, was the establishment of full EU competence over immigration issues. Accordingly, the Benelux countries, with the support of the Commission, proposed radical amendments to the Rome Treaty which would bring all the various intergovernmental groupings into the EU's institutional framework. This proposal, of course, was fiercely opposed by the usual Euro-skeptic nations (UK, Denmark, Ireland), who made clear their preference to stick with the existing intergovernmental frameworks. This intergovernmentalist opposition was incorporated into a compromise treaty submitted by the government of Luxembourg, which held the Presidency of the Council of Ministers during the 1991 IGC, and which sought to assuage the Euro-skeptic worries by creating a three-pillar institutional framework under which immigration issues would fall under the Treaty's third pillar, this being an "umbrella" grouping of all existing intergovernmental frameworks dealing with justice and home affairs policy. Although the Dutch government, assuming the Council Presidency in mid-1991, attempted to reverse this apparent victory for intergovernmentalism with a new draft treaty

that would bring the intergovernmental pillars under full EU competence. the Dutch draft did not have sufficient support to overcome the Luxembourg compromise. It was clear that intergovernmentalism was going to survive, post-Maastricht, in the form of the pillar structure (Papademetriou).

The European Commission, however, continued to work on its own independent proposals for full competence over harmonization, despite the apparent setbacks to this goal in the form of the member state unwillingness to give up on intergovernmentalism. Callovi summarizes the Commission's hopes that it could salvage a victory for supranationalism:

It was thought . . . that in the context of the European Council of Maastricht, Treaty commitment to 'formal and actual harmonization' could take place regarding policies on asylum, immigration and aliens, and activities currently carried on in an intergovernmental framework could be brought into the sphere of the Union. The Commission prepared, as a contribution, two communications (p. 364).

These communications, authored by the Commission in late 1991, attempted to settle the growing policy conflict between supranationalism and intergovernmentalism by moving "beyond the legal debates as to which authorities should be competent to take such measures" (European Commission, 1991, p. 13, cited in Papademetriou, pp. 53-54). Part of this new attempt at cooperation was the Commission's decision to limit its calls for harmonization to the areas of control and restrictions, a familiar strategy for appeasing member state objections. In the communications, the Commission urged the ratification of the Dublin Convention, along with other measures of asylum policy harmonization. in order to meet the widely-shared goals of streamlining asylum claims and eliminating asylum abuse. Once again, however, this Commission initiative towards a harmonization of *restrictions* can be seen as an attempt to create spillover, by laying the foundation for the eventual widening of EU competence over immigration policy should the political climate become more favorable:

The Commission's proposals drew criticism from some immigrant advocates for their restrictive and exclusionary tone. However, one would be remiss to overlook the more forward-looking aspect of the October 1991 Communications. Despite its prior assertion that such sensitive issue areas as border controls and admission criteria should be settled through the

intergovernmental process, the Commission may have endorsed harmonization in certain 'control' areas as a means of introducing, and eventually expanding, Community competence into immigration and asylum areas (Papademetriou, p. 54).

As Papademetriou also makes clear, it would have been politically unrealistic, given the asylum-related security panic of the time period, to have proposed further harmonization in any areas not related to control and restriction. Any such proposal "might have only served to isolate the Commission further" (p. 55).

The 1991 Maastricht Summit and the AHIG's Action Plan

It was primarily because of this renewed push by the Commission towards further harmonization (albeit a fundamentally restrictionist brand of harmonization), as outlined in their 1991 Communications, that a process of further harmonization-related political momentum was launched into play. The most important step in this process was the AHIG's submission of an "Action Plan" to the 1991 European Summit in Maastricht. Indeed, this Action Plan took into account much of the Commission's 1991 Communications, by stressing the need for harmonization across all areas of immigration policy, including matters of TCN integration. In fact, the Action Plan openly called into question the effectiveness of nationally-based TCN policies, and thus recommended the eventual harmonization of employment policies and political rights for legally-resident TCNs. Papademetriou underlines the impact of this recommendation:

The importance of these and other statements in the report cannot be over-emphasized. They are a formal acknowledgment by an intergovernmental body of high-level member state officials that *strictly national policies* could not provide adequate responses to the Community-wide challenges of immigration and asylum. Policy harmonization was thus set up as a prerequisite to progress on these issues (Papademetriou, p. 56).

Despite the emerging consensus towards the desirability of harmonization that was emerging at the time, however, the AHIG's Action Plan can also be seen as a short-term setback to the

goals of the Commission, since it recommended the maintenance of intergovernmentalism in three of the five policy areas to be harmonized:

According to the Action Plan, harmonization of foreign worker recruitment, cooperation on external border control, and granting of some equal rights to non-EU nationals residing in the EU are to be dealt with within intergovernmental procedures. The EU will be involved in the remaining two areas: the increased mobility of EU nationals and the negotiating of conventions with countries of emigration (Ugur, p. 989).

And it is here where the Fortress Europe distinction again confronted the harmonization process, because of the Action Plan's clear line separating EU competence in external relations and intra-EU migration on the one hand, and TCN policy on the other. As Ugur reminds us, the maintenance of intergovernmental structures vis-à-vis TCNs has continually translated into policies of exclusionism. For this reason, Fortress Europe was very much alive and well going into the Maastricht process, despite all of the optimistic rhetoric of a "new era."

Fortress Europe in the 90s: Nationality, Divisibility and Transparency

Accordingly, before proceeding to the re-shuffling of the harmonization game that took place under the Maastricht Treaty, we should first review the consolidation of Fortress Europe that took place in the period leading up to Maastricht's ratification. By reviewing this entrenchment of intergovernmentalism and exclusion, we can establish the factors responsible for the relative success and ease of the implementation of free movement for the EU's nationals, when compared with the seemingly inexorable political difficulties that have continued to block the post-Maastricht attempts at TCN inclusion. To carry out this analytical task, a deeper look at Ugur's Fortress Europe hypothesis provides us with some illuminating answers. As mentioned earlier, Ugur's perspective draws a linkage between the free movement vs. exclusion question and the supranationalism vs. intergovernmentalism question, by asking: "why is it the case that EU member states have agreed to a highly liberal intra-EU migration policy based on delegation of authority while insisting on strict intergovernmentalism and exclusion in the area of non-EU immigration?" (p. 967). Up to this point in the analysis, it has been shown that during the single market's implementation

throughout the 1980s, intergovernmentalism was the prevailing institutional mode of immigration policymaking, while exclusion was the prevailing policy approach towards TCNs. While Philip's spillover hypothesis does not deny the existence of these developments, he does argue that they are only temporary, and that "immigration policy is set to become more and more of an EU affair as the consequence of greater economic interdependence and the shared perceptions of common threatening external pressures work themselves through" (p. 188). The logical end-point of this process would be full EU competence over immigration, and implied in the concept of full EU competence (or "delegation of authority" as Ugur terms it) is a stronger institutional grounding for the Commission's linkage strategy, with the aim of TCN inclusion and societal integration. But Philip's optimism is a perspective that looks highly questionable when viewed in the context of the late 1980s, since there were only minimal challenges to the prevailing approaches of intergovernmentalism and exclusion. And it is Ugur's analysis that best allows us to understand the political factors that served to entrench these approaches.

Ugur begins his exploration of the free movement vs. exclusion question by arguing for a broad analytical perspective. He claims that most of the previous analysis of EU immigration policymaking had been overly-state centric--only considering factors related to the political elite as explanatory variables. Ugur instead reminds us of the usefulness of "opening" the narrow focus on state actors, to include the important variables of societal political pressure. "Once this is done, it can be seen that the exclusionist stance of the immigration policy and the essentially intergovernmental nature of the policymaking are due to an implicit contract between states and constituents implied by the concepts of nationality and citizenship" (p. 964). It is this nationality-based contract, also referred to as the nationality principle--which is drawn up by political elites in response to societal pressure--that has paved the way for a relatively non-controversial policy of free movement for EU nationals.

Although the traditional state-centric approach, according to Ugur, has been proven quite valid for understanding the *evolution* of present-day immigration policy, since it

predicts exclusionism and “loose intergovernmental arrangements”—based upon the logic of national sovereignty and national interests—it is the society-centric approach that points out, quite rightly: “recent developments in the area of international human rights as well as the emergence of regional rules on immigration are factors which limit the freedom of the state to pursue immigration policies based on exclusionary discretion” (p. 966). For these reasons, it is the society-centric approach that can best understand the distinctions between intra-EU free movement and TCN exclusion. However, the society-centric approach on its own is also inadequate, since it cannot explain the fact that such international and societal pressure has “been ineffective in changing the perceptions of the receiving countries about the desirability of international arrangements with binding rules” (p. 968). In other words, a focus upon state actors allows us to understand the prevalence of intergovernmentalism and its accompanying doctrine of exclusionism, and a focus upon societal pressures allows us to understand the development of an intra-EU migration policy that is both supranational (under EU competence) and inclusionist (across all EU nationalities):

While the state-centric approach may explain the reluctance of EU member states to delegate authority to the Commission and the exclusionist stance of their policies vis-à-vis third country immigration, the society-centric approach can rectify the former’s failure in explaining the integrated policymaking with respect to intra-EU migration by focusing on the societal factors that curtail the ability of the member states to assume go-it-alone attitudes (pp. 968-969).

Fundamental to the Fortress Europe hypothesis is a deep-rooted skepticism over the degree to which EU nationality can be eventually de-linked from the privilege of free movement. Not only does this pessimism fundamentally contradict the concept of spillover, as mentioned earlier, but it also stands in direct contradiction to another perspective, advanced by Heisler (1992), which draws upon “institutional political sociology” to assess the prospects for TCN inclusion. Heisler posits a different brand of optimism from the spillover hypothesis, by arguing that the insider-outsider divide will essentially solve itself, given time, since the “major issues stem from historical factors and are time-dependent” (p.

609).¹⁹ Heisler does admit the daunting fact that “buying such time while redressing the public tendency to scapegoat immigrants as the most visible sources of difference . . . is a very difficult task” (p. 610), and it is the persistence of this formidable political obstacle which makes it clear that Heisler’s analysis falls somewhat short, since there is a certain amount of over-simplification involved in the broad historical logic of his argument. Indeed, Heisler’s approach thoroughly ignores the stark distinction between the societal *acceptance* of intra-EU immigration that has occurred as compared to the prevailing hostility towards TCNs. For this reason, it seems clear that Ugur’s objection to Heisler’s argument is a valid one, in that “time and social change cannot be relied upon . . . because the existing social/political arrangements would create and reinforce vested interests favoring the maintenance of the closed system” (p. 968).

In seeking to understand the factors that prevent the opening of this closed system, Ugur proposes two explanatory factors: 1) the nature of immigration as a policy issue; and 2) the level of centrifugal societal tendencies that confront national policymakers. Ugur’s concept of centrifugal societal tendencies is a fairly complex one, which he defines as “societal assertiveness against state/government authority” and which “can be observed in the form of ‘exiting’ the established legal/social order through radical dissent, capital flight, emigration, tax avoidance or general disobedience” (p. 969). Although this category of Ugur’s is perhaps too broad, since it lumps together phenomena as incongruous as capital exports and right-wing violence, it nevertheless is a useful analytical device for understanding state/society relations in the context of immigration. In the face of these “centrifugal” sentiments towards the immigration issue—whether the sentiments are inclusionist or exclusionist in nature—the only practical option that is available to European policymakers is to “approximate” (harmonize) their policies “to dampen the demonstration

¹⁹ Heisler therefore posits “time and social change” as the crucial factors in the struggle for TCN inclusion: “It took from two to four generations, in some cases longer, to construct democratic welfare state regimes in Western Europe. Their institutionalization is not yet complete. Reopening the social contracts embodied in those regimes in order to accommodate immigrants would require cognitive and institutional arrangements that . . . require much time—certainly several generations” (pp. 609-610).

effect and consequently the attractiveness of exit” (p. 969). Thus, for the purposes of our analysis, we can predict the nature of a converging EU immigration policy (on the continuum of exclusionism/inclusionism) by looking at the effects of Ugur’s centrifugal societal tendencies:

While liberal immigration policies can be seen as a convergent response aimed at legitimating the political regimes through high levels of economic growth and prosperity, the convergence towards restriction can be interpreted as a means of achieving the same objective by appeasing xenophobic sentiments (p. 970).

Moving on the other factor, the nature of the policy issue, Ugur writes that “what is involved here is the extent to which the policy issue is amenable to the construction of package deals and compromises between EU governments” (p. 970). In other words, the more transparent and divisible the policy issue, the easier it becomes to carry out cross-national harmonization. “Without such transparency/divisibility, the parties perceive of the cooperation process as a zero-sum game either because cost/benefit analysis is based on nontransparent criteria or because the nondivisibility of the issue makes it difficult to construct package deals based on trade-offs” (p. 970). It is at this point where the security panic enters the picture, because Ugur argues that immigration has been rendered nontransparent and nondivisible because of its perceived linkages with issues of national security and sovereignty.

Ugur draws upon the work of Hollifield (1992) to explain the nondivisibility of immigration by looking at its politicization in the present-day European context. This cross-national politicization is due to the linkages that have been drawn between the issue of immigration and the issue of *citizenship*, which are absent in the traditional “nations of immigration” (Australia, Canada, New Zealand and the United States), where the immigration debate does not enter into the touchy realm of “national interests” with the same political intensity that has been witnessed in the present-day European context. Based upon this information, Ugur concludes that the implication of immigration’s politicization in the European context “has been to make the immigration issue in Europe nondivisible—a feature that makes it possible to present parochial claims as national interest” (p. 972).

The transparency issue, on the other hand, is based upon the non-technical conceptions of *identity* in European societies. The work of Layton-Henry (1992) is utilized here, to show that immigration:

is perceived by societal forces as a threat to established visions of identity and social integrity. Such perceptions make the immigration issue nontransparent and therefore the policy debate is forced to move away from transparent cost-benefit analysis towards nontransparent claims and counterclaims involving nonquantifiable symbolic/cultural values (p. 973).

Although the development and application of these concepts (centrifugal societal tendencies, transparency/divisibility) have allowed Ugur to put forth a groundbreaking perspective on the TCN/free movement issue, it is unfortunate that his explanatory factors are not bolstered with concrete examples. This particular shortcoming, however, is one that is common to most research on the harmonization debate, since the broad focus upon EU-level factors and processes can lead to (for research purposes) the neglect of specific national inputs into the policy realm. Since Ugur's conceptions are drawn from the realm of national politics, we must take them at face value, as there is obviously not sufficient time or space to adequately test his hypotheses in all of the EU's 15 member states.

Fortress Europe and TCN Exclusion

Leaving these objections aside, therefore, we can now present Ugur's central hypotheses, in light of his conceptual framework described above. The Fortress Europe hypothesis, as applied to the harmonization issue, contains two interrelated points: 1) the institutional mode of intra-EU migration policymaking will continue to be supranationalism, and "the stance of the policy will be *inclusive* as the nontransparency/nondivisibility of the policy issue is reduced by delinking intra-EU migration from a narrowly defined concept of nationality"; and 2) immigration policy towards TCNs "will tend to be characterized by intergovernmental procedures and *exclusionism* because of the maintenance of the linkage between non-EU immigration and nationality" (p. 973; emphasis added). Furthermore, Ugur (in his only mention of the competing perspective) explicitly contrasts these two facets of the

Fortress Europe hypothesis with Philip's spillover effect, which Ugur criticizes for positing "a quasiautomatic process of integration because of interpolicy linkages that render the completion of the initial integrative step (intra-EU migration) impossible without integration of further policy areas (such as third country immigration, asylum policies, etc.)" (p. 973).

An inherent aspect of these "interpolicy linkages" proposed by the spillover hypothesis is the aforementioned linkage strategy that the Commission has pursued in the name of TCN inclusion. While Philip's argument leads us to conclude that linkage will gather momentum as the single market gains momentum—and as the EU's central institutions succeed in winning increased competence—Ugur's conclusion regarding linkage is that the strategy, while a logical one, is doomed to failure because of the nationality principle as well as the nontransparency/nondivisibility of TCN immigration as compared to intra-EU free movement:

Intra-EU migration is made transparent/divisible by creating an 'insider group' of EU nationals who are entitled to privileges within a European social space that exclude an 'outsider group' of third country nationals. Looked at from this perspective, it can be then seen that the intergovernmental/exclusionist stance against third country immigrants is then both a necessary condition for and a result of free movement on the basis of nationality. The recent surge of exclusionist policies must be seen in the context of an ongoing interaction between the tendency of the European political elites to resort to blame-avoidance in the face of rising unemployment and a faltering welfare state, as well as the rising constituent assertiveness reclaiming the privileges associated with nationality (pp. 973-974).

Although Ugur's conclusions leave little hope for the linkage strategy, with its accompanying goal of TCN inclusion, he does in the end concede that the eventual inclusion of Europe's legally-resident TCNs (such as Germany's non-citizen guestworkers)—as opposed to the massive obstacles blocking inclusion of *new* TCN immigrants—is not as remote a possibility as one might deduce from the Fortress Europe hypothesis:

There may be . . . some scope for partial policy integration and inclusion with respect to existing third country immigrants as a result of legitimization concerns at both national and Union levels. This positive development, however, will be conditional on the consolidation of

exclusionist measures--determined mostly within intergovernmental frameworks--against potential immigrants (p. 974).

In other words, there may yet be room within Fortress Europe for new members, because of the enormous political pressure (what Ugur refers to as "legitimation concerns") placed upon the nations which use *jus sanguinis* citizenship models (such as Germany and Austria), forcing them to extend the benefits of nationality to at least the children of first-generation legally-resident TCNs. However, according to Ugur, this progressive step towards harmonization of citizenship policies would be conditional upon further restrictions being placed upon new inflows of migrants. The implications of this conditional linkage are that: 1) legally-resident TCNs gain rights and privileges at the expense of new TCNs; and 2) intergovernmentalism will continue to be the prevailing institutional mode vis-à-vis external immigration policy. But what factors could overcome this linkage, by promoting supranationalism and unconditional TCN inclusion? If we are to discard Heisler's hypothesis that "time and social change" can provide remedies, there is only one theoretical realm left to draw upon for a reserve of optimism, this being Philip's spillover hypothesis. Only the spillover effect that is emphasized by this hypothesis can secure the unconditional inclusion of TCNs by strengthening the institutional and legal foundations for the EU's central institutions to pursue their linkage strategy of TCN inclusion.

As outlined earlier, the spillover hypothesis of Philip sees two areas in which hope can be found for an inclusionist and supranational process of harmonization. The first of these is "the need for the Community to resolve issues usually well outside its reach in order to deliver the single market promise". The second area of spillover is "the slow, albeit reluctant, association of the EC institutions with more and more issues (visa policy, family reunification and . . . migration policy) which national governments had previously dealt with separately or intergovernmentally" (p. 187). Although these twin processes of spillover have their origins in the mid-1980s--with the Commission's 1985 Guidelines for a Community Policy on Migration and the subsequent Single European Act--it was not until the 1992

Maastricht treaty that the EU's central institutions gained the increased degree of institutional strength that would launch the spillover effect into full swing.

Maastricht and the Pillar Structure

Before accepting the conclusion that Maastricht gave a vital boost to the spillover effect, however, it should be reiterated that the concrete institutional impact of the Maastricht Treaty was minimal, as far as its limited reorganization of immigration-related policy frameworks. Because the Dutch proposal to bring all intergovernmental frameworks under EU competence was scrapped at the 1991 IGC, the proposal which was finally accepted for incorporation into the Union structure ended up being the Luxembourg compromise, with its two separate pillars for intergovernmental cooperation: the second pillar of foreign and security policy, and the third pillar of justice and home affairs policy.

However, amidst the continuing persistence of intergovernmentalism, there have always been "signs of hope" for supranationalism, and the Maastricht Treaty's pillar structure is no exception. "Despite its intergovernmental character, the third pillar anticipates more common strategy on immigration policy" (Papademetriou, p. 59). This proposed common strategy is outlined in Title VI of the Treaty, which contains four key articles, under the umbrella of justice and home affairs policy, that fundamentally shape the EU's post-Maastricht immigration policy. Article K.1 defines the categories of policymaking, which are divided into nine areas: drugs, fraud, civil law, criminal law, customs, police cooperation, political asylum, border controls and TCN immigration. This last policy area, TCN immigration, is a broad category which includes:

a) Conditions of entry and movement by nationals of third countries into the territory of member states, b) conditions of residence by nationals of third countries in the territory of member states, including family reunion and access to employment and c) combating unauthorized immigration, residence and work by nationals of third countries in the territory of member states (Niessen, 1992, p. 682).

It should be obvious by now--from the linkages drawn earlier between immigration policy and the security panic--that Article K.1's lumping together of immigration with security and

law enforcement matters was a concession to the more security-minded member states, assuaging their worries about appearing "soft" on immigration to their constituents.

The next important Title VI article for immigration policy, Article K.3, is a crucial one for the advocates of supranationalism because it creates the mechanism by which the EU's central institutions are granted limited competence over immigration matters. This established competence comprises the right of "co-initiative" for the Commission to make policy proposals, as well as entrenching a "consultation and collaboration" procedure for intergovernmental/EU decision making (Papademetriou, p. 60). Furthermore, Article K.3 also makes room for bringing immigration policy under EU law, by stating that "the Council may elect to grant the European Court of Justice jurisdiction to interpret and arbitrate disputes arising from community policies (European Communities, 1992, p. 132, cited in Papademetriou, p. 61).

Article K.4 creates the actual institutional structure of the third pillar, by replacing the aforementioned 1988 Coordinators' Group on the Free Movement of Persons--which was a pre-Maastricht attempt to bring the various intergovernmental organizations under one institutional umbrella--with the so-called "K.4 Committee". This Committee is made up of one senior official from each member state, plus a representative from the Commission. Although the K.4 Committee has the same essential task as the previous Coordinators' Group, that is, to provide an over-arching institutional framework, the K.4 Committee's institutional position is a strengthened one:

Like the Coordinators' Group it replaces, the K.4 Committee is designed to coordinate the numerous *ad hoc* bodies and processes in the immigration area, but unlike the Coordinators' Group it also has 'political' authority over them . . . the ability not only to propose solutions but also to intervene, where necessary, to resolve differences on immigration matters" (Papademetriou, pp. 76-77).

Finally, Article K.9 of Maastricht Title VI is an especially important milestone for the spillover process, since it provides an institutional mechanism for a kind of "pillar transference", whereby full competence over K.1's immigration policy categories can be eventually be granted to the EU's central institutions. The existence of this "bridge

provision" (European Parliament, 1997c) shows that intergovernmentalism was not as entrenched in the Maastricht framework as one might conclude from a brief glance at the pillar structure. "The Treaty's procedural provisions for the possible transfer of certain issue areas to the Community's competence raised expectations that a comprehensive common strategy in these policy realms could be achieved" (Papademetriou, p. 61).

Callovi has identified three elements of Maastricht which signal the birth of limited supranationalism. He refers to these three factors as the "building blocks" of Maastricht's immigration policy framework. The first building block, visa policy, is the one immigration-related area that was placed under the first pillar, meaning that the EU's central institutions are granted *full* competence under Maastricht. In the area of visa policy, this competence refers to the determination of countries whose nationals need a visa to enter EU territory, and the creation of a universal EU format for these common visas (European Parliament, 1997c). While the policy area of visas is a fairly non-controversial--perhaps even marginal--issue, it can be seen as a kind of vanguard for EU competence over other areas, and hence a key starting point for spillover.

Callovi's second building block is found within Article K.3, and the Commission's stated ability to initiate proposals on immigration, "with a view to coordinating the action of the member states" (p. 371). While the right of co-initiative is certainly not equal to full competence, as the institutional mode remains intergovernmental, EU law does not apply, and the European Parliament has no powers of review (only powers of consultation), this granting of limited initiative to the Commission is another opening for spillover.

The third building block is in the area of social policy, also an important area of spillover, as mentioned earlier by Philip. With regards to legally-resident TCNs, Maastricht adopts the Community Charter of the Fundamental Social Rights of Workers that had been agreed upon by 11 of the 12 member states at the 1989 Strasbourg Summit. This Charter, under Maastricht, is annexed to a section entitled "Protocol on Social Policy", and represents legal recognition of limited EU competence in the area of TCN policy. Article 2, paragraph 3 of the Charter "lists several areas where the Council will act unanimously on a proposal

from the Commission, and, among others, it mentions 'conditions of employment for third country nationals legally residing in Community territory'" (p. 371).

Fortress Europe in Spillover's Clothing

So what is to be made of these formal and apparently substantive moves toward at least a limited degree of EU competence over immigration policy? At the time, optimism was rampant, and many analysts felt that the spillover effect was inevitable. "The Maastricht Treaty offers one, among several, indications that immigration policy is set to become more and more of an EU affair as the consequence of greater economic interdependence and the shared perceptions of common threatening external pressures work themselves through" (Philip, p. 188). Some scholars, writing just after the Maastricht's ratification, even went so far as to argue that spillover would soon render Fortress Europe a thing of the past. Callovi writes that the Maastricht Treaty has provided:

. . . new institutional capacity of the Community to act in a strengthened juridical framework . . . Although the outlines of the emerging context of political decision-making are still blurred, it may nonetheless be sustained that the Community will not be a self-contained and inward-looking fortress, if only because of its commitments to respect basic human rights (family reunion and humanitarian factors will be valid reasons for immigration, but so probably will employment factors, albeit via different channels from those of the past) (p. 365).

Additionally, part and parcel of this Maastricht-era spillover optimism was a perception that new hope existed for the Commission's linkage strategy towards TCNs, since Article K.1's harmonization of restrictions was seen as opening the way for further TCN inclusion:

If closer agreement between the member states in applying policies on access will mean that operations designed to reduce illegal immigration to the minimum will be increasingly coordinated, as a counterbalance there might be more openings for the right to seek employment throughout the Community territory for third-country nationals allowed permanent residence in a member state. The Community cannot just drop some of the citizens which it has allowed in, for a tense climate would be the ideal breeding ground for racism and xenophobia (Callovi, p. 365).

While it cannot be denied that there is a definite logic to the spillover-based optimism of Callovi's Maastricht-based critiques of Fortress Europe, it is apparent now that he was perhaps too caught up in the optimistic rhetoric of the 1992-93 period. Indeed, the subsequent loss of momentum experienced by the European unification process shed many doubts upon the ability of the EU to carry out all of the sweeping goals proposed at the Maastricht Summit. "The European public was far more ambivalent about the direction taken by Brussels than had previously been assumed" (Papademetriou, p. 62). Therefore, when Callovi writes that the EU "cannot just drop some of the citizens which it has allowed in," he is perhaps forgetting the implications of the fact that legally-resident TCNs are not, in fact, *citizens* of the EU at all. These "denizens" of the EU are completely at the mercy of the policies undertaken by their national governments. While they may possess certain baseline societal membership rights,²⁰ such as housing, employment and social security, the institutional and legal control over citizenship and naturalization policies has remained exclusively *national*, throughout the harmonization process.

Indeed, citizenship is the one area in which member states have consistently refused to give up *any* degree of competence, and thus is the one area which is most important for the maintenance of Fortress Europe (Ugur's "nationality principle") and the exclusion of TCNs from the privileges of free movement. The anti-Fortress Europe arguments for inclusion are persuasive, and have a functional as well as a normative logic:

Should not the social dimension of the internal market without frontiers and a common labor market imply the right for every citizen living legitimately in the Community territory to seek employment anywhere in the Community, particularly if they are unemployed and vacancies exist in another member state? The obstacles are not technical . . . but exclusively political. Will not firms' competitiveness in a free economic and trade area be threatened if third-country labor does not enjoy, in all member states, equality of treatment with national labor? The establishment of a Community-wide market in services and, particularly, common rules providing for open and fair conditions of competition to cover the major part of public procurement will certainly increase the number of contracts with

²⁰ The nature and context of these "post-national" TCN rights is best outlined by Soysal in her 1994 *Limits of Citizenship*.

non-nationally based firms employing third country nationals" (Callovi, p. 368).

To introduce Union citizenship is a good thing to do: it must, however, be followed by concrete steps leading to the equality of treatment of all those legally residing in the member states (Niessen, p. 680).

However, despite the inherent logic articulated here, it cannot be denied that no matter how persuasive these arguments have been--and whether they are put forth by policy analysts, by the central institutions of the EU, or by NGOs (Niessen was writing as head of the highly vocal Churches' Committee for Migrants in Europe)--they have fallen on deaf ears where some of the more exclusionist member states are concerned. The fact that the Maastricht Treaty's TCN policies are limited only to the area of economic rights, such as working conditions, implies that "more general topics linked to 'integration' and living conditions, such as housing, education, health, equality of social rights and opportunities" are left to national control, and do not fall under Maastricht's scope of harmonization. Therefore, despite all of the hopeful indicators for future spillover, we can conclude that Fortress Europe remained alive and well after 1992:

As has so often been the case, performance did not live up to promise. After pre-Summit hype and post-Summit euphoria subsided, Europe before and after Maastricht was virtually indistinguishable with respect to immigration matters. In fact, one is hard-pressed to identify significant progress in either process or outcome on a broad array of long-standing issues as member states again favored national solutions to what are increasingly perceived to be *national* challenges (Papademetriou, pp. 61-62).

One additional indicator of a future opening for supranational initiatives should be mentioned, however. This is Maastricht's establishment of a new Intergovernmental Conference, to be convened in 1996, to continue working on the harmonization objectives laid out in the treaty. It is this IGC which completed its work in Amsterdam, and which seems to represent a significant step towards spillover, supranationalism and inclusion, albeit more than four long years after the Maastricht process was set in motion.

5. AMSTERDAM AND THE FAILURES OF THE PILLAR STRUCTURE

The Post-Maastricht Lull: Loss of Supranational Initiative

In the four years following Maastricht's ratification, very little was accomplished in the way of implementation, especially regarding the goals of TCN inclusion. The implementation of the TCN linkage strategy, of course, has always depended upon political initiatives by the European Commission and Parliament, as the key advocates of TCN inclusion at the European level. This strategy of pursuing a linkage--between immigration restrictions and TCN inclusion--also represents a broader linkage, for the purposes of our analysis, and this is the linkage between supranationalism and inclusionism. As long as the Commission and EP have pushed for supranational competence over immigration policy, the inclusion of Europe's legally-resident TCNs, under some form of European citizenship or common residence permit, has been a primary goal of this push. But the political difficulties experienced during and after the Maastricht ratification process, coupled with the institutional weakness of the EP under Maastricht (being given only powers of "consultation") meant that the EU's central institutions were essentially taken out of the fight:

The Commission--so often the Community's intellectual, political, and administrative motivator on such matters--and key member states experienced pronounced bureaucratic inertia on the immigration and asylum fronts as they became preoccupied with politically more pressing issues, such as the quagmire in former Yugoslavia, the deepening economic downturn . . . world trade negotiations, and their own electoral upheavals. Final closure on the two conventions that had preoccupied Europe most during the Single European Act period--the Dublin and External Frontiers Conventions--remained elusive (Papademetriou, p. 63).

In the absence of a supranational push for inclusion, the post-1992 agenda continued to focus upon security, restrictions and illegal immigration. The fact that very little harmonization was accomplished *even in these areas*, however, meant that in the four years between 1993 and 1997, the pillar structure of Maastricht proved its fundamental unworkability. The political difficulties surrounding the process of European unification cannot be blamed entirely for the failures to achieve increased policy harmonization, since some harmonization

was achieved in other policy areas, such as those related to economic and monetary Union. Thus, despite the Commission's continuing efforts to promote increased coordination and harmonization of immigration control issues, the list of failures under the pillar structure is an impressive one. The most important shortcoming, during these years, was the ongoing failure to ratify Dublin and the EFC, with the EFC being held up mainly by the UK/Spain Gibraltar dispute, and Dublin's ratification being blocked by the fact that:

Some member states were concerned that acceding to the Convention would imply *de facto* endorsement of another state's legal and regulatory asylum-adjudication mechanisms, and thus the possible dilution of national humanitarian and protection standards. Moreover, some states had already ratified various international refugee-protection and human-rights accords and were concerned that a blanket acceptance of the Convention's criteria would raise fundamental constitutional and legal issues for them (Papademetriou, p. 65).

The pillar structure's second harmonization failure, prior to 1997, was the absence of any substantive coordination in the area of anti-racism/anti-discrimination policy. Indeed, these years witnessed a high-profile boom of hate crimes, but very little in the way of corresponding EU-level action to address this dangerous phenomenon. One sign of progress did appear at the 1994 Corfu Summit, with the Council's establishment of a "Consultative Commission" that could promote "tolerance and understanding of foreigners" and propose measures "aimed at combating acts of racist and global violence" (European Council, 1994, cited in Papademetriou, p. 89). However, substantive progress did not match institutional progress, as the first proposal made by this Consultative Commission, a Joint Action on Racism and Xenophobia, was shot down by several UK objections, including "British sensitivity about outside interference with or criticism of its race relations record, and philosophical differences . . . that reflect the differing judicial and civil liberties traditions of the United Kingdom and those of other European member states" (Papademetriou, p. 90).

The third failure during the post-Maastricht years took place in the area of visa policy, when the member states could not reach agreement upon either the common "visa list" of third countries or upon the format for a universal EU visa. The Commission, exercising its

competence in the area of visa policy, prepared a list comprising 126 countries. However, the inclusion of several British Commonwealth countries on the list did not meet with the UK's approval, predictably. Also, Italy opposed the placement of Serbia and Montenegro on the list. Thus, once again, a final agreement was blocked by the objections of one or two member states. And the proposed format of the common visa suffered a similar fate when "Conservative 'Euro-skeptics' in the British Parliament persuaded Prime Minister Major . . . to delay agreement. The Tory 'rebels' likened the mutual recognition of visas to relaxing internal border controls--another move, in their view, toward the 'slippery slope' of establishing a federal Europe" (Papademetriou, p. 94).

The fourth failure came from a 1995 French effort to harmonize TCN policy, through a proposal to include TCNs in employment-related free movement by creating a common, EU-wide residence and work permit for legally-resident TCNs. However, the JHA Council--the third pillar intergovernmental body which oversees the work of the K.4 Committee--could not agree on the final text of the proposal (Papademetriou). And lastly, the fifth failure also stemmed from a French proposal during 1995, this one regarding illegal immigration:

The JHA Council . . . failed to approve a . . . proposal for a joint action to establish a common approach to illegal immigration and unauthorized employment. In this case, member states objected not so much to the proposal's contents as to the obligations they would incur because it was a 'joint action'. They did, however, agree to adopt it as a much less demanding 'recommendation' (Papademetriou, p. 95).

Because of the incredibly high expectations that were created by the Maastricht process, the subsequent failure to achieve even a minimal degree of substantive harmonization meant a renewed look at the desirability of intergovernmentalism. As Papademetriou phrased the common perception in 1996, "dissatisfaction with the Community's pillar structure is nearly universal" (p. 100). All advocates of closer cooperation and harmonization, whether arguing from an inclusionist or exclusionist position, came to realize that the complex institutional arrangements created by Maastricht were wholly inadequate to the task of a coherent process of policy harmonization. And it appears that these critiques of the pillar structure have finally hit their mark at the Amsterdam Summit. Before analyzing the ramifications of Amsterdam's institutional re-

shuffling, however—including the steps taken at the IGC to address the five failures mentioned above—it would be useful to break down the pre-Amsterdam critiques of the pillar structure into two primary theoretical areas. Like the aforementioned arguments for TCN inclusion, the supranationalist arguments against intergovernmentalism, in the post-Maastricht period, are made up of functional critiques and normative critiques.

Functional Critiques of Intergovernmentalism

Philip's spillover hypothesis has been labeled as a functionalist perspective, because it foresees the gradual expansion of EU competence over policy due to a "strong practical necessity . . . intergovernmental co-operation may be the member states' chosen method . . . but it has shown itself already to be slow, messy, halting and untransparent in its progress" (p. 188). So if we are dealing with such functionalist critiques of the intergovernmental pillar structure—that is, critiques of the effectiveness with which these structures operate in meeting the agreed-upon goals—then it would be helpful to re-introduce the crucial concept of subsidiarity, since this concept has been the most widely used criterion to evaluate all facets of EU policy along functional lines. Indeed, subsidiarity was the key argument employed by Maastricht's proponents of intergovernmentalism, who succeeded in implementing the pillar structure over EU objections, since the principle of subsidiarity holds that full competence should be transferred to the EU's central institutions *only when required by the goal of efficiency*.

Accordingly, the harmonization failures of the past four years mean that the logic of subsidiarity can now be applied *against* the pillar structure, since the goal of maximum efficiency has certainly not been met through the existing intergovernmental frameworks:

In hindsight, it is obvious to practitioners and observers alike that Union procedures will have to be streamlined further if the Community is to function with its increased membership. At a minimum, such streamlining must include rethinking the pillars structure and the multi-step procedures for channeling matters to the Union's decision-making bodies . . . and extending majority voting to more issue areas (Papademetriou, p. 100).

Indeed, it is Papademetriou's latter recommendation, the abandonment of the unanimity principle, which in the eyes of the EU's supranationalists is the most attainable functional improvement that can be worked towards. It should be fairly obvious to the reader that most of the post-Maastricht harmonization failures were due to the objections of only one or two recalcitrant member states, usually the UK. Although the UK has adamantly opposed the extension of majority voting to areas of immigration policy, it appears that this extension is a necessary requirement for further progress, especially in light of the EU's growing membership. With this requirement in mind, just prior to the Amsterdam IGC, the European Parliament included such a call for majority voting in their proposals to use K.9's bridge procedure to re-shuffle the existing institutional arrangements and thereby strengthen the EU competence over immigration:

The 'passerelle' procedure, provided for in Article K.9 of the TEU, should be applied in a more flexible way and should be extended to cover all the areas listed in Article K.1. Furthermore, the Council should act by a qualified majority instead of unanimously. Existing restrictions on the Commission's right of initiative and implementation should be removed. The roles of the Court of Justice, Court of Auditors and European Parliament should be strengthened, and the legislator should be able to adopt directives without unanimity being required (European Parliament, 1997c).

The Commission agreed with Parliament's conclusions on majority voting and the extension of competence, writing that "the unanimity rule generally paralyses the Council. It should be replaced by qualified majority voting. Parliament must be more closely involved and Commission should have the power of initiative in the fields concerned" (European Parliament, 1997c).

Normative Critiques of Intergovernmentalism

There is another, non-functional line of argument which has been used to promote supranational competence over all areas of EU immigration policy, and particularly over the inclusion of TCNs. This line of argument is made up of normative critiques of Maastricht's pillar structure specifically, and of intergovernmental policy arrangements in general. While these normative critiques have generally been secondary to the functional critiques in the

harmonization debate, as the functional critiques have gained increased legitimacy through their association with the widely-supported principle of subsidiarity, the normative critiques have in their own right been important rallying points for Euro-federalist forces in their push towards increased EU competence over Maastricht's immigration policy framework.

In the four years running up to the Amsterdam Summit, the normative critiques of the pillar structure focused mainly on issues of political legitimacy. Since the decision-making processes under the pillar structure were perceived by critics to be closed-door, secretive and *ad hoc* arrangements, without judicial review, and being made up largely of non-elected national officials, the legitimacy-based critiques that were put forth by Euro-federalists--such as the government of the Netherlands or the Churches' Committee for Migrants--addressed these perceptions by arguing for the necessity of increased institutional openness and democratic control. As the Churches' Committee phrased it, "the intergovernmental approach prevails over a community approach and democratic control over the decision-making process is still not satisfactorily arranged (Niessen, p. 683).

The supranational push to gain this necessary degree of democratic control can be further broken down into proposals for: 1) parliamentary review; and 2) judicial review of policies at the European level; that is, the establishment of full parliamentary review by the EP, which was only given powers of "consultation" under Maastricht, and the establishment of judicial review by the ECJ, which was not granted jurisdiction over immigration-related cases under the pillar structure. This granting of competence to the European Parliament would infuse new legitimacy into the policymaking process, since the elected officials of the EP would be directly accountable to Europe's citizens for debates and voting on immigration issues, while Europe's NGOs would be able to lobby the EP to ensure that the perspectives of their groups be taken into account. And the granting of judicial review to the ECJ would grant increased legitimacy to the EU's policy framework by providing a neutral arbitrator to effectively resolve disputes among member states and third parties, as well as providing a legal forum where grievances can be heard, such as those of asylum applicants wishing to make claims for human rights abuses. This would rectify the human rights situation as it

stood under the pillar structure, since there was no legal recourse for these kinds of cases. As Philip writes, in describing the normative shortcomings of intergovernmentalism:

The legitimacy of its activities in fields where individual civil liberties are at stake has been challenged by lawyers and parliamentarians both because the process is not transparent and almost impossible to subject to democratic control, and because so much executive discretion is brought into play in these policy areas that it is often difficult to subject the implementation of policy to due process of law (p. 188).

One problem, however—for the supporters of EU competence in advancing these normative critiques against the defenders of intergovernmentalism—has been the existence of similar legitimacy-based arguments that are often made *against* the EU's central institutions. These arguments, along with the sovereignty-based objections of such Euro-skeptical nations as the UK, have served to consolidate Euro-skeptical support for the continuation of the pillar structure. Indeed, accusations of aloofness, elitism and a lack of accountability have consistently been leveled at the "Eurocrats" in Brussels, and have done much to blunt the arguments for full EU competence over immigration policy:

There is a nearly universal impression that the EU bureaucracy—in both its policy-initiation and implementation functions—is a large part of the problem. Lack of openness and transparency characterize both process and product. The persistent tendency of European officials to overstate what has been, or can be, achieved only makes things worse. Typically, it results in the devaluation of actual achievements and contributes to skepticism about the effectiveness and value of the processes themselves. European institutions can ill-afford such reviews (Papademetriou, p. 110).

By this logic, if we are to acknowledge the supranationalist arguments that a culture of secrecy *does* happen to pervade the EU's intergovernmental decision-making procedures, then it is clear that the same can also be said about the proceedings of the European Council and its various committees, meaning that the EU's central institutions retain no normative high ground in the matter of legitimacy. It should be pointed out that the central institutions *have* made substantial progress towards their stated goal of creating a "citizen's Europe" in recent years, by bringing the average European more in touch with the goings-on in Brussels, but it cannot be denied that this problem—a kind of "democratic deficit"—still exists, and has provided an effective Euro-skeptic weapon for fighting off the central institutions' attempts

to gain full competence over policy. Accordingly, the normative-based arguments for EU competence have also included a call for increased openness at the EU level. Papademetriou phrases this call by writing that the EU's central institutions "must reconsider their bureaucratic tendencies and culture of secrecy, which probably have done more to harm Europe's image and to undermine the public's confidence in an affinity with 'Europe' than has any single event or decision" (p. 111). Supranationalists and immigrant advocates have made it clear that the only mechanisms which can overcome this problem are full democratic and judicial control of policymaking at the European level. And it is the proposed changes to the Maastricht Treaty, made at the Amsterdam Summit--that is, the shifting of immigration issues from the third to the first pillar--which can open the way for this control. As Niessen, of the Churches' Committee for Migrants, has written regarding this shift:

If these changes are adopted, the Parliament would be consulted, thus opening the floor for public debate. Another consequence is that the measures adopted by the Council of Ministers would be subject to judicial control by the European Court of Justice in Luxembourg. Both these issues of democratic and judicial control are very important for NGOs (Migration and Ethnic Relations Group for European Research, 1997).

Amsterdam, Enlargement and the Two-Speed Europe

On June 16th and 17th of 1997, the Intergovernmental Conference was held in Amsterdam, wherein representatives of the member states and central institutions made new harmonization proposals to pave the way for EU enlargement and a "Maastricht II" Treaty. During this conference, the Council reached full agreement on a new draft treaty, to be signed in October 1997, under which the EU's supranationalists (and hence the EU's immigration inclusionists) gained a key victory: it was agreed that immigration issues (the first six of Article K.1's "common interest areas") would be transferred from the third to the first pillar. By taking this step, over strong British objections, the Euro-federalist member states were able to grant full EU competence over immigration policy, meaning: 1) a right of sole initiative for the Commission; 2) a right of parliamentary oversight for the EP; and 3) jurisdiction for the ECJ (Migration News, 1997b).

Not only was this key victory for supranationalism finally achieved--full EU competence over immigration policy--but progress was also made in several other crucial policy areas which had been stalled for years under the pillar structure: namely, Schengen, Dublin and the issue of Racism and Xenophobia. On the latter issue, it was announced in June that after three years of Consultative Commission inaction, and a great deal of British opposition, the EP was finally able to win approval for its proposed European Monitoring Centre for Racism and Xenophobia. This Centre is an EU-level institution which will have two major roles under the new Treaty. The first of these will be to take stock of and evaluate racist and xenophobic phenomena in the EU, and to analyze their causes. The second role will be to formulate concrete and practical proposals to combat these phenomena (Migration and Ethnic Relations Group for European Research, 1997). Although the problems of racism and xenophobia are complex and have proven themselves difficult to solve, it cannot be denied that any action at the EU level, such as the roles carried out by the new Monitoring Centre, will be a step forward from the tradition of mere "recommendations" towards member state action, backed by very little institutional competence, that have emanated thus far from Brussels under the auspices of the Consultative Commission.

Furthermore, the ratification of the Dublin Convention on political asylum, after a protracted seven-year struggle over asylum harmonization and adequate guarantees for human rights protections at the European level, means that the EU will finally be able to implement common standards and procedures for the granting of political asylum hearings and asylum status. The transfer of immigration and asylum issues to the first pillar, under the new treaty, means that human rights are now guaranteed through a provision for ECJ review of cases. Indeed, it was this particular guarantee that allowed the ECJ's member-state defenders, such as the Netherlands, to finally withdraw their normative opposition to Dublin's ratification.

More significantly for the goal of free movement, however, is the fact that after seven years of failure to resolve member state disputes over the External Frontiers Convention--for a common policy on border controls--it was simply decided to incorporate the Schengen free-movement zone into the EU itself. This hurdle was cleared through the granting of opt-outs

for Britain, Ireland and Denmark, which have been the consistent free movement skeptics, blocking any attempt to implement a Schengen-like situation across the EU. Accordingly, this implementation will go ahead under the new Treaty, and any one of the three opt-out nations will "be entitled to exercise at its frontiers with other member-states such controls on persons seeking to enter . . . as it may consider necessary" (Migration News, 1997b).

At this point in time, therefore, we can begin to gain some perspective on the progress attained at Amsterdam by arguing that the (almost) EU-wide implementation of Schengen can be hailed as a major victory for the goal of free movement. Furthermore, the granting of EU competence over the implementation of this free movement can be hailed as a possibly major victory for the goal of TCN inclusion, since the Commission has stated its intention to pursue the linkage strategy under the new (and more favorable) arrangements, by pushing for a uniform TCN residence permit which would grant the right of intra-EU free movement across all participating member states. The very fact that some member states would not be participating, however, means that even this potential future victory cannot be seen as total.

Indeed, it is now safe to say that the process of a *two-speed* harmonization, which was begun in 1985 by the Schengen group of fast-track member states, has reached its logical conclusion, with an EU immigration policy that excludes certain key members from the proceedings. And as the EU enlarges to include several lower-income member states from Eastern Europe, it is doubtful that these new members would be allowed to join the free movement zone for many years, due to the same concerns that plagued the extension of free movement to Southern Europe during the EU's earlier waves of enlargement. Not only are the energies of the EU's central institutions usually too preoccupied during a period of "widening" to be able to effectively "deepen" this Union by extending free movement, but there have also been widespread security-based concerns about the ability of new members to police their borders and to adhere to EU-wide control standards. In the past, there has usually been a lag of seven to 10 years before nationals of new member states obtain full freedom of movement rights. Spanish workers, for example, have had full freedom of movement rights only since 1993 (Migration News, 1997c). So it is safe to assume that the

entry of any new member states into the free movement zone could be delayed until well in the next century. These developments mean that the process will continue to be a two-speed one, with only an elite "core group" of nations, their citizens, and possibly their legally-resident TCNs (conditional upon the success of the Commission's linkage strategy) participating in free movement. While such a two-tiered situation is not desirable for the advocates of a fully supranational, EU-wide single market, since it hinders the ability of the central institutions to govern the EU effectively and coherently as a whole, it is probably the best balance that can be achieved under the circumstances, due to the recalcitrance of the three opt-out nations, as well as to the widespread concerns, both security-related (border controls) and functional (preoccupation with enlargement of the Union), that have blocked free movement rights for the nationals of any new member states admitted to the EU.

One other setback should also be mentioned, since it casts significant doubt on the EU's ability to effectively harmonize policy under the new treaty. It was mentioned earlier that majority voting was one of the key proposals on the table that could effectively streamline and improve decision-making procedures under the pillar structure. While there was a great deal of support for the extension of majority voting and the abandonment of the unanimity principle at Amsterdam, this support was vetoed by a nervous German government. In fact, German Chancellor Kohl, under pressure from the governments of the German Länder, said that as a matter of "national duty and a piece of self-preservation," Germany would retain a veto over asylum policies by requiring that all EU decisions on asylum and immigration be decided by unanimous rather than a majority vote. And the main factor in this German recalcitrance was a domestic political factor, at the federal level, which illustrates the difficulty of reaching intergovernmental progress in a time of political uncertainty: the fact that "the state of Bavaria reportedly fears that coordinated EU immigration policies could grant third-country residents living legally in one EU country the same rights of movement as EU citizens" (Migration News, 1997b).

This last admission of Bavarian opposition to TCN inclusion, through that particular State's opposition to majority voting on immigration policy, is a highly revealing example of the politically influential nature of the exclusionist sentiments that have prevailed in EU

deliberations, throughout the unsteady evolution of policy harmonization. And it is because of the political strength of these sentiments, coming even from the normally Euro-federalist quarters of Germany, that the goal of TCN inclusion, despite the new victories for supranationalism gained in Amsterdam, does not look like a guaranteed success for the immediate future. This looming question mark for inclusion persists in spite of the fact that the EU's central institutions have renewed their pledge to push forward with the linkage strategy:

The aim is to develop a community approach which would allow binding rules on migration and asylum policies. The proposal also includes issues related to the right of third country nationals to work and to live in other EU countries (Migration and Ethnic Relations Group for European Research, 1997).

Indeed, despite Amsterdam's strengthened institutional grounding for the EU to pursue the linkage strategy and its goal of TCN inclusion, this right for TCNs to work and live in other EU countries has been derailed by the continuation of the unanimity principle for Council decision-making. As long as one member state exists that opposes the granting of full free movement rights to its legally-resident TCNs, the extension of free movement to all of the Union's denizens is a goal that will go unrealized. And until this goal is realized, it cannot really be said that the spillover effect has fully taken hold. It is clear from the evidence presented here that Philip has been consistently accurate in predicting the gradual extension of EU competence over more and more areas of immigration policy. Nevertheless, a truly "European" policy cannot be said to exist until: 1) all EU nations participate in such a policy; and 2) all EU residents participate in the benefits of such a policy (free movement). As long as the principle of exclusion, coupled with the overriding focus on security issues and border controls, is able to dictate the direction of harmonized policy, then the existence of Fortress Europe lingers on, albeit in a greatly weakened form. For these reasons, neither hypothesis can be recognized as being analytically "correct" in full. Although exclusionism continues to hold the upper hand where free movement is concerned, the recent victories for spillover at the Amsterdam Summit appear to have confirmed the long-term optimism of the spillover

hypothesis. The (possibly temporary) existence of a two-speed Europe is the only significant obstacle to this optimism, and even this shortcoming should not affect the eventual implementation of a fully borderless Europe within the EU's fast-track zone.

Conclusion

It has been shown, in the previous pages, that the ongoing evolution of a harmonized EU immigration policy has been an apparently inexorable process, despite the chaotic and controversial nature of the political debates and institutional battles that have characterized this process thus far. While the amount of progress made, until now, does not equate with the considerable amount of resources and attention devoted to the immigration issue (Papademetriou), there has been a substantial degree of harmonization achieved nonetheless, especially in light of the recent treaty revisions at Amsterdam.

This harmonization of immigration-related solutions was initially due to the convergence of immigration-related *problems* that had taken place across all European nations in the early 1970s. These converging problems, made up of migratory and political pressures, created a type of crisis situation in which European governments looked to each other for help, in the face of an apparently insurmountable common dilemma between migratory flows and exclusionist pressures. Initially, the cross-national attempts to address these problems were both intergovernmental and security-obsessed, reflecting the prevailing member state emphasis upon the concepts of national security, sovereignty and interests.

This emphasis began to weaken, however, as the European single market came on the scene, along with the entrance of a new political force into the harmonization arena: this being the central institutions of the EU. In granting some competence to these central institutions, in order to most effectively implement free movement and ensure minimal social protections for all of Europe's residents, the member states set the stage for a protracted battle over institutional competence. And from the beginning, the supranationalist forces in this battle--the central institutions and their member state allies--took the inclusion of legally-resident TCNs as a fundamental condition of their competence over immigration policy, relying upon both functional and normative arguments to meet this goal. This focus on

inclusion has been labeled here as the linkage strategy, in which the supranationalists have appeased the forces of Euro-skepticism by allowing restrictionist policies of immigration control in exchange for the gradual inclusion of legally-resident TCNs. This strategy has yielded few concrete results so far, but has been given additional hope by the renewed spillover effect set in motion at the Amsterdam Summit.

Until this spillover can give a vital boost to the linkage strategy, however, the Fortress Europe distinction--between EU nationals and legally-resident TCNs--continues to divide the single market and its free movement privileges into an "in" group and an "out" group, despite all manner of normative and functional arguments to the contrary. The exclusion of TCNs has been able to persevere, despite these objections, because of the nationality principle, which allows each member state to grant free movement privileges only to its own citizens, and also because of the nontransparency and nondivisibility of immigration as a political issue on the European scene, which politically insulates member state governments from inclusionist arguments. For these reasons, the linkage strategy being pursued by the EU's central institutions, despite the renewed political and legal grounding for these institutions after Amsterdam, will be ineffective in the short term for winning equal treatment of legally-resident TCNs. Although supranationalism appears to have prevailed over intergovernmentalism in the competence battle, the accompanying inclusionism which was supposed to be advanced in the event of an EU victory will be blocked by the continuation of institutional holdovers from the intergovernmental era--such as the principle of unanimity voting on the Council--to the delight of the more Euro-skeptical member states. In the short term, therefore, the picture does not look much better for Europe's legally-resident TCNs. Their only hope is that some additional spillover can result from the successful integration of Schengen and the EU, as well as from an ultimately successful conclusion of the process of EU enlargement, so that the future implementation of fully free movement and a truly borderless Europe is able to allay the security-related fears of the Euro-skeptics.

It should be clear to the reader that both the Fortress Europe and the spillover hypotheses have been analytically correct at various times in the process of European

unification. During this process, there has been a kind of "stop-and-start" momentum whereby optimistic rhetoric will go hand-in-hand with some substantive changes. only to be bogged down by internal wrangling and external political difficulties. Indeed, this tradition is common to the entire range of EU policy areas, including economic and monetary union. and is not unique to immigration policy alone. When the single market first received a boost from Jacques Delors and the mid-1980s initiatives of Euro-federalism, it appeared that a process of spillover was imminent, and that immigration would soon become a European-level affair. The security panic of the late 1980s proved these predictions wrong, however, and the EU's legally-resident TCNs became the primary victims of this panic, excluded from all manner of social and political rights, including those at the European level, such as free movement across national borders.

The Maastricht Treaty of 1992 seemed at the time to be another key indicator of spillover, and yet the subsequent entrenchment of the pillar structure did much to paralyze the harmonization process and to consolidate the exclusionism and intergovernmentalism of Fortress Europe. Again, there seemed to be a loss of the supranational momentum that Philip admits is so crucial to the spillover effect. As Papademetriou phrased it in 1996, however, Maastricht was not the first time "that Europe has faced a break in momentum. It is quite possible that with a new vision, scaled-back expectations, and rethought--and refined--roles for its institutions, Europe's integration agenda can move forward again" (p. 103). In the wake of the treaty revisions made at Amsterdam, it appears that just such a process of moving forward is taking place again. The Amsterdam European Summit provided EU policymakers with a new vision, scaled-back expectations and new roles for the central institutions. Because of this new momentum, it seems safe to say that the spillover effect is on the move again. But only the right combination of several factors--national politics, EU enlargement, monetary union, migratory pressures and the results of the most recent policy harmonization--will be able to carry this newest spillover effect into the 21st Century. If the spillover process can indeed prove to be a lasting development, then perhaps the end, after all, is finally in sight for the exclusionism and isolation of an embattled Fortress Europe. Much hangs in the balance for the EU's immigrants, policymakers and general public alike.

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