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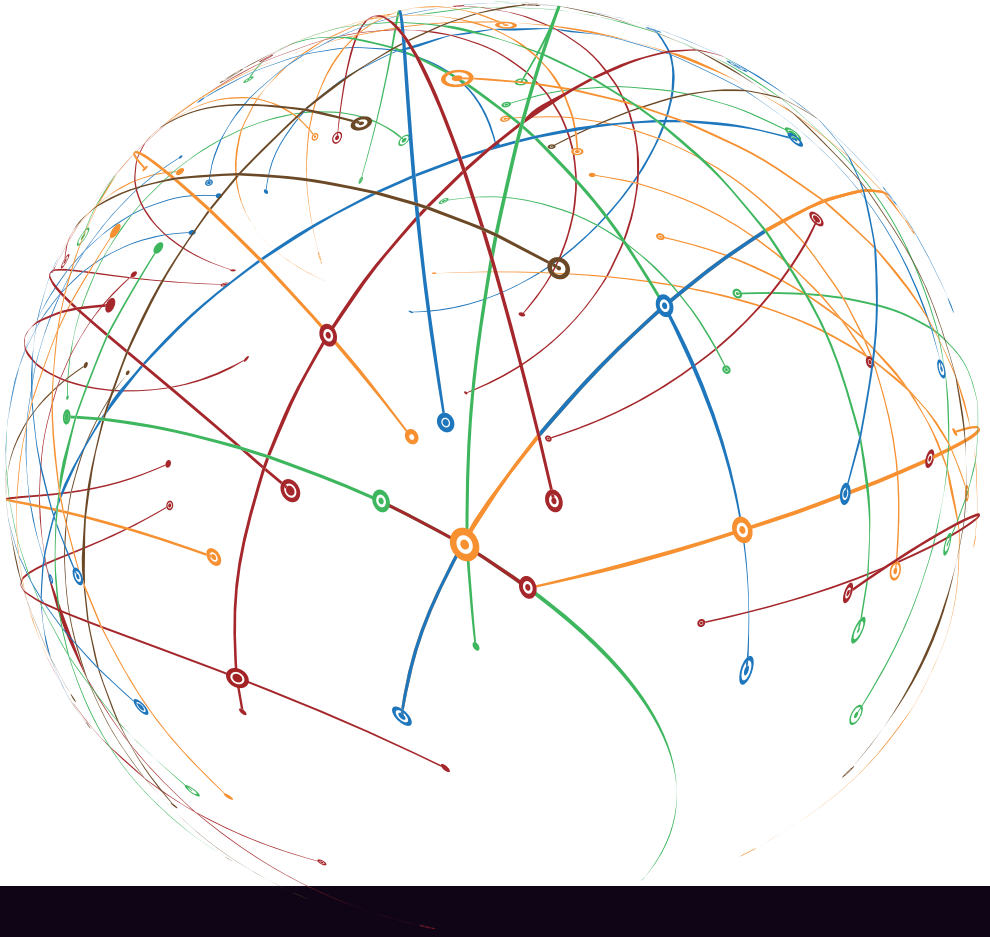
MIGRATION, FREE MOVEMENT AND REGIONAL INTEGRATION



Social Science Studies Series

Migration, Free Movement and Regional Integration

Edited by
Sonja Nita, Antoine Pécoud, Philippe De Lombaerde,
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Foreword

In 2015, more than 244 million people resided in a country other than their country of birth; many migrated within their region or towards high-income OECD countries. Within this broader context, where migration is acknowledged as an ever-crucial parameter for development, this publication addresses the issue of the free movement of people within regional spaces.

The scenario of free movement, its ethical underpinnings and its human rights, economic and social implications were explored in the UNESCO publication "Migration without Borders. Essays on the Free Movement of People". Its success prompted UNESCO and UNU-CRIS to embark on an initial three-year research project (2008-2011) focusing on regional organizations, which was updated and expanded in the following years. This focus was driven by two interrelated considerations: the global trend of regional integration and its impact through economic liberalization and market enlargement on human mobility; and the potential role and comparative advantage of regional organizations in addressing migration challenges.

This book brings together a host of well-known scholars to analyse, from a cross-disciplinary perspective, the different approaches to free movement used by some 30 regional organizations. It also presents a comparative review of the various measures taken and obstacles encountered by these organizations to highlight current and emerging trends.

A dominant feature in regional arrangements, irrespective of the economic, 'political-security' and socio-cultural context, is the framing of free movement agreements around potential economic gains for citizens or a perceived shared regional identity. The latter is premised on common interests with regard to specific migration challenges and/or the mutual trust that is forged by a common past. Another important characteristic is the influence of domestic politics on the implementation of regional priorities. Concerns over border security and fears of political backlash in contexts marked by socio-economic inequalities may affect the commitment to arrangements seeking to further liberalize free movement and result in divergences from agreed regional standards. The aforementioned obstacles, the severity of which differs from region to region, have had significant consequences on the rights of migrants and most notably among the most disadvantaged.

Against the backdrop of intensifying international efforts to reinforce migration-related commitments and relevant implementation frameworks, we hope that the findings presented in this publication will prove relevant beyond the research community, to decision-makers, policy-makers and civil society actors in Member States and organizations.

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Migration, Free Movement and Regional Integration: Introduction

Sonja Nita[1], Antoine Pécoud[2], Paul de Guchteneire[3], Philippe De Lombaerde[4], Kate Neyts[5] and Joshua Gartland[6]

This volume is the outcome of a research project launched by UNESCO and conducted in cooperation with the United Nations University Institute on Comparative Regional Integration Studies (UNU-CRIS) to better understand the approach of regional organizations towards the free movement of people. The project builds on a previous research initiative and publication by UNESCO entitled *Migration without Borders*, which investigates the ethical, human rights, economic and social implications of the free movement of people (Pécoud and de Guchteneire, 2007). The migration without borders (MWB) scenario draws its inspiration from the Universal Declaration of Human Rights, which states that 'Everyone has the right to leave any country, including his own, and return to his country' (Art. 13-2). As the right to emigrate is however not complemented by an equivalent right to immigrate, this points to the necessity of a more comprehensive right to mobility. It furthermore fits into the broader notion of globalization, where not only goods, capital and information circulate widely, but also people.

While free movement seems difficult to achieve at the global level, it may be a more realistic policy option at the regional (supranational) level. Throughout the world, several regional organizations have already adopted concrete policies to liberalize the movement of people within the territories of their Member States. As will be shown later in this volume, this can take various forms, from the simple removal of visa-requirements to facilitate intra-regional travel to comprehensive free movement rights in a common economic space. The European Union (EU) is probably the most prominent example of a free movement area, but measures to facilitate intra-regional movement have likewise been adopted in other world regions.

The research leading to this publication started in 2009 and was finalized in 2014. In the first phase, a worldwide study of free movement attitudes and policies

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among regional organizations was undertaken. Around thirty regional organizations covering all world regions were contacted in order to better understand their approach towards free movement, as well as assess any measures taken so far, their successes and achievements, major obstacles and possible future steps. Building upon this first mapping exercise, selected regional experts were approached to conduct an in-depth analysis of the actual situation of free movement agreements and identify major hindrances to regional free movement. This working method is also reflected in the structure of the present volume. After a general introduction into the thematic, the findings of the mapping exercise, authored by Sonja Nita, are presented first. This will lay the groundwork for the subsequent expert chapters, which cover selected regional organizations and their approach towards free movement in Africa (Aurelia Segatti, Lama Kabbanji and John Oucho), the Americas (Isabel Studer, Carla Gallinati and Natalia Gavazzo, and Mercedes Eguiguren) and the Caribbean (Floyd Morris), Asia-Pacific (Sophie Nonnenmacher, Hugo Graeme and Richard Bedford), Europe (Philippe De Bruycker), the post-Soviet space (Irina Molodikova) and the Gulf (Zahra Babar). A concluding chapter will subsequently follow this.

Global and regional approaches in governing the movement of people

In contrast to other cross-border phenomena such as trade in goods or services, international migration still lacks a comprehensive and coherent institutional framework at the global level. There is no UN migration organization but rather a network of different intergovernmental organizations and agencies focusing on specific aspects of the migration process (Koser, 2010, p. 301). This however does not mean that there is no global governance. It is rather spread among different actors and institutions, which target different dimensions of the migratory process at the national, regional and international level. Following Betts (2010) one can distinguish three broad levels in which the global governance of migration takes place. First, migration is governed through formal multilateralism, as illustrated by the international refugee regime[7]. Second, the movement of people is regulated through different international rules, norms and principles, which do not constitute an independent body of (migration) law but are 'embedded' in other policy areas such as international human rights law, WTO law and international maritime law[8]. Thirdly, informal networks such as the Global Forum on Migration and

7 It has to be noted that the international refugee regime is currently the only area of migration governance with a strong formal multilateralism. In general, the success of multilateral migration agreements at the global level has been limited so far, as illustrated by the case of the UN Convention on the Protection of the Rights of all Migrant Workers and their Families. For a detailed analysis see Pécoud and de Guchteneire (2004).

8 The same applies to those organizations part of the Global Migration Group (GMG), which all target different aspects of international migration. At present, the GMG consists of 14 organizations: ILO, IOM, OHCHR, UNCTAD, UNDP, UNDESA, UNESCO, UNFPA, UNHCR, UNICEF, UNITAR, UNODC, World Bank, UN Regional Commissions. For more details, see: http://www.globalmigrationgroup.org/.

Development (GFMD) and Regional Consultative Processes (RCPs) are emerging as variations of global migration governance (Betts, 2010). In addition, the last fifteen years have witnessed a proliferation of different initiatives – in both policy-making and academic circles – calling for greater cooperation and dialogue on governing international migration in a multilateral framework[9]. Despite all these developments, there is 'no consensus on whether global governance is really required, what type of global governance would be appropriate, and how it should develop' (Newland, 2010, p. 331).

This is all the more relevant when considering a multilateral framework for the free movement of people. It seems reasonable to assume that cooperation between states is a necessary precondition to the materialization of free movement across borders. As noted by Pécoud and de Guchteneire (2007, p.21) unilateral openness is not only highly unlikely but may also have potentially damaging effects on a country's welfare, security and social cohesion. A multilateral approach to free movement could ensure both cooperation between states – to avoid the pitfalls of unilateral policies – and help monitor the socio-economic changes that free movement may bring about. According to Pécoud and de Guchteneire (ibid.) there are two possible ways to develop such an approach. One would be to establish a 'managed migration regime' (Gosh, 2007) instead of overall free movement in order to avoid the potentially negative effects of an open border policy. A second option would be to start multilateral cooperation on issues acceptable to a majority of states and let free movement develop gradually. No matter which approach prevails (if any) it seems evident that a multilateral agreement on free movement is a distant prospect. Highly diverging interests of sending and receiving countries around the world, the current obsession with the security dimension of migration and the unforeseeable social, economic and political effects of such a scenario will make multilateralism in this field a long-term endeavour, to say the least. Against this backdrop, it makes sense to envisage the regional (supranational) level as a potential layer of migration governance between the national and global (multilateral) levels.

A case for regional migration governance?

While free movement of people may be difficult to achieve at the global level, it may be a more realistic (and desirable) policy option to consider the regional level as a preliminary step. Several arguments can be brought forward in favour of such an approach. First off, a significant part of today's cross-border movements takes place within regional spaces. Starting from a broad, quasi-continental, definition of a region, the World Bank has estimated the levels of intra-regional mobility as a percentage of total emigration (World Bank 2011). In Sub-Saharan Africa, for instance, 63 per cent

9 The most important initiatives within the UN system are listed in Newland (2010, p.332 -33). Proposals from the academic world include, among many others, a 'General Agreement on Movements of People' (Straubhaar, 2000), a 'New International Regime for Orderly Movements of People' (Gosh, 2000), and a 'Global Agreement on the Movement of People' (Veenkamp et al., 2003).

of emigrants remain within the region (World Bank 2011, p. 33). The numbers are even higher when looking at subregions such as West Africa, where around 7.5 million migrants move within the region, accounting for 86 per cent of total emigration (OECD-SWAC, 2008). When looking at data from Europe and Central Asia together, 55.1 per cent of emigration is intra-regional, followed by the Middle East and North Africa with 31.5 per cent, and South Asia with 28.2 per cent. In contrast, East Asia and the Pacific do not have comparable levels of intra-regional flows (15.1 per cent of total emigration) as most of the movements are directed towards high-income countries both within and outside the OECD (World Bank, 2011, p.23). The same is true for Latin America and the Caribbean (intra-regional migration amounts to 12.9 per cent of total emigration), where 84.8 per cent of all emigrants head towards high-income OECD countries (World Bank, 2011, p.27). Another important observation in this regard is that South-South migration (understood as migration between developing countries) is larger than migration from the South to high-income countries belonging to the OECD[10]. According to calculations by Ratha and Shaw (2007), 80 per cent of South-South migration, for which there is statistical evidence, takes place between countries that share a common border, as compared to 20 per cent of South-North migration. It seems therefore reasonable to consider both intra and trans-regional migration schemes in the Global South, with countries cooperating within and between their respective regions. However, in order to develop effective policies, more research is needed to fully understand South-South migration patterns[11].

A second important argument is that regional agreements are usually easier to reach in comparison to multilateral (global) frameworks. Due to the smaller number of states involved, comprehensive agreements are more likely, especially if countries show similar levels of socio-economic development. Countries of the same region may share common interests with regards to specific migration challenges and cooperation may be easier due to existing personal links and mutual trust. This is all the more relevant in transnational spaces, which were often created by migrants long before the erection of international borders. If these transnational areas are divided by (artificial) boundaries, people will continue to cross borders regardless of whether they are allowed to do so by law. Under this condition, sovereign states may act legitimately if they transfer some of their decision-making powers to a regional (supranational) institution to organize cross-border movements of people within a regional space (Kleinschmidt, 2006, p.3). Regional organizations can facilitate such agreements

10 According to the World Bank, 'South' refers to low- and middle-income countries ('developing countries') as defined by the World Bank´s country classification. On South-South migration, see also De Lombaerde, Guo and Povoa (2014).

11 One current example of such an undertaking is the ACP Observatory on Migration, which has been officially launched in October 2010 to produce data on South-South ACP migration flows and enhance research capacities in ACP countries for the improvement of the migrants´ situation and the strengthening of the migration-development nexus. More details can be found at: http://www.acpmigration-obs.org/.

by providing necessary infrastructure and by pooling limited human and financial resources.

Regional arrangements might also have certain advantages vis-à-vis bilateral agreements. Generally speaking, the bargaining power of sending countries is likely to be weaker in a bilateral agreement (e.g. labour migration) as receiving countries usually dictate the conditions, in terms of defining the sector and type of occupation, length of stay, renewability, conditions of employment, etc. More importantly, bilateral agreements usually do not envisage free movement but rather aim at managing certain migration flows[12].

Nevertheless, regional migration schemes may also display certain weaknesses. One downside is certainly that by abolishing internal borders within a region, new external borders are created towards countries not belonging to the regional arrangement. As in the case of the European Union, intra-regional free movement ('Europe without borders') has been accompanied by enhanced control and security of EU external borders ('Fortress Europe'). That said, whether these two trends do generally go together remains to be seen with the emergence of other regional free movement schemes around the globe.

Furthermore, one general challenge faced by regional integration schemes is the issue of overlapping membership. Captured in the famous image of a 'spaghetti bowl', countries sometimes belong to several different regional organizations simultaneously. In the worst-case scenario, this can lead to incoherence and poor implementation of policies, considerable economic costs and an overall lack of commitment. Last but not least, migration is not only a transnational but also a truly global phenomenon. As pointed out by Gosh (2007) major countries of origin and destination may not always be located in the same region. Regional and (future) global schemes must therefore be complementary to one another in order to ensure a certain degree of policy coherence.

Regional approaches to migration

With respect to the movement of people, there are basically two different types of governmental cooperation that have developed at the regional level. The first type includes (formal) regional arrangements, which by pursuing different economic, political or security-related objectives have led to the inclusion of the movement of people into integration agendas[13]. As illustrated in the first chapter, a substantial number of regional arrangements have already developed instruments to liberalize the intra-regional movement of people within their membership. This can take various forms, from the simple removal of visa-requirements to facilitate intra-regional travel, to a more comprehensive approach granting the right to reside and work in any other Member State. Second, Regional Consultative Processes (RCPs) have emerged

12 Exceptions include Australia-New Zealand, Russia-Belarus, etc.

13 These regional arrangements range from the highly institutionalised, in the case of the EU, to those that are little more than comprehensive free trade agreements, in the case of the North American Free Trade Agreement.

during the past 25 years, promoting intergovernmental dialogue and cooperation on international migration[14]. As RCPs generally do not develop programmes related to the free movement of people, they will not be discussed in-depth in the framework of this volume. However, RCPs may have important links to regional organizations and agreements, and their activities can be influenced or can influence the implementation of such regional agendas.

Regional organizations and agreements

Against the background of globalization and a (still) fragmented multilateral system, the regional level has emerged as an intermediate layer of governance. Although there has been a significant growth in both the number and scope of regional organizations and agreements in recent years, the idea of regional integration and cooperation is certainly not new (Fawcett, 2005). Different unions, associations, leagues and the like have existed throughout history, with a first major wave of initiatives in the nineteenth century (Mattli, 1999). Today, a multitude of regional organizations, associations and agreements exist, differing considerably in their scope, range of activities, institutional set-up, decision-making procedures and membership[15].

In order to distinguish these different forms of regional integration processes, two dimensions are usually brought forward: (1) a chronological view and (2) a qualitative view (Van Langenhove and Costea, 2005). The chronological approach identifies successive waves of regionalism, starting either after the Second World War (two waves of regionalism) or including initiatives in the interwar period (three waves of regionalism). The qualitative approach, by contrast, distinguishes between 'old' and 'new' regionalism, implying a fundamental (qualitative) difference between the two processes[16]. While the 'old approach' usually refers to early attempts at regional economic integration and cooperation in the context of the bipolar world order, 'new regionalism' encompasses the development of a broader and deeper version of regionalism. New regionalism goes beyond trade liberalization of goods, services or other productive factors and also involves non-state actors such as multinational corporations, non-governmental organizations (NGOs) and civil society. An alternative is to speak of 'generations' instead of 'waves', hereby avoiding the strict separation of chronological clusters while circumventing the dichotomy of 'old' and 'new' (Van Langenhove and Costea, 2005, p. 2).

The 'first generation' of regionalism is often associated with the idea of a (linear) process of economic integration whereby former separate (national) economies merge into larger (regional) economies[17]. Following Balassa's approach (1961), different

14 For further reading see Klekowski von Koppenfels (2001), Thouez and Channac (2005), IOM (2005), Hansen (2010).

15 For a comprehensive list of regional arrangements worldwide, see the Regional Integration Knowledge System (RIKS) at: http://www.cris.unu.edu/riks/web/.

16 See also, De Lombaerde and Söderbaum (2013).

17 This is also extensively discussed in chapter 4 by John Oucho.

'sequences' of economic integration can be distinguished. The process starts with a Free Trade Area, in which the participating states agree to abolish all internal customs on goods while retaining control over their national customs duties on goods entering their markets from non-member states. During the next stage these external tariffs are harmonized, leading to a so called Customs Union. This is followed by a Common Market, including the free movement of goods, services, capital and labour. Monetary integration, the next theoretical stage, implies the adoption of a common currency, a common monetary policy and a supranational authority to monitor this policy. An Economic and Monetary Union goes even one step further by introducing a common fiscal policy too. Within this first generation of regionalism, the movement of people can be addressed very differently according to the stage of integration. Free Trade Agreements usually contain only very limited provisions targeting high-skilled workers or persons involved in regional trade and business. A Common Market, by contrast, allows for the free movement of all factors of production, with workers enjoying a right to enter, work and settle in other Member States. Common to all stages of this first generation regionalism is that, at least in theory, the liberalization of movement is linked to economic activity and the integration of labour markets. The concept of a common market is extremely relevant for the purposes of this volume. As will be seen in various chapters, free movement of people is in practice often linked to building a common market.

By contrast, the 'second generation' of regionalism is often associated with the idea that economic integration cannot be separated from other political, social or cultural developments and that integration may also include non-economic matters such as security, justice, education, etc. Apart from just removing obstacles to economic integration, positive measures can be adopted to facilitate integration in other domains. This usually entails the establishment of a strong institutional and legal framework and also involves non-state actors such as multinational corporations, NGOs and civil society. This type of regionalism is not limited to the European Union but includes various integration processes in other world regions too. Within this generation of regionalism, one would expect the economic focus on migration to be broadened by a social (or human) dimension. In order to enhance labour mobility in a region-wide labour market, the non-discrimination of migrant workers needs to be ensured. Apart from the removal of formal barriers, this may also require complementary policies such as the recognition of skills and qualifications and the portability of social security rights. In addition, one could also imagine the scope of free movement to be broadened beyond economically active people to allow all categories of people mobility within a region.

The 'third generation' finally implies that regions are playing a role on the world stage of global politics. This is often referred to as global 'actorness' as the region is performing different tasks as an actor at a global governance level. Prerequisites needed in order to speak with a unified voice in the international arena include both the formation of a 'regional identity' and a functioning institutional architecture to achieve regional coherence on how to address global issues. In contrast to the previous two generations, 'third generation' regional arrangements would have a clear focus

on the external dimension of the region, engage in inter-regional arrangements and seek to become more actively involved as single entities at the UN and other world bodies (Van Langenhove and Macovei, 2010, p. 17). This form of regionalism is still a normative idea, although the European Union is displaying certain elements of third generation regionalism (Van Langenhove and Costea, 2005, p. 12.). Within this generation, one could expect a region to develop a common policy towards the entry and movement of third country nationals. This could imply a common (external) migration policy (e.g. legal migration into the region) and/or a common approach towards refugees and asylum seekers.

Regional consultative processes

Apart from formal regional arrangements described above, Regional Consultative Processes (RCPs) have emerged in the past 20 years as intergovernmental fora to address migration-related issues at the regional level[18]. Despite considerable differences in history, purpose, organizational structure and composition, RCPs do share some essential characteristics distinguishing them from classical regional or international institutions. First, RCPs are informal and non-binding. According to Hansen (2010), informality refers to a depoliticized space in which participants can openly discuss issues of common interest without defending national positions in the first place. However, informality is not to be confused with the absence of (formal) procedures, which are vital for the smooth functioning of such processes. They are non-binding in that participating states do not negotiate binding (legal) rules and are not obliged to follow the conclusions adopted during a meeting. Second, RCPs are processes, meaning that they are neither one-time events nor comparable to formal regional institutions. They are repeated, regional meetings of government officials, technical experts and representatives of different international and regional organizations. Finally, RCPs are characterized by a minimum administrative structure, their secretariat often hosted by an international organization. The overall aim common to all RCPs is to create networks of information exchange between participating governments, to build trust between all actors involved and thereby facilitate a common understanding of migration issues, which can ultimately lead to convergence in migration policies and practices.

Linkages between regional organizations, RCPs and external actors

One interesting idea as regards RCPs, regional cooperation and free movement, is the fact that RCPs could help channel ideas, practices and policies from one region to another[19]. This transfer or learning process could be facilitated by the fact that

18 For a detailed view on Regional Consultative Processes (RCPs) and their membership, see https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/rcps/RCP-Infosheet.pdf

19 The following paragraph is taken from the initial report on free movement.

extra-regional states or other regional institutions or RCPs are sometimes invited as observers or experts to RCPs meetings. The gathering of regional actors within RCPs can engender a process of socialization within these regional fora, through which they may eventually integrate and take over some political experiments previously undertaken in regions where cooperation on migration and free movement policies had reached a more advanced stage of development.

RCPs most often lean, during their creation, on existing regional or subregional processes of economic integration, or agreements concerning movements of people between neighbouring states. Thus, RCPs are not created *ex nihilo*, and the outlines of the region are already partially fixed by these previous experiences of cooperation (Thouez and Channac, 2006, p. 383). In most cases, there have already been experiments of regional multilateral cooperation, which probably facilitates the establishment of the new RCPs. In Africa, for example, while assembling some southern EU states, the Conference on Western Mediterranean Cooperation (5+5) also gathers all the UMA Member States (Arab Maghreb Union). At the same time, the MIDSA (Migration Dialogue for Southern Africa) exactly follows the borders of the SADC (Southern African Development Community) and of the COMESA (Common Market for Eastern and Southern Africa); while the ECOWAS (Economic Community of West African States) and the UEMOA (West African Economic and Monetary Union) are closely associated to the development of the MIDWA (Migration Dialogue for West Africa). In Latin America, RCPs are bound to regional economic groupings, such as MERCOSUR (Southern Common Market), NAFTA (North American Free Trade Area), the OAS (Organization of American States), and even the CARICOM (Caribbean Community). For Asia and the Pacific, the ASEAN (Association of Southeast Asian Nations), the SAARC (South Asian Association for Regional Cooperation), the PIF (Pacific Island Forum) and the APEC (Asia-Pacific Economic Cooperation) support the majority of the RCPs.

The linkage between these regional economic-based mechanisms and the RCPs is not a matter of pure coincidence. On the one hand, in a context of globalization, the multiplication of economic agreements aimed at liberalizing trade, finance or investment flows often increases the pressure on governments to liberalize certain movements of people; a pressure compounded by the recent emphasis placed on the linkages between development policies and international migration, along with the idea that better migration management at the regional level can not only favour the economic development of the concerned countries, but can also contribute to regional stability. Moreover, linkages also exist between regional organizations, RCPs and international organizations, with some of the latter participating as observers in regional organizations. In recent years, the UN has clearly demonstrated its willingness to collaborate with regional organizations, particularly in the domain of peace and security. In the field of forced migration, the Office of the UN High Commissioner for Refugees (UNHCR) has a long history of cooperation with regional institutions, some of them having developed specific instruments for the protection of refugees. Other international organizations such as the International Organization for Migration

(IOM) have become increasingly involved in regional capacity-building activities, which also often link regional organizations and RCPs[20].

Regional integration and the free movement of people

Within the different regional integration processes analysed for the purpose of this publication, the facilitation of movement of people is approached in a great variety of ways. The liberalization of movement might be a primary or secondary objective of an agreement and the overall purpose of the regional integration process influences the extent to which the movement of people is liberalized. Variation also occurs with regard to the different aspects of mobility tackled within the integration process. This can include classical rights of entry, temporary or permanent residence and work, ancillary policies like the mutual recognition of skills or the portability of social security rights. The categories of people benefiting from certain rights also differ (e.g. migrant workers, business people, visitors and tourists, students, refugees and asylum seekers, family members, etc.). As will be discussed in more detail in the first and final chapters, regional arrangements can be divided into different groups according to their current approach towards free movement and to the progress they have made regarding the issue.

Regional agreements or organizations not envisaging general free movement of people

The first broad category includes all regional arrangements that do not aim towards a general free movement of persons but rather intend to facilitate the movement of certain categories of people. The primary goal is to boost economic development by enhancing intra-regional trade in goods and services. Certain categories of high-skilled workers and service providers are granted the right to work in another Member State, while low-skilled workers are usually denied access to the labour market.

NAFTA is representative of such an agreement as it only grants temporary entry for certain categories of high-skilled workers. As Studer describes in Chapter 6 on NAFTA, trade and migration were presented as mutually exclusive policy options. One of the underlying ideas behind the agreement was that free trade and foreign investment would act as development catalysts, thereby representing (partial) substitutes for migration. Consequently, only the movement of business people or intra-corporate transferees has been facilitated, while the issue of low-skilled labour remains unaddressed. Despite expanded investment and increased trade flows within the NAFTA countries, the movement of people across borders has not decreased, as illustrated by the current figures of irregular migrants crossing the border from Mexico to the US.

20 For instance IOM activities in Southern Africa (SADC and MIDSA), in Central America, etc.

ASEAN is another arrangement that falls within this group, following to a large extent the approach of the General Agreement on Trade in Services (GATS). As illustrated by Nonnenmacher in Chapter 12, most initiatives within ASEAN have focused on facilitating the movement of service providers with a view to expanding trade in services and deepening economic integration. A future ASEAN Community, to be established by 2015, is supposed to consolidate existing initiatives by building on three main pillars: the ASEAN Political-Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community. This may open ways to address also non-economic migration issues, as illustrated by the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers signed in 2007. Most of these instruments however do not give rise to binding obligations and the issue of legal migration channels and immigration procedures remains unaddressed. The movement of semi- and low-skilled workers has also not been tackled in the current policy framework, which largely ignores the reality of labour mobility in the region. According to Nonnenmacher, this is partly due to the institutional structure of ASEAN, which is characterized by the principle of non-interference, consensual decision-making and a preference for non-binding instruments.

Regional arrangements aiming towards free movement of people within the region

A significant number of existing regional arrangements aim for the comprehensive (or complete) free movement of people in the framework of a Common Market (or Single Economic Space), including the free circulation of goods, services, capital and labour. The most prominent example of such an approach is certainly the European Union, which has achieved free movement of EU citizens on an unprecedented scale. What is considered today a fundamental right for EU citizens has been developed as part of a gradual and long-term process. The founding fathers of the European Economic Community (EEC) did not envisage a general free movement right but targeted the working population only. The rationale behind this was clearly to integrate European labour markets and to allow for labour surpluses from southern Europe to move to the centre of the EEC (Kunz and Leinonen, 2007, p. 142). Since then, however, the right to free movement has been incrementally extended to all categories of people, notably through the introduction of Union citizenship in 1993 and the integration of the Schengen acquis into Community law in 1999. With this development, it soon became clear that by abolishing internal borders, a common approach towards entry and movement of third country nationals would be needed. De Bruycker elaborates on the EU's free movement policies and their legislative basis in Chapter 10, where he addresses not only the situation of EU citizens but also that of third country nationals.

The attempt to liberalize the movement of people is however not restricted to the European Union; other regional organizations have also taken steps in this direction. On the African continent, almost all Regional Economic Commissions (RECs) have considered the free movement of people as a goal to be achieved within their regional integration processes. As described by Kabbanji in Chapter 3, the Economic

Community of West African States (ECOWAS), and to a lesser extent UEMOA, have adopted measures to establish a borderless West Africa. In the free movement protocol signed by ECOWAS Member States in 1979, three phases (right of entry, residence and establishment) were identified to achieve the free movement of people within the West African region. Despite concrete achievements such as visa-free travel up to 90 days, various obstacles still hinder the smooth implementation of the free movement protocols, which will be further discussed in the final chapter. Kabbanji also shows that intra-regional free movement is influenced by changes in the regional political agenda, a stronger focus on (extra-regional) migration flows from West Africa to Europe and the role external actors play in the formulation and implementation of regional migration policies.

Within the Gulf Cooperation Council (GCC), free movement of nationals also constitutes a major objective to be gradually achieved on the way towards full economic integration. As Babar shows in Chapter 5, the facilitation of movement within the GCC has to be seen as a means to achieve greater economic unity and enhance trade and economic cooperation among Member States. What makes this case particularly interesting is the fact that despite favourable political, economic and social conditions and the effective removal of barriers to free movement, intra-regional migration among GCC countries remains low. According to Babar, this can be explained by the similar structure and segmentation of national labour markets, the lower significance of private sector employment as compared to the public sector, and a special state-citizen relationship, which confers favourable rights to citizens in their home countries. Finally, the GCC example shows that free movement of nationals may only be beneficial to the regional economies if the supply and demand of skills match within a region-wide labour market.

For the East African Community free movement may be considered a corollary of economic integration in the region, framed as it is by the Protocol on the Establishment of the East African Common Market. In Chapter 4, Oucho further explains how the free movement of particular persons is part of the REC and considers the issues it has already encountered.

MERCOSUR, CAN and the CIS are regions that are more so characterized by a shared regional identity and/or history, which has helped reinforce their regional management of migration. In Chapter 7 on MERCOSUR, Gallinati and Gavazzo emphasize the existence of a South American cultural identity and its importance for regional integration and the development of free movement in the region. Regarding the Andean region, Eguiguren contests this view and is of the opinion that CAN lacks a regional identity and even a certain cohesion; however she also points out that there has been an evident evolution in regulating the freedom of movement, which she discusses in detail in Chapter 8.

Molodikova too raises questions on the CIS as a coherent region, but at the same time she points out that it has actively promoted the free movement of people. She further elaborates in Chapter 11 on the migration trends within the area and the effect of "fortress Europe" on historical-ethnic relations.

Last, the Caribbean region might be placed into this category. In his chapter on CARICOM, Morris clearly states that the idea of free movement was introduced as part of a set of policies aimed at facilitating full regional integration. He points out that in order to maximize the development of the region, nationals should be able to move freely within said region. He further elaborates on the development of CARICOM and its take on migration management in Chapter 9.

Other regional arrangements

Two more regions will be reviewed in this volume that do not exactly fit into the previously defined categories. First, there is the Pacific Islands Forum (PIF), whose take on the free movement of people within the Pacific islands region is discussed by Graeme and Bedford in Chapter 13. They point out that regional cooperation on migration in the region mainly takes the form of temporary workers programmes, with workers from the islands undertaking seasonal agricultural labour in Australia or New Zealand. However, the latter countries are opposed to initiatives to expand regional free movement policies, even within the framework of the PACER+ negotiations to liberalize trade in the region.

Second, there is the Southern African Development Community (SADC). As mentioned before, socio-economic divides within a region tend to mitigate against extensive regional mobility; that is certainly the case for SADC (and is also very apparent within the PIF). As Segatti explains in detail in Chapter 2, many governments within SADC are reluctant to delegate power to regional, supranational arrangement as it challenges the role of the state (see further). Meanwhile, the dominance of relatively more developed states such as South Africa, Namibia and Botswana, who prefer to pursue bilateral agreements with their key labour supplying partners, has made free movement a difficult issue within the region.

Towards regional free movement: Opportunities and challenges

Throughout this project, it became clear that the establishment of a regional free movement area is a long-term and complex process involving a multitude of different actors at various governance levels. People are not commodities, but human beings with complex social needs and relationships. Consequently, effective free movement requires the setting up of legal measures in policy fields that, though related to migration, are often not considered by political actors (at least not in the beginning of such a process). This can lead to both opportunities and challenges. On the one hand, there are plenty of possibilities to deepen regional integration and go beyond a purely economic agenda through the creation of regional citizenship rights and a feeling of 'regional belonging'. On the other hand, this requires political measures that touch upon the core of state sovereignty with possible repercussions on public security, social cohesion and economic competitiveness. Some of these issues are discussed below.

Challenges to the traditional role of the state

Regional integration as a political and economic process involves a devolution of power from the state to a regional entity. These processes also entail some transfer of sovereignty from the state level to the regional level. Similarly, free movement of people creates new dynamics to which states have to adapt. As a result, both regional integration and free movement of people call for a redefinition of the traditional concepts of statehood. They challenge the Westphalian concept of the state, as they demand that traditional elements such as sovereignty and the sanctity of international borders be reviewed and reconceptualised. As can be observed with all regional arrangements, states remain reluctant to give up their sovereign right to decide who enters and stays within the boundaries of their territory. With the exception of the European Union, regional organizations worldwide have so far neglected to create supranational institutions with independent powers, but largely apply a classical intergovernmental approach based on consensus.

Free movement, citizenship and identity

The movement of people significantly challenges the notion of individual or collective identity associated with the nation state. Even in today's multicultural and diverse societies, nationality and citizenship are overriding features that define who belongs and who does not belong to a specific country. As a consequence, many aspects of social life are affected by regionalization and the free movement of people (identity, citizenship, culture, ways of life, etc.). Effective free movement can help create a regional identity or 'regional consciousness'. However, it requires more than just abolishing direct barriers to movement; it needs to guarantee and enforce the non-discrimination of all migrants. This will inevitably lead to the question of economic, social and political rights, often discussed under the notion of 'regional citizenship'. Two cases particularly illustrate the difficulty of establishing such regional citizenship rights. After four decades of regional integration and the development of far-reaching free movement rights, it was only with the Maastricht Treaty (1992) that the EU introduced the concept of 'Union citizenship'. Attempts are however still ongoing to establish a link between 'Union citizenship' and state nationality and to give real effect to related rights. The GCC is another interesting case, where Member States clearly confer a higher status to own citizens. Consequently, GCC nationals often refrain from seeking employment opportunities elsewhere within the region despite comprehensive free movement rights.

Regionalism, free movement and economic development

Regional integration can be an instrumental element for the development of a given region. Free movement of people, by improving market access through economic integration and encouraging the movement of the labour force, can benefit the

economic situation within a region. One major challenge in this regard is that economic imbalances within a given region are often deployed to argue against free movement. In the case of SADC, socio-economic disparities between Member States were one of the major arguments against comprehensive mobility, contributing to the eventual rejection of the initial Draft Protocol on Free Movement (Williams, 2006). In the case of the EU, economic imbalances occurring through different rounds of enlargement have usually been addressed through 'transitional provisions' limiting the immediate free movement of workers from the new Member States. In both cases, it is legitimate to ask whether these courses of action were taken on grounds of sound economic (and demographic) analysis, or whether they primarily served political purposes.

The social dimension of regional free movement

The management of public goods at the regional level, as well as increased regional economic integration have led the way for the introduction of a social dimension to regional integration efforts (Baert et al., 2008; Deacon et al., 2010). Such topics as social, health, and labour regulations or even regional social redistribution schemes can be expected to play an ever increasing role.

With regard to free (or facilitated) movement of people, this raises the question of whether these rights are also accompanied by a social or civic dimension. Migrant workers contribute largely to the economic and social development of both host and sending countries (at the macro- and micro-levels) with implications for equity, equality and social distribution. In this context 'it is simply no longer reasonable or feasible to continue to treat the movement of people across borders separately from the ways in which societies define their social contracts and insert themselves into the global market economy' (Hajo and Piper, 2007, p.5). Many of the selected regional arrangements have developed mechanisms to promote the non-discrimination of migrant workers as regards labour conditions or the portability of social security rights. In order to be effectively implemented, these measures do however require strong monitoring and enforcement mechanisms as well as a considerable degree of cooperation between Member States. Finally, the role of financial (or social) redistribution mechanisms needs to be further elaborated as it can diminish economic discrepancies between countries and facilitate agreements on free movement.

Gender and migration

Women are increasingly taking part in both regional and international migration streams. Therefore, the circumstances in which females migrate, their family situations, labour market access and opportunities, and specific health needs constitute very distinct challenges for regions aiming to provide free movement for their citizens. Since implementing gender equality is one of UNESCO's global priorities, the editors have emphasized the gender dimension of free movement by incorporating (mainly by means of footnotes) various gender-relevant developments into this volume.

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Part I:

Comparative View

1

Free movement of people within regional integration processes: A comparative view

Sonja Nita[1]

1.1 Introduction

Considering the complexity of today´s international migration flows, the attempt to manage the movement of people unilaterally at the national level seems highly inadequate. On the other hand, no comprehensive global migration regime has yet emerged, although discussions to establish one are brought up frequently. In contrast to international trade in goods and services, states seem much more reluctant to liberalize the cross-border movement of people and to install a coherent international framework for migration. Therefore a myriad of legal instruments, norms and principles continues to exist, targeting different aspects of migration at all possible governance levels (national, regional and international).

Within this 'patchwork' of international migration management, the regional level has emerged as an important layer of governance. Informal regional processes of consultation and cooperation are flourishing all around the globe, bringing together like-minded states with common migration interests and concerns. Although these so called Regional Consultative Processes (RCPs) are non-binding and informal in nature, they represent an important step towards regional multilateral strategies in the management of migration (Nielsen, 2007). What has been less observed, at least from an academic point of view, is the increased significance of (formal) regional organizations and agreements in facilitating the movement of people. Numerous regional arrangements covering all world regions have already adopted legal instruments to facilitate the movement of people within the territories of their Member States. The approaches vary significantly, from facilitated travel arrangements to far-reaching free movement schemes in the framework of regional common markets.

The purpose of the present chapter is to give an overview of regional organizations and their approach towards the free movement of people. It starts first with a presentation of all selected regional arrangements and discusses the criteria for their

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selection. Second, major research challenges are outlined to create awareness of possible pitfalls and shortcomings of such a large-scale comparison. The third and major part will present the empirical findings. It will be divided into three main parts. In a first step, primary law provisions of all selected regional arrangements are examined to get an idea about the goals and aspirations towards free movement ('Aspirational Level'). In a second step, existing free movement policies are scrutinized to see how these aspirations are put into practice ('Operational Level'). The practical implementation of these policies is the focus of the third part ('Level of Implementation'), which will concentrate on two different aspects of the implementation process: (1) problems leading to implementation and (2) problems of implementation. The last section concludes the chapter.

1.2 Selection of regional arrangements

There are numerous regional organizations and agreements worldwide, but not all of them are relevant to a study focusing on the free movement of people. A selection was therefore made on the basis of the following criteria. As a starting point the database of the Regional Integration Knowledge System (RIKS) was consulted, which includes among other things a comprehensive list of regional arrangements worldwide[2]. From this list, regional arrangements were filtered out following two main selection criteria: the arrangement must be a) regional and b) relevant. For the purpose of this study, the term regional is understood as follows:

- Member States belong to the same geographical subregion or to neighbouring geographical subregions.
- A minimum participation of three states is required, excluding therefore bilateral agreements.

Second, the issue of free movement of people must be of relevance. This can be manifested in two different ways:

- The arrangement in place has a legal mandate in the field of movement of people.
- The issue of free movement of people is on the regional organization's agenda.

Consequently, classical free trade agreements are excluded as well as cross-regional arrangements and forms of cooperation that focus on very specific issues (e.g. tourism). The North American Free Trade Agreement (NAFTA) represents one exception because of its importance and relevance with regard to the movement of people. Besides, it is to be noted that the focus of this study is on regional organizations that are characterized by a certain degree of (formal) institutionalization. Regional Consultative Processes (RCPs) are closely linked to regional organizations and often

2 The Regional Integration Knowledge System (RIKS) is a joint initiative taken by UNU-CRIS and the GARNET Network of Excellence. The database section of RIKS contains among others statistical data and indicators on regional integration processes and degrees of regional interdependence (http://www.cris.unu.edu/riks/web/).

develop in the broader framework of regional cooperation on migration[3]. As they are however informal processes without binding character, they will not be analysed in great detail in this study. Based on these criteria, the regional arrangements were selected (and listed geographically) as shown in Table 1.1. It is considered an open list which may be changed according to current and future developments.

Table 1.1 Selection of regional arrangements

Macro-Region	Regional Arrangements
Africa	African Union (AU), Common Market for Eastern and Southern Africa (COMESA), Economic and Monetary Community of Central Africa (CEMAC), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), Southern African Development Community (SADC), Community of Sahel-Saharan States (CEN-SAD), Arab-Maghreb Union (AMU)
The Americas and Caribbean	Andean Community (CAN), Caribbean Community (CARICOM), Central American Common Market (CACM), North American Free Trade Agreement (NAFTA) and Southern Common Market (MERCOSUR)
Asia-Pacific	Association of Southeast Asian Nations (ASEAN), Pacific Island Forum (PIF), South Asian Association for Regional Cooperation (SAARC)
Europe	Black Sea Cooperation (BSEC), Benelux, Community of Independent States (CIS), Council of Europe (COE), European Free Trade Agreement (EFTA), Nordic Common Labour Market (NORDIC), European Union (EU), Eurasian Economic Community (EURASEC), Organisation for Democracy and Economic Development (GUAM), Economic Cooperation Organisation (ECO)
Middle-East and Northern Africa	Gulf Cooperation Council (GCC), League of Arab States (LAS)

1.3 Challenges of comparing free movement rights at the regional level

A comparison of free movement rights at the regional level is not without pitfalls and needs to be conducted with appropriate caution. Attempts to compare regional integration processes are often accompanied by conceptual, methodological and theoretical challenges, frequently leading to more confusion than enlightenment (De Lombaerde and Schulz, 2010)[4]. From a conceptual point of view, the major problem lies in the absence of (interdisciplinary) agreement on fundamental notions like region, regional integration, regionalism, regionalization, etc. For comparative research, this is especially important because the definition of a notion or concept decides upon the selection of a case and ultimately influences the conclusions or generalizations to

3 For a good overview of RCPs see Klekowski von Koppenfels (2001); Thouez and Channac (2005; 2006); IOM, (2001); and Hansen (2010).

4 On the methodological problems in comparative regionalism, see e.g. also, De Lombaerde et al. (2010) and De Lombaerde (2011).

be drawn (ibid.). With regard to the movement of people, this is especially relevant because key notions related to migration may also differ across countries and regions. This is exacerbated by the fact that certain concepts are often not defined or further explained. One of many examples can be found in the Draft Protocol of the South African Development Community (SADC), which does not draw a clear difference between 'residence' and 'establishment' (Williams, 2006, p. 10).

The second major challenge becomes obvious when looking at the multitude of different theoretical approaches aiming to explain regional integration processes and outcomes. Some theories have developed in line with classical theories in political science and IR, while others emerged in a particular regional context (Fawcett, 2005). Especially region-specific theories are said to suffer from a Eurocentric bias, leading to a situation in which 'progress in regional integration is defined in terms of EU-style institutionalism' (Breslin et al., 2002, p.11). When comparing free movement of people within regional integration processes, the European experience should be used as a rich case study. It can for example be helpful in anticipating certain problems that arise once a certain degree of integration between Member States is achieved (e.g. the necessity of a strong social dimension or granting of citizenship-like rights). Nevertheless, the trajectory of the EU should not be considered the one and only path to follow.

Thirdly, when comparing different regional approaches towards free movement of people, a clear distinction should be made between the legal provisions and the actual implementation of a policy. Several regional arrangements aim at establishing a Common Market, but only few have achieved it in reality. A certain instrument may grant visa-free travel within a region, which in reality is ignored by border posts due to incomplete information, corruption, or weak enforcement mechanisms. A particular challenge is that information on the actual situation is very difficult to obtain and there are usually no mechanisms which try to measure the degree of successful implementation[5].

Finally, one should always bear in mind the scope and purpose of a specific regional organization or agreement. If an arrangement focuses primarily on trade in goods and services, no comprehensive mobility of people can be expected (and should therefore not be used as a benchmark). It would be however interesting to find out to what extent (limited) mobility rights are extended to other groups of people. Or to put it in other words, can spill-over effects be observed once an organization has introduced certain mobility rights?

5 Even at the EU level, there are no systematic reports or instruments on how to measure the successful implementation of the free movement of workers, persons, etc. This is rather done through periodical reports by the Member States or academic institutes.

1.4 Primary law provisions – aspirational level

In order to get a first grasp on the different regional approaches, it makes sense to look at primary law provisions related to the movement of people as laid down in founding treaties, protocols, etc. The goals formulated in these core legal texts allow distinguishing the selected regional integration processes according to their aspirations towards the free movement of people (Table 1.2).

A majority of regional arrangements aim for a full or complete free movement of people in the framework of a common (or single) market, including the free movement of goods, services, capital, and persons. The free movement of people is usually conceived as a long-term goal to be established gradually. A second group of regional arrangements have limited their mandate explicitly to the facilitation of movement of certain categories of people. No free movement of all persons is envisaged, but rather those relevant in the framework of regional trade in goods and services. This includes mostly high-skilled workers, business people, or service providers on a temporary basis. A third group of regional organizations is mandated to become active in the field of migratory movements. However, these organizations do not aim at establishing free movement schemes but rather at strengthening the rights of migrants in the framework of existing (or future) subregional, bilateral or national policies. The Council of Europe is representative of such an organization as it has adopted a great variety of different instruments targeting people on the move. A fourth group does not have a mandate at all, although migration-related issues may be included in regional cooperation efforts.

Table 1.2 Mandates of the regional organisations in the field of movement of people

Regional Arrangement	Scope of mandate
AMU	The AMU aims to 'work towards the progressive realisation for the free movement of persons, services, goods and capital' (AMU Treaty 1989, Art. 2).
ASEAN	No mention of movement of people in the Bangkok Declaration (founding document of ASEAN); ASEAN Economic Community Blueprint mentions ASEAN professionals and skilled labour who are engaged in cross-border trade and investment related activities.
AU	'The gradual removal, among Member States, of obstacles to the free movement of persons, goods, services and capital and the right of residence and establishment' (Abuja Treaty of 1991, Art. 4 (2i)).
BENELUX	The Benelux Union seeks 'the maintenance and development of an economic union including the free movement of persons, goods, capital and services (…)' (Revised Benelux Treaty, Art. 2).
BSEC	Simplification of visa procedures (Agreements on simplification of visa procedures of businesspeople and professional lorry drivers 2008).
CACM	One main goal is to promote the establishment of a Central American Common Market (General Treaty on Central American Economic Integration, Art. 1).

Regional Arrangement	Scope of mandate
CAN	Border and physical integration of the sub-region are pursued (Art. 3, Cartagena Agreement); Simón Rodríguez Agreement on Social-Labour Integration.
CARICOM	Free movement for the provision of a service on a temporary basis, Free movement to establish a business, Free movement of eligible categories of wage earners, Facilitation of travel (Revised Treaty of Chaguaramas, Art. 3 and 4).
CEMAC	The UAEC Convention states as one objective to create a common market based on the freedom of movement of goods, services, capital and persons (Title 1, Chap. 1, Art. 2 c).
CEN-SAD	The Original Treaty states as a main objective 'the removal of all restrictions hampering the integration of the member countries through the adoption of necessary measures to ensure (a) free movement of persons, capitals and interests of nationals of Member States (…)'
CIS	MS are called upon to cooperate in the 'formation and development of a common economic space' as well as in questions related to migration policies (Minsk Agreement, Art.7).
COE	Mandate is derived from the general terms of the Statute of the Council of Europe (5 May 1949).
COMESA	The founding treaty states as a specific undertaking the removal of 'obstacles to the free movement of persons, labour and services, right of establishment for investors and right of residence within the Common Market'(COMESA Treaty Art. 4(6e) and Art. 164).
EAC	MS agree to adopt 'measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community' (Art. 104 EAC Treaty).
ECCAS	The founding Treaty states as an objective the 'progressive abolition between Member States of obstacles to the free movement of people, goods, services, capital and to the right of establishment' (ECCAS Treaty, art. 4(e)).
Economic Cooperation Organization (ECO)	ECO is a regional economic entity with primary focus on economic development. (mandate unclear).
ECOWAS	Establishment of a common market through the removal of obstacles to the free movement of persons, goods, services and capital and the right of residence and establishment (Revised ECOWAS Treaty of 1993, Art. 3).
EFTA	Free movement of persons having the nationality of one of the EFTA Member States (Agreement amending the Convention establishing the European Free Trade Association, 2001).

Regional Arrangement	Scope of mandate
EU	According to Art. 18 EC every EU citizen shall have the right to move and reside freely within the Community. Art. 39 EC grants free movement of workers. Art. 43 EC grants the freedom of establishment. Art. 49 EC grants the right to provide services within the Community.
EURASEC	Creation of a customs union and a single economic space (Treaty establishing the EURASEC, 2000); 'Effective functioning of the common (internal) market in goods, services, capital and labour' (Agreement on Customs Union and Common Economic Space, 1999).
GCC	One main goal is the establishment of a Gulf Common Market, in which GCC natural and legal citizens shall be treated the same way as compared to citizens of that MS with regard to all economic activities (GCC Economic Agreement).
GUAM	n/a (no mandate according to information in questionnaire).
IGAD	Member States agree to 'promote free movement of goods, services, and people and the establishment of residence' (Agreement establishing IGAD, Art. 7(b)).
LAS	n/a (no mandate according to information in questionnaire).
MERCOSUR	The Treaty of Asunción does not directly relate to the free movement of people but states that the free movement of factors of production is one of the main goals of the Common Market.
NAFTA	Temporary entry of high-skilled labour (Chapter 16 of NAFTA).
NORDIC	It is regarded a fundamental right for nationals of the Nordic countries to be able freely to take up employment and settle in another Nordic country (Preamble, Agreement concerning a Common Labour Market 1983).
PIF	Free movement of recognised professional/skilled workers, Movement of semi-skilled/tradespersons under quota mechanism (PICTA-TMNP).
SAARC	In order to facilitate trade, the SAFTA Agreements includes the goal of simplifying visa procedures for business people.
SADC	MS are required to 'develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States' (SADC Founding Treaty of 1992, Art. 5 (2) (d)).

1.5 Free movement policies – operational level

After having compared primary law provisions illustrating the aims and goals laid down in founding treaties and protocols, this section documents the efforts to adopt concrete legal instruments to put these aspirations into practice. It shall be noted that at this stage only the content of specific instruments will be outlined and information on the legal status of the instrument will be given. Whenever necessary it will be indicated if a protocol or agreement has only been signed or already ratified by the

necessary number of Member States and therefore entered into force. At this point, no information will be given on how the instrument is implemented in practice. This will partly be done in section 6 on the implementation challenges. The classification of all selected regional arrangements into broader groups must thus be read according to the content of the signed (or ratified) agreement and not according to its implementation.

In order to get a clearer overview, the main rights associated with free movement (rights of entry, residence and work) will be examined separately and an attempt will be made to divide the selected regional arrangements into broader groups. In addition, ancillary policies such as common travel documents and the mutual recognition of skills and qualifications will be included too.

1.5.1 Travel facilitation and rights of entry

In most countries of today's world[6], people are free to leave the boundaries of their states[7]. This is also acknowledged by the Universal Declaration of Human Rights (1948) which states that 'Everyone has the right to leave any country, including his own, and to return to his country' (Art. 13(2))[8]. This right to *emigrate* is however not complemented by an internationally recognized right to *immigrate*. Consequently, the decision of whether a person is allowed to enter another country is still in the discretion of sovereign Nation States. Discussions have been brought up frequently regarding whether or not to introduce a universal right of entry, but progress in terms of concrete output has been limited so far.

In order to control entry into the territory of a state (or region), different tools can be applied. One measure is to set quotas that put a quantitative restriction on the number of migrants to be admitted during a certain period of time. Another common way is the issuance of a visa, usually understood as 'an endorsement by a consular officer in a passport or a certificate of identity that indicates that the officer, at the time of issuance, believes the holder to fall within a category of non-nationals who can be admitted under the State's law' (IOM, 2004, p. 69). The types of visa vary according

6 The worldwide migrant stock in 2013 was over 231.5 million people, of which 48% were female (UN, 2013). Caritas (2010) points out that even though the shares of women and men in migration flows are relatively equal, these flows may hide significant differences in the circumstances of both movement and opportunities. Many migration experts are now aware of the significance of female migration because of the increasingly changing role of women in the family and in the community, the working conditions of jobs taken by migrant women (such as those in the domestic and caregiving sectors), the phenomenon of mobility orphans, and the vulnerability and exposure of female migrants to different kinds of risks, such as trafficking.

7 Cuba and Uzbekistan are exceptions, as their citizens need an exit visa before going abroad.

8 The decision to return can be structural, individual, or it can depend on policy interventions. Women might return home for structural reasons if the labour market in the host country is not easily accessible for female migrants. Policy interventions can be gender-biased and more male-oriented, making it difficult for women to (re)integrate. A gendered approach to reintegration programmes is necessary. Studies have found that female returnees often report the loss of gendered gains. Upon return, they are often less independent than abroad and have to conform to the local gender norms (Caritas, 2010).

to the purpose of entry and may include tourist visa, business visa, temporary work visa, student visa, etc. It is to be noted that a visa usually does not give the holder any additional rights beyond the right to enter a country and to stay there for a limited period of time.

Among the selected regional arrangements, a considerable number have adopted instruments to facilitate entry and travel of their citizens (Table 1.3). Although some legal instruments remain silent about what the person may do during that (visa-free) period of stay, it can be assumed that such visits are intended for reasons[9] not addressed in other instruments (e.g. employment) (Williams, 2006, p. 9)[10]. Four main categories can be distinguished here:

- Full visa exemption
- Temporary visa exemption (variation occurs with periods of stay and categories of people)
- Temporary visa exemption only for economic related activities
- No regional instruments implementing entry rights or visa-free travel

Within the first category, providing for *full visa-exemption*, the European Union and the Schengen area are certainly the most prominent examples of regional free movement. Within the EU, the right to enter and move around freely is exercised in two different ways. First, every EU citizen is automatically entitled to enter another Member State without a visa, only to be restricted on grounds of public policy, public security or public health. Second, it is within the Schengen area that people in Europe are allowed to move around freely. However, since the Schengen regime was developed outside the EU framework, it does not exclusively apply to EU citizens. At present, it covers 22 EU Member States, with Bulgaria, Romania, Cyprus, and Croatia not (yet) complying, although they are legally obliged to adopt the Schengen acquis. The UK

9 Reasons for migration are for both women and men to search for better living conditions or to support their family. However, poverty is not the only factor that can affect the decisions of women to migrate. They can also be driven by state and community settings, traditions and family and personal circumstances. Female migration based on non-economic reasons is often to escape patriarchal societies that limit their freedom, to escape a bad or abusive marriage, or fuelled by a desire for equal opportunities and an escape from discrimination. In particular, single mothers, unmarried women, widows and divorcees face discrimination. Another reason for migration can be to escape political or natural chaos. Women, children and the elderly are considered the most vulnerable refugees and represent typically 80% of a refugee population. In spite of the fact that refugees are often female, only a minority of women are granted refugee status, on the one hand because gender-related causes of persecution are rarely accepted as valid grounds for refugee status, and on the other hand because women often lack the literacy and administrative skills to complete the bureaucratic application process. Women and girls face many dangers and obstacles throughout their refugee experience. Rape is not uncommon and they often need special health care. Migrant women often come from countries where poor health is common; they therefore possess little information regarding health matters. Their health status may be further compromised by the stress of adjusting to a new environment, by violence and by sexual exploitation. Moreover, pregnant women might be discriminated against while receiving service. EU studies have shown that migrants often receive inadequate antenatal care and have higher rates of stillbirth and infant mortality (Caritas, 2010).

10 One example would be the SADC Protocol for the Facilitation of Movement of People.

and Ireland decided to opt out of the regime. Three non-EU countries also participate in the Schengen area: Iceland, Norway and Switzerland. Regional arrangements such as the Benelux, EFTA or the Nordic Common Labour Market have developed their own free movement mechanisms, which do however overlap to a great extent with the Schengen space[11].

The complete abolition of visa requirements for citizens of a regional organization is however not confined to the EU (and the Schengen area), but has taken shape in other world regions as well. The EURASEC signed an Agreement on Mutual visa-free travel of citizens in February 1999, granting EURASEC citizens the right to enter, move across and reside in the territories of the Member States without a visa by simply presenting a national identification document[12]. Member States of the CIS signed an agreement on the visa-free movement of citizens in 1992, establishing the right of CIS citizens to enter, leave, and move within the territories of CIS Member States without a visa, provided that they carry national identification documents[13]. According to the Economic Agreement of the GCC, citizens of the organization's Member States shall enjoy equal treatment with regard to the right of residence and movement among GCC Member States. Movement via the simple presentation of an Identity Card is currently in place in five Member States of the GCC[14].

11 On the Benelux, see Wouters et al. (2006).

12 EURASEC Agreement on mutual visa-free travel of citizens, 26 February 1999.

13 It has to be noted that the status of the agreement is currently unclear. In 2000, Russia notified that it was leaving the agreement, while other signatory states concluded different bilateral agreements.

14 Saudi Arabia is still preparing movement by ID. See GCC website, areas of cooperation achievements, available at: http://www.gcc-sg.org/en-us/CooperationAndAchievements/Achievements/Pages/Default.aspx.

Table 1.3 Travel facilitation and rights of entry (legal provisions)

FULL	BENELUX	Not specified	Benelux citizens	Valid identification document	no	Grounds of public policy, security or health
	CACM (CA-4)	90 days[1]	CA-4 citizens (El Salvador, Guatemala, Honduras, Nicaragua)	National identification document or passport.[2]	no	Grounds of public order, national interest or state security
	CIS3	Not specified	CIS citizens	National identification document	no	Exceptions based on bilateral agreements
	EFTA	Not specified	EFTA citizens	Valid identity card or passport	no	Grounds of public policy, security or health
	EU	Not specified	EU citizens	Valid identity card or passport	no	Grounds of public policy, security or health
	EURASEC	Not specified	EURASEC citizens	National identification document	no	No information available
	GCC	Not specified	GCC citizens	Identity Card (five MS)	no	No information available
	NORDIC	Not specified	NORDIC citizens	No passport needed	no	Not specified

Regional arrangement	Period of stay (without a visa)	Categories of persons	Identification documents	Additional requirements	Reasons to refuse (if specified)	
TEMPORARY	ASEAN[4]	14 days	ASEAN citizens	Valid passport	Stay should not be intended for other purpose than visit	Person is considered 'undesirable' by the destination country
	CAN	90 days	CAN nationals and foreign residents	Valid national identification document	no	Immigration regulations, domestic order, national security, public health
	CARICOM	6 months	CARICOM citizens	Travel permits, ID cards with photographs, birth certificates, drivers licenses	no	Security concerns and if person is likely to become a charge on public funds
	CEMAC	90 days	Certain categories[5]	Valid national passport	no	Not specified
	COMESA	90 days	COMESA citizens	Valid travel document	no	National security or public health; temporary suspension of entry rights possible
	EAC	6 months	EAC citizens	National passport, EAC passport, temporary travel documents	no	Competent authorities can ask person to register, in accordance with the national laws of the Partner State.
	ECOWAS	90 days	ECOWAS citizens	Valid travel document	International health certificate	Person is inadmissible under national law
	MERCOSUR	90 days	MERCOSUR citizens	Valid travel document	no	Not specified
	SADC[6]	90 days	SADC citizens	Valid travel document	Evidence for sufficient means of support; entry through official port of entry	Visitor is 'prohibited person' under national law

Regional arrangement	Period of stay (without a visa)	Categories of persons	Identification documents	Additional requirements	Reasons to refuse (if specified)	
TEMP. ECO	NAFTA	Temporary (not specified)	Business visitors, traders and investors, intra-company transferees, professionals	Nonimmigrant NAFTA Professional Visa (or TN Visa); different requirements for Canadian or Mexican citizens	Only for economic purposes	Public health, safety and national security; persons involved in labor disputes
	SAARC	30 days	34 specific categories of persons	No information available	Only for economic purposes	No information available
	AU	Framework Agreement				
	BSEC	Visa facilitation certain categories				
	PIF	Under negotiation				
	CEN-SAD, COE, LAS, ECCAS, IGAD, AMU	No regional instrument				

1. http://www.iadb.org/en/intal/institute-for-the-integration-of-latin-america-and-the-caribbean-intal,19448.html

2. http://repositorio.cepal.org/bitstream/handle/11362/26127/M20130015_es.pdf?sequence=1 p. 14

3. The status of the Agreement on visa-free movement is currently unclear. Russia started signing bilateral agreements with Ukraine (January 2007) and Azerbaijan (July 1997), while notifying that it would leave the agreement. Meanwhile, Uzbekistan signed conventions on introducing visa regimes with Turkmenistan (March 2000) and Kyrgyzstan (June 2000).

4. The ASEAN Framework Agreement on Visa Exemptions, signed in 2006, has so far been ratified by Indonesia, Lao PDR, Thailand, Cambodia, and Vietnam. It shall enter into force when the instruments of ratification or approval of all Member States have been deposited.

5. This includes members of government and parliament, national and regional civil servants, teachers and researchers, students, investors as well as the heads and leading staff of enterprises and labour unions.

6. The SADC Protocol on the Facilitation of Movement of Persons has been signed by the minimum of nine Member States, but only five countries have ratified it so far (South Africa, Botswana, Mozambique, Swaziland and Lesotho). The protocol is therefore not yet in force.

Source: Compiled by the author

Temporary visa exemption is provided by the majority of the selected organizations, ranging from 14 days of visa-free travel in the case of ASEAN to 6 months for CARICOM nationals. Within African regional integration processes such as CEMAC, ECOWAS and SADC the maximum period of stay without a visa is usually 90 days, but differences exist with regard to additional requirements like

health certificates or proof of financial support. In the case of the Andean Community (CAN), visa-free travel is likewise allowed for 90 days and applies not only to CAN citizens but also to foreign residents.

The Common Market of the South (MERCOSUR*)* approved an agreement on visa exemptions granting artists, scientists, sportspersons, journalists, specialized professions, and technicians visa-free travel up to 90 days[15]. The 'Agreement on Residence for State Party nationals', which grants all MERCOSUR citizens an automatic visa and the freedom to live and work in another Member State, is however not yet in force. ASEAN signed a Framework Agreement on Visa Exemptions in 2006, which grants visa-free travel up to 14 days to citizens of the Member States. The agreement has however not entered into force yet, as only five countries (Indonesia, Lao PDR, Thailand, Cambodia, and Vietnam) have ratified it.

Temporary visa exemption only for economic purposes is granted within SAARC, which allows for 30 days of visa-free travel to certain categories of economically active people. The same is true for NAFTA, which only facilitates the movement of four categories of highly-skilled workers.

Those regional arrangements included in the last category with no regional instruments to facilitate intra-regional travel are characterized by very different approaches. The BSEC does not (yet) provide for any kind of visa exemption either, but adopted two agreements to facilitate visa procedures for business people and professional lorry drivers. The African Union is yet another case which has not adopted its own instruments to grant rights of entry, but serves as a (continental) framework for the Regional Economic Communities to facilitate the movement of people. Finally, some regional arrangements have not adopted any mechanisms at all. This group is comprised mainly of those organizations which are considered dormant (or inactive) for the time being (e.g. AMU or CEN-SAD).

1.5.2 Labour mobility - free movement of workers

It is widely acknowledged that dialogue and cooperation between countries involved in labour migration processes[16] are essential to ensure that international labour migration benefits all actors involved: countries of origin and destination, employers, and the migrant workers themselves (ILO, 2010, p. 191). Most of these cooperative efforts are taking place at the bilateral level, many at the regional level and some at the global level (ILO, 2010, p. 192). Bilateral labour agreements are usually, though not exclusively, concluded between labour sending and receiving countries. They

15 Acuerdo sobre Exención de Visas entre los Estados partes del MERCOSUR, Mercosur/CMC/DEC No. 48/00.

16 International labour contracts are highly gendered, for migrant women are nearly exclusively found in the service sector and as domestic workers. Women tend to be concentrated in the most vulnerable jobs. For example, domestic work is a worldwide unregulated sector, as no labour laws and standards exist. Women are therefore at a higher risk of being exploited or badly treated. This makes addressing gender inequality issues of migration processes a necessity (Caritas, 2010).

often deal with managerial issues such as recruitment, entry and residence conditions, social security rights and remittances, but do not per se provide formal commitments to market access (Trachtman, 2009, p. 206). As outlined later in the text, bilateral agreements often constitute an important pillar within regional efforts to facilitate labour migration. In some cases, they may even substitute regional endeavours to facilitate the movement of people. At the global level, no international regime to liberalize labour migration has yet emerged. There are however international treaties and conventions, which do protect the rights of migrant workers and can influence the way regional agreements are negotiated.

Within regional integration processes, labour migration is addressed in a great variety of ways. In the context of regional free trade agreements, countries may include migration provisions as an adjunct to foster trade in goods, services or investment[17]. The North American Free Trade Agreement (NAFTA) is illustrative of such an approach. Despite its underlying objective to improve living standards in the region by creating new employment possibilities and to reduce unauthorized migration flows between Mexico and the US, the Agreement omitted to deal extensively with migration issues (Flores-Macias, 2007, p.147). It does not aim at liberalizing the movement of people in general, but at facilitating exclusively the temporary entry of high-skilled labour[18].

In other regional arrangements, the free movement of workers is considered as one of the 'four freedoms' (next to goods, services and capital) and seen as a key component towards the establishment of a common market or single economic space. Hence, freeing the movement of workers (or people in general) is part of a broader integration project and considered a key variable for successful regional integration. These agreements generally provide for progressive harmonization of labour policies, eventually giving full equal treatment to the nationals of Member States. However, many agreements remain far from being fully implemented, as outlined in more detail in section 6.

Yet other regional organizations follow a different path, which does not necessarily lead to free movement among the participating Member States, but builds a legal

17 It has to be noted at this point that those Regional Trade Agreements (RTAs) notified to the WTO are not 'regional' in the sense of the present paper as they include also bilateral agreements. For a complete list of RTAs notified to the WTO see: http://www.wto.org/english/tratop_e/region_e/region_e.htm.

18 Dumont et al. (2007) point to two trends in international migration flows: their growing feminization, and the increasing selectivity of receiving countries towards the highly-skilled. They find that female high-skilled migrants are as well represented in the brain drain from less developed to more developed countries as male high-skilled migrants, which is remarkable since women still face unequal access to tertiary education in many less developed countries. They also find that the poorer the country of origin, the more high-skilled women emigrate. This effect is also observed for men, but to a lesser extent. The reports shows that the emigration of highly skilled women has a negative impact on infant mortality, under-5 mortality and secondary-school enrolment rate by gender, which raises concerns about the potentially negative impact of the female brain drain on the poorest countries. To minimize these potential negative effects, the gender dimension of (high skilled) migration should be taken more into account in migration and aid policies. Caritas (2010) adds that it is mainly the way women move that has been the changing trend over the past few years. More women are migrating independently now in search of jobs, instead of travelling with husbands or joining them abroad.

framework for the better management of migration and the protection of migrant workers and their families.

To sum up, we can broadly distinguish four different types of approaches, which will be discussed in detail below:

- Regional organizations or agreements offering full mobility of labour;
- Regional arrangements granting access to their labour markets only for certain categories of people (mostly high-skilled workers);
- Regional arrangements following the GATS model by granting labour market access only to service providers on a temporary basis;
- Regional arrangements not aiming to regulate market access but to protect the rights of migrant workers.

Comprehensive arrangements for labour mobility

Within this category, the most advanced regional integration scheme is certainly the European Union (EU). As one of the four fundamental freedoms of Community law, Art. 21 TFEU (ex. Art. 18 TEC) gives every EU citizen the right to move and reside freely within the territory of the Member States. More specific treaty provisions apply to the movement of workers (Art. 45 TFEU), the self-employed (Art. 49 TFEU), and to service suppliers (Art. 56 TFEU). In addition, there is relevant secondary legislation on social security, health care, taxation, mutual recognition of diplomas, etc. According to Article 45 TFEU and Regulation 1612/68, every national of an EU Member State has the right to work in another EU Member State without the need of a work permit[19]. This includes equality of treatment with regard to employment, remuneration and other working conditions. Family members are entitled to specific rights as well[20]. However, employment in the public sector might be restricted and Member States can deny access to their labour markets on grounds of public policy, public security or public health. It is worth mentioning that in the context of eastward enlargement, several old Member States introduced transitional restrictions on the free movement of workers from the new Member States. During this period, old EU Member States are allowed to apply national measures to restrict access to their labour markets, including by requiring work permits. This restriction can be maintained for a maximum of seven years. It expired in May 2011 in the case of the eight countries that joined the EU in 2004 (Malta and Cyprus were excluded), and 2014 for Bulgaria and Romania. For Croatia, the newest Member State of the EU, transitional restrictions may be maintained until 1 July 2020.

19 This includes the right to seek employment, to stay in the Member State for the purpose of employment and to remain in the territory of a Member State after having been employed.

20 Family members have, irrespective of their nationality, the right to reside with the migrant worker and to receive a residence permit for the same period of time as the worker. Children of migrant workers have in addition the right to education in the host country on the same conditions as children of national workers. They can retain their right of residence even after the migrant worker has left the country.

However, the full mobility of labour is not only a principal goal of the EU, but it is likewise envisaged in other regional integration processes as well (Table 1.4). In the founding Treaty of the Economic Community of West African States (ECOWAS), Member States are called upon to abolish all obstacles to the freedom of movement and residence of Community citizens and to allow them to work and undertake commercial activities within the Community (Art. 27 (1) and (2)). In order to achieve these long-term goals, a Protocol relating to Free Movement of Persons and the Right of Residence and Establishment was signed in 1979. It identified three main phases (right of entry, residence and establishment) through which free movement should be achieved within a maximum time period of 15 years. The right to work is addressed in the second phase, which entered into force via a supplementary protocol in 1986. It includes the right of residence for the purpose of seeking and carrying out income earning employment (Art. 2). Employment in the civil service of the Member States is however excluded unless permitted by national laws (Art. 4). Citizens wanting to reside in another Member State are obliged to apply for a residence card or residence permit at the competent ministry of the host Member State[21].

Table 1.4 Regional labour mobility (legal instruments)

Comprehensive Limited	BENELUX	Workers, self-employed, service providers	Residence permit issued by host country	Yes	Employment in public sector; reasons of public policy, security and health
	CACM	All categories of migrant workers	No information available	-	-
	CIS	All categories of migrant workers	No information available	-	-
	EFTA	Employed persons, self-employed, service providers, frontier workers	Residence permit issued by host country	Yes	Employment in public sector; protection of general public interest
	EU	Workers, self-employed and service providers; transitional period for new MS	No work permit needed, residence permit issued by host country	Yes	Employment in public sector; reasons of public policy, public security, public health

21 A comprehensive analysis of free movement of people within ECOWAS can be found in Adepoju, 2005 and 2007, SWAC/OECD, 2006, and Martens, 2007.

Regional arrange-ment	Categories of workers	Residence and work permits	Family members?	Exceptions	
Comprehensive Limited	ECOWAS	Migrant workers (border area workers, seasonal workers, itinerant workers), self-employed persons	Residence permit issued by host country	Not specified	Employment in public sector only if permitted by national law; national security, public order or morality, public health, non-fulfillment of essential condition of residence
	COMESA	Workers, service providers	No information available	Not specified	Employment in public service; reasons of public policy, public security or public health
	CAN	Individually moving workers, company workers, seasonal workers, border workers, service providers	Temporary residence?	Right of entry and departure for families	Public administration; reasons of public morals, law and order; human life and health, interests of national security
	EURASEC	Migrant workers (not specified)	No information available	-	-
	EAC	Workers and self-employed, service providers	Contract of employment needed at entry; work permit required	Right of entry and exit for spouses and children	Competent authority may reject application for work permit (reasons not specified)
	GCC	GCC nationals working in the government and private sectors	No information available	Not specified	-
	MERCOSUR	Service providers, Workers?	Temporary and permanent residence	Right of entry and residence	Public sector employment;
	NORDIC	All Nordic citizens are allowed to work in another Nordic MS	No work or residence permit needed	yes	Public policy, security or health
	NAFTA	Business visitors, traders and investors, intra-company transferees, professionals.	No permanent residence	Yes, but different requirements	Public health, safety and national security; persons involved in labor disputes

Regional arrange-ment	Categories of workers	Residence and work permits	Family members?	Exceptions	
Comprehensive Limited	ASEAN	Skilled labour, business visitors, intra-corporate transferees, service suppliers	GATS-Plus principle; no permanent residence	no	Not specified
	CARICOM	Certain categories of skilled labour, service providers on a temporary basis	No work permit, but special certificate for skilled labour	yes	
	PIF	Recognised professionals, semiskilled/trade professionals	Not yet decided	n/a	n/a
	SADC	Employees or self-employed; persons establishing and managing a profession, trade, business or calling	Work permit needed	Not mentioned	Here the question is whether this is a 'limited regional approach 'or rather no regional approach at all (as national rules apply)
Rights Protection	COE	Migrant workers and their families	national	n/a	Convention does not apply to frontier workers, artists, entertainers and sportsmen, seasonal workers, etc.
NONE	AU	Non-binding framework programme for REC´s	n/a	n/a	n/a
	BSEC	No regional agreement on labour mobility, only visa facilitation for business people and lorry drivers	n/a	n/a	n/a
	CEN-SAD, CEMAC, EC-CAS, IGAD, SAARC, AMU	No regional agreement on labour mobility	n/a	n/a	n/a

1. The Draft Protocol on the Facilitation of Movement of SADC citizens has not yet entered into force.
Source: Compiled by the author

The Common Market for Eastern and Southern Africa (COMESA) envisages the free movement of goods, services, capital and labour. The founding Treaty states as an objective the removal of 'obstacles to the free movement of persons, labour and services, right of establishment for investors and right of residence within the Common

Market'. In 2001, the Protocol on Free Movement of Persons, Labour, Services, Right of Establishment and Right of Residence was adopted. As implementation is however slow – the protocol has been ratified only by Burundi – Member States are still applying the Protocol on Gradual Relaxation and Eventual Elimination of Visa Requirements.

Within the Andean Community (CAN), the Andean Labour Migration Instrument (IAML) contains the most important provisions related to labour migration[22]. It provides for the gradual establishment of unhampered movement and temporary residence for Andean migrant workers, who are grouped into four different categories: (1) Individually moving workers, (2) company workers, (3) seasonal workers and (4) border workers[23]. Andean migrant workers are granted the right to equal treatment, to form labour unions and to collectively bargain their wages (Arts. 10 and 11). Families of migrant workers are also protected under the IAML. Rights of entry and departure are to be granted to spouses of migrant workers, minor children who are not yet emancipated, older disabled children, and parents of migrant workers (Art. 12). It should nevertheless be noted that an additional regulation still needs to be adopted in order to implement the provisions laid down in the IAML (Santestevan, 2007, p. 380).

Within the Gulf Cooperation Council (GCC), full equal treatment shall be accorded to GCC nationals working in the government and private sectors[24]. Effective from 1982 on, GCC nationals were allowed to engage in all economic activities not listed within a specific document ('negative list approach'). In 2007, the list was reduced to four types of activities which are limited to the nationals of the respective Member State[25].

Regional arrangements providing labour market access only for certain categories of people

The North American Free Trade Agreement (NAFTA) focuses exclusively on facilitating the mobility of business people on a temporary basis (Chapter 16 of NAFTA). According to Article 1608 of NAFTA, the term 'business people' includes persons involved in trade in goods, the provision of services, and the conduct of investment activities. The agreement is limited to temporary entry, which is defined as being 'without the intent to establish permanent residence' (Art. 1608 NAFTA). Temporary entry is basically granted to four categories of high-skilled labour: (1) business visitors, (2) traders and investors, (3) intra-company transferees, and (4) professionals. This last category requires a special visa, also known as the non-immigrant NAFTA Professional visa or TN visa (Alarcón, 2007, p. 253). It is to be noted that the requirements for obtaining

22 Established by Decision No. 545, 25 June 2003.

23 The different categories are defined and explained in Articles 5 to 8 of the Labour Migration Instrument.

24 See resolution of the Supreme Court, 23rd session Doha 2002.

25 See http://www.gcc-sg.org/en-us/Pages/default.aspx

a NAFTA visa in order to work in the US differ for Canadian and Mexican citizens as well as for their family members[26].

Within the Caribbean Community (CARICOM), certain categories of Community nationals are granted the right to seek employment as wage earners without a work permit. At present, these categories include holders of university degrees and equivalent qualifications, artists, musicians, media workers, sportspersons, teachers, nurses, holders of associate degrees and equivalent qualifications, as well as artisans who have received a Caribbean Vocational Qualification[27]. In order to prove that they belong to one of the eligible categories, CARICOM nationals have to apply for a Certificate of Recognition of CARICOM Skills Qualification. This certificate ensures a definite entry of six months and can be transformed into indefinite entry once the holder´s qualifications are verified by the receiving country[28]. In addition, service providers are allowed to enter another CARICOM Member State on a temporary basis (Nonnenmacher, 2007, p. 393). The provision of services is permitted at all skill levels as long as service providers are not employees. This certificate however does not translate into a right of residence or a right to enter the local labour market.

The way labour migration will be addressed within the Pacific Island Forum (PIF) has not yet been decided. The Pacific Island Countries Trade Agreement (PICTA) includes at present only trade in goods. However, Pacific Trade Ministers decided in 2001 that the scope of PICTA should be broadened to include also trade in services (TIS) and the temporary movement of natural persons (TMNP). This TMNP scheme shall include two different categories of persons, namely professional workers (tier 1) and semi-skilled workers (tier 2)[29]. Recognized professional workers shall be allowed to move freely among the Member States while semi-skilled workers shall be subject to a quota system. The final design of the agreement has however yet to be decided.

Regional arrangements following the GATS model

The Common Market of the South (MERCOSUR) has not (yet) moved towards general free movement of labour, but grants access primarily to service providers. The Protocol of Montevideo on Trade in Services directly replicates the GATS model by linking mobility rights to specific commitments formulated in the annex of the protocol (Trachtman 2009, p. 237). According to the Protocol, Member States are obliged to ensure that service providers receive equal treatment as compared to nationals or service providers from third countries. The Agreement on Residence for State Party Nationals and a similar agreement including Bolivia and Chile provide that

26 See also Papademetriou, 2004.

27 The original categories are laid down in Art. 46 of the Revised Treaty. For the current categories of skilled labour, see CARICOM Status Report of Free Movement of People in the Region (unpublished).

28 For more details on this and other aspects of movement of people within CARICOM, see Mac Andrew (2005) and Nonnenmacher (2007).

29 Study on the Pacific Island Countries Trade Agreement (PICTA) Temporary Movement of Natural Persons (TMNP) Scheme, TOR (i).

citizens of the Member States have the right to entry, reside and work in other Member States[30]. The right of residence can be transferred to family members while children are guaranteed access to education. The Residence Agreement has however not entered into force yet.

The Association of Southeast Asian Nations (ASEAN) also follows the GATS approach by aiming at the elimination of barriers to trade in services. Liberalization in services under the ASEAN Framework Agreement on Services goes beyond Member States' commitments under GATS, following what is known as the 'GATS-Plus principle'. The categories listed under the agreement include, among others, business visitors, intra-corporate transferees and contracted service suppliers.

Regional arrangements not aiming to regulate market access but to protect the rights of migrant workers

The Council of Europe adopted the European Convention on the Legal Status of Migrant workers on 24 November 1977, aiming to improve the legal situation of migrant workers. The scope of the Convention extends to the right to work. Whereas the first work permit can only be limited to the same employer or locality for a maximum of one year, subsequent work permits may be for periods of at least one year so long as the current state and employment situation permits (Article 8). Residence permits are linked to the validity of the work permit (Article 9). The host state has to facilitate re-employment (Article 25) but is not required to allow a migrant worker to remain for a period exceeding the period of payment of unemployment insurance (Article 9.4). Treatment should however not be less favourable than for national workers. With regard to implementation, the Consultative Committee of the European Convention on the Legal Status of Migrant Workers and the Standing Committee of European Convention on Establishment have similar functions, limited to preparing periodic reports on relevant laws and regulations in Contracting States and making proposals to improve the implementation of their respective conventions and amendments.

1.5.3 Rights of residence

The right of residence is closely linked to the right of entry and the right of work. According to the IOM, residence can be understood as 'the act or fact of living in a given place for some time (…)' (IOM Glossary, 2004, p. 56). One can distinguish between temporary residence (e.g. linked to a limited period of employment) and permanent residence (granted for an indefinite period). Furthermore, differences may exist with regard to the requirement of documents (e.g., residence permits). Also important to mention is the fact that some organizations or agreements do not explicitly use the term 'residence'. If rights of entry and work are granted even within

30 Acuerdo sobre Residencia para Nacionales de los Estados partes del MERCOSUR, Bolivia y Chile, Mercosur/RMI/CT/ACTA No. 04/02.

a limited period of time, the right of 'residing' in another country can however be implied for that particular period.

From all selected regional arrangements, only a minority grants residence rights independently from economic activity (Table 1.5). Within the EU, the right of residence for up to 90 days is usually granted without any formalities, although Member States may require that citizens announce their presence within a reasonable period of time. In order to qualify for the right to residence for more than 90 days a person must fulfil one of the following requirements: (1) Person must be engaged in economic activity; (2) Person must have sufficient resources and health insurance; (3) Person must follow vocational training; (4) Person must be a family member of a Union citizen. With regard to necessary formalities, registration might be required with the relevant authorities after three months. The right to permanent residence can be acquired by EU citizens and their family members who have legally resided for a continuous period of five years in another Member State.

Citizens of EURASEC have the right to enter, move across and reside in the territories of the Member States provided they are in the possession of an identification document. Those citizens residing permanently in another Member State enjoy the same rights and obligations as nationals of that Member State.

Within MERCOSUR, service providers are granted temporary residence for up to four years. Once the Residence Agreement enters into force MERCOSUR citizens will be entitled to temporary and permanent residence, which encompasses the right to enter, exit and move around freely.

However, the great majority of the listed arrangements make residence rights subject to the exercise of income-earning employment. CAN, CARICOM and ECOWAS explicitly link the right of residence to income earning employment, whereby differences exist with regard to the categories of workers. In the case of NAFTA, temporary residence is limited to those high-skilled workers under the NAFTA visa scheme. Permanent residence is explicitly excluded in the agreement.

Table 1.5 Rights of residence – legal provisions

Residency Rights	BENELUX	All categories of persons		
	CACM (CA-4)	Pensioner, annuitant or investor; spouse of a national of the country in which the residence is requested (minimum period of their marriage); children of national or nationalized, minors or unmarried; parents of children with the nationality of the host country; temporary residents with at least two years of stay in the country; religious or featured in art, science or sports people.[1]	Temporary residence granted for a period of 2 years renewable; permanent residence must be renewed every five years.1	
	EFTA	Employed and self-employed persons as well as to persons not pursuing an economic activity as long as they have sufficient financial means/health insurance	Not specified	Self-sufficiency required in case of non-economic activities
	EU	Right to reside up to three months for all categories of persons; for more than 3 months for workers, self-employed, student or self-sufficient person	Unlimited but different conditions apply	Residence permit required after three months
	NORDIC	All categories of persons	unlimited	No residence permit needed
	COMESA	COMESA citizens	n/a	MS shall endeavour to harmonise their national laws, rules and regulations having regard to the need to grant the right of residence

	Regional arrange-ment	Categories of persons	Period of stay	Other remarks
Residency Rights /Economic Activity	EURASEC	EURASEC citizens	Not specified	Permanent citizens enjoy the same rights and freedoms and have the same obligations as compared to nationals of that country
	GCC	GCC citizens	Not specified	Non-discrimination of GCC nationals
	EAC	Workers or self-employed, spouses and children of migrant workers	Duration of work permit	Right of residence on the basis of a work permit, residence permit or dependant's pass
	MERCOSUR	MERCOSUR citizens (plus Bolivia and Chile)	Temporary residence for two years; possibility of permanent residence	Temporary or permanent residence guarantees equal civil, social, cultural and economic rights (including labour rights) as compared to nationals
	CARICOM	Person must be involved in economic activity and not be a charge on public funds	Right of residence after being granted indefinite entry	
	ECOWAS	Right of residence for the purpose of seeking and carrying out income earning employment	Not specified	Conditions entitlement to residence on possession of an ECOWAS Residence Card or Permit
	SADC		Temporary residence	Application for residence permit in host country
	CAN	Migrant workers	Temporary residence?	
NONE	NAFTA	No regional rules	n/a	No permanent residence envisaged
	AU	No regional agreement	n/a	Framework agreement for RECs
	CIS, COE, BSEC, ASEAN, CEMAC, CEN-SAD, ECCAS, IGAD, PIF, SAARC, AMU	No regional agreement		

1. http://repositorio.cepal.org/bitstream/handle/11362/26127/M20130015_es.pdf?sequence=1 p. 24

1.5.4 Common travel documents

Interestingly enough the most advanced regional integration schemes do not issue common travel documents (e.g. EU, EFTA, Nordic Common Labour Market). There are however other organizations which do provide their citizens with common passports and/or travel documentation (see Table 1.6). Generally speaking these documents are national documents (issued by national authorities) endowed with a regional symbol or stamp.

Table 1.6 Common travel documents at the regional level

Approach	Regional Arrangement
Common travel documents	CACM, CAN, CARICOM, ECOWAS, EAC, MERCOSUR
Common travel documents for certain categories of people (e.g. diplomats)	AU, CEMAC
No common travel documents	AMU, ASEAN, BENELUX, BSEC,CEN-SAD, COE, COMESA, ECCAS, EURASEC, GCC , GUAM, IGAD, PIF, NORDIC, LAS, NAFTA, EU, EFTA, ECO, SAARC, SADC, CIS

In 2007, the General Secretariat of CAN issued Resolution 527 recognizing the 'Andean Migration Card' (TAM) as a compulsory and standardized document for entering and leaving the territory of CAN Member Countries. Furthermore, Decision No. 504 introduced the Andean Passport, which is currently in use in Bolivia, Ecuador and Peru (p. 11).

A CARICOM Passport has been introduced, which is now issued in all twelve Member States participating in the CSME[31]. There also exist special passports for diplomats (CARICOM Diplomatic Passport) and officials of Member States (CARICOM Service Passport). All passports are national passports, issued in accordance with an agreed regional format. The Bahamas, not being part of the CSME, and Montserrat, not granted entrustment by the UK, do not employ these documents. Haiti is not issuing the respective documents either, but it is eager to do so upon its hoped-for entry into the CSME.

Within ECOWAS, there are two common travel documents: the ECOWAS Travel Certificate, introduced in 1985 with the aim of simplifying border formalities by issuing a travel certificate that would exempt ECOWAS citizens from completing immigration or emigration forms when crossing borders between Member States; and the ECOWAS passport, introduced in 2000 with the goal of progressively replacing national passports.

31 Suriname was the first Member State to have issued the CARICOM Passport (7 January 2005), followed by St. Vincent and the Grenadines (20 June 2005), St. Kitts and Nevis (25 October 2005), Dominica (14 December 2005), Antigua and Barbuda (16 January 2006), St. Lucia (16 January 2007), Republic of Trinidad and Tobago (24 January 2007), Grenada (29 January 2007), Guyana (13 July 2007), Barbados (1 October 2007), Jamaica (2 January 2009) and Belize (16 March 2009). See http://caricom.org/communications/view/belize-becomes-twelfth-member-state-to-issue-caricom-passport-belize-becomes-twelfth-member-state-to-issue-caricom-passport.

Citizens of the East African Community have been able to use the EAC passport since 1 April 1999. It has a six month multiple entry validity, costs around 10 US dollars, and is issued by national immigration offices. The EAC passport is currently valid only for intra-regional travel, but discussions are ongoing to adopt it as an international travel document, too. On 25 May 2007, the African Union issued the African Union Diplomatic and Service Passport.

1.5.5 Mutual recognition of skills and qualifications

As most of the world´s migrants are migrant workers with their families, the portability and recognition of skills and qualifications becomes vital in an emerging global labour market. Migrants with internationally or regionally recognized skills or qualifications are more likely to move, while recognition itself improves access to labour markets and diminishes the risk of 'brain waste'. Recognition can generally be understood as 'a formal acknowledgement by a competent authority of the value of foreign qualifications with a view to access to educational and/or employment activities' (Hartmann, 2008, p. 8). With regard to academic qualifications, this entails the possibility of an applicant to pursue further study, while the recognition of professional skills empowers a person to perform a particular profession[32]. Authorities in charge of acknowledging qualifications include governments as well as professional organizations or associations.

The mutual recognition of skills and qualification is generally a very complex process involving a considerable degree of cooperation between the respective countries. According to Hartmann (2008), the following prerequisites are needed to achieve mutual recognition. First, the host country needs to have in place a qualifications system that regulates access to education and/or employment. This system should include mechanisms to compare foreign to domestic requirements, to identify existing gaps, and to allow for possible compensation mechanisms. Consequently, participating states need to exchange information on their education systems and acquire a profound knowledge about one another's regulatory regime. In other words, 'recognition regimes comprise communication across borders' (ibid., p. 9).

A significant part of the selected regional arrangements have long started such cooperation and adopted instruments to recognize skills and qualifications (Table 1.7). These are either included in economic trade agreements (e.g. related to the liberalization of services) or are part of conventions aiming at cultural or educational cooperation between countries. Apart from those agreements initiated within regional integration processes, UNESCO has developed six regional conventions and one cross-regional convention covering all world regions in order to promote the recognition of

32 With regard to the latter, a distinction is usually made between regulated and non-regulated professions. Regulated professions cannot be practiced without authorization or registration e.g. lawyers or doctors. Non-regulated professions in contrast do not require formal authorization conferring considerable discretionary power to the employer who has the final say on the competence of a candidate. See also Nonnenmacher, 2007, p.94.

academic qualifications for academic and professional purposes. These include Africa, the Arab States, Asia and the Pacific, Latin America and the Caribbean, Europe (two conventions), and the Mediterranean region[33].

Table 1.7 Recognition of skills and qualifications at the regional level

Approach	Regional Arrangement
Regional Recognition Agreements	EU, EFTA, BENELUX, COE, NORDIC, GCC, ECOWAS, SADC, EAC, CARICOM, CAN, EURASEC, CIS, CACM/SICA, COMESA, EAC,
GATS approach ('positive list')	ASEAN, MERCOSUR
'Negative list approach'	NAFTA
No regional agreements	AMU, PIF, ECO, LAS, SAARC, CEMAC, BSEC,GUAM, ECCAS, IGAD

Apart from the Arusha Convention adopted by the African Union (AU), in the context of UNESCO's Regional Recognition Conventions, several subregional recognition agreements have been adopted on the African continent. ECOWAS for example concluded in 2003 the General Convention on the Recognition and Equivalence of degrees, diplomas, certificates and other qualifications in Member States (Regional Report on Education, 2009). As mentioned in the Regional Report on Education, ECOWAS has established as an ad-hoc committee of five countries as well as ex-officio members from UNESCO, CAMES, AAU and WAEC to implement the convention. It has furthermore commissioned a study on the different certificates and their equivalence (pp. 9-10).

Meanwhile, SADC Member States signed a Protocol on Education and Training in September 1997, which entered into force in July 2000. It states as one of its main principles that 'Member States shall take all steps possible to act together as a Community, in the gradual implementation of equivalence, harmonization and standardization of their education and training systems under this Protocol' (Art. 2h). In order to facilitate the mutual recognition of qualifications and ensure their effective comparability, a SADC Qualifications Framework (SADCQF) was approved in June 2005. In East Africa, the EAC Secretariat commissioned the Inter University Council for East Africa (IUCEA)[34] to conduct a study on how to harmonize the five different education systems and establish the mutual recognition of professional qualifications (Muramira, 2009).

33 See UNESCO's section on migration: http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/migrant/.

34 The Inter-University Council for East Africa (IUCAE) is a regional inter-governmental institution under the umbrella of the EAC. Its mission is to encourage and develop mutually beneficial collaboration between universities in East Africa and between them and governments as well as non-governmental organizations. For further details see: http://www.iucea.org/?jc=index.

Member States of the North American Free Trade Agreement (NAFTA) agree not to adopt licensing or certification measures that constitute unnecessary barriers to trade (NAFTA, Art. 1210). Like the GATS, but contrary to classical regimes of mutual recognition, this does not imply the mutual recognition of skills, qualifications or experiences. It only acknowledges the right of a State Party to recognize qualifications obtained in the territory of another Member State. There is no obligation to grant the same right to another State Party. A major difference between NAFTA and GATS is that while the latter is characterized by a 'positive list approach', the NAFTA approach covers all sectors and modes of supply unless exceptions are specified ('negative list approach'). Furthermore, the contracting parties aim at strengthening recognition arrangements by providing a platform for the development of recommendations on common standards (Baert et al., 2008, p. 24). At present, such recommendations exist for engineering, legal services, public accountancy and architecture (Hartmann, 2008, p. 26).

Also similar to the GATS, the MERCOSUR Protocol on Trade in Services acknowledges the right of a Member State to recognize the education, experience, licenses, matriculation results, and certificates obtained in another Member State without automatically requiring an extension to other MERCOSUR States Parties (ILO, 2007). In addition, three Educational Integration Protocols have been developed: (1) the Educational Integration Protocol on the Recognition of Certificates Degrees and Primary- and Non-Technical Secondary Level Studies; (2) the Educational Integration Protocol on the Revalidation of Diplomas, Certificates and Degrees and the Recognition of Secondary-Level Technical studies; and (3) the Educational Integration Protocol on the Recognition of University Degrees for the Pursuit of Postgraduate Studies at the Universities of MERCOSUR Countries (Santestevan, 2007, p. 372).

Within the CAN, the recognition of qualifications takes place in the framework of Decision 439 on liberalizing trade in services. Member States have to recognize professional degrees, certificates and licenses of service providers if they were granted in another Member State. This has to be done in accordance with criteria included in a particular decision, which has still to be adopted.

Within the CARICOM, certain categories of skilled labour are allowed to move freely with a work permit. At present, this includes holders of university degrees and equivalent qualifications, artists, musicians, media workers, sportspersons, teachers, nurses, holders of associate degrees and equivalent qualifications, as well as artisans who have received a Caribbean Vocational Qualification[35]. In order to prove that they belong to one of the eligible categories, CARICOM nationals have to apply for a Certificate of Recognition of CARICOM Skills Qualification. Attempts are ongoing to establish a regional accreditation body.

According to the ASEAN Framework Agreement in Services, Member States are allowed to recognize education or experience obtained in another Member State

35 The original categories are laid down in Art. 46 of the Revised Treaty. For the current categories of skilled labour, see Status Report on Free Movement of Persons in the Region, p.2.

without being obliged to grant the same right to other States Parties. In this regard, it resembles the GATS approach. However, the agreement also provides for the possibility to negotiate mutual recognition agreements among Member States. In this context, eight Mutual Recognition Agreements have been adopted to enable the qualifications of service providers to be mutually recognized by signatory member countries. At present, these agreements cover engineering services, nursing, architectural services, surveying, medical practitioners, dental practitioners, accounting services and tourism professionals[36].

Improving the recognition of skills has also become a major objective of SAARC. In 1989, SAARC leaders decided to include education in their areas of cooperation and established a Technical Committee on Education, which was later transformed into the Technical Committee on Human Resource Development (Baert et al., 2008, p. 31). In 2002, it was decided to establish common regional education standards through uniform methods of instruction and teaching aids. In 2003 a Committee of Heads of University Grants Commission/Equivalent Bodies was established, which recommended there be minimum requirements for Bachelor degrees and that degrees awarded by Chartered Universities in the region should be recognized by all Member States on the basis of number of years studied, grades, and credits obtained. It is however not clear if, and to what extent, these recommendations have been put into practice.

The European Union (EU) has been particularly active in establishing a system of mutual recognition of qualifications, which is considered a cornerstone of free movement of people within the Community. Since the 1970s, the EU has adopted several directives that target different regulated professions such as architects, dentists, doctors, lawyers, midwives, nurses, pharmacists, and veterinarians (Hartmann, 2008, p. 21). Following this sectoral approach, Member States were obliged, for professional purposes, to recognize academic titles or degrees acquired in other EU Member States[37]. The success of the directives was however limited, and a decade later Member States decided to abandon the sectoral (or vertical) approach in favour of a horizontal approach. Three main directives formed this general system for the recognition of qualification. Directive 89/48/EEC regulates the recognition of higher education diplomas awarded upon completion of professional education and training of at least three years. Directive 92/51/EEC complemented the first directive by targeting education and training of at least one year. Finally, Directive 99/41/EC installed a system of recognition for those professions not covered by the first two directives. As these directives were only applicable to EU citizens, the Council decided in 2003, by way of Directive 2003/109/EC, to recognize the right of third country nationals to enjoy equal treatment with EU citizens as regards the mutual recognition of professional diplomas, certificates and other qualifications. The key characteristic of this general system of recognition is that Member States are to recognize qualifications of other EU

36 For more details, see chapter on ASEAN.

37 A sectoral approach in this sense is also sometimes called vertical approach as it covers only certain segments of the labour market.

Member States unless there is a substantial difference with the qualifications required by the host country. In that case, Member States are allowed to ask for compensatory measures such as additional courses or the testing of skills. Directive 2005/36/EC finally replaced the majority of sectoral directives in 2005 (with a transitional period until 2007), thus serving as the major framework for the recognition of qualifications[38].

In addition, the EU instituted the European Qualification Framework (EQF), which was further advanced through the so-called Bologna Process. The Bologna Process launched the European Area for Higher Education in March 2010, the major framework derived from the UNESCO-Council of Europe Convention on the Recognition of Higher Education in the European Region, adopted in 1997. Through the ongoing Bologna Process a variety of different recognition procedures have been developed. The European Credit Point Transfer System (ECTS) facilitates mutual recognition by awarding credit points for different courses or learning modules. These credit points are accumulated until the student meets the requirement for a specific degree or certificate, making degrees of different countries comparable. The countries participating in the Bologna Process have also agreed to establish a European Register for quality assurance and accreditation agencies for higher education institutions. In order to develop common European standards, a European Network of Quality Assurance (ENQA) was created in 2000. Following the ECTS, a European Credit System for Vocational Education and Training (ECVET) was developed to ensure adequate country-level similarities of vocational education and training. Finally, it should be noted that the success of the evolving European recognition regime lies also in its strong enforcement mechanisms. Compliance with the general system directives can be enforced through the European Court of Justice.

The European Free Trade Association (EFTA) followed the EU approach and incorporated the recognition regulations into its own legal framework (EFTA Appendix 3 Art. 22. See also Hartmann, 2008, p. 24). The major difference in relation to the EU system however, is that enforcement mechanisms are weaker because the implementation of relevant legislation does not fall within the jurisdiction of the European Court of Justice (ibid.).

Member States of the Commonwealth of Independent States (CIS) adopted a Cooperation Agreement to create a common educational area in 1997. This was followed by a Draft Convention on the Recognition on State-pattern credentials, Academic Degrees and Academic Titles and the creation of a CIS Council on Cooperation in Education. A Draft Agreement on Mutual Recognition of Qualifications, Academic Degrees and Titles was adopted in 1998. It should be noted that several CIS Member States are signatories of either one or two of UNESCO´s Regional Conventions (Lisbon Convention and the Asia-Pacific Regional Convention).

With regard to EURASEC, several initiatives were taken before the formal creation of the organization in 2000. In 24 November 1998, a Convention on mutual

38 For more details, see http://ec.europa.eu/internal_market/qualifications/policy_developments/legislation/index_en.htm.

recognition and equivalence of documents of education, scientific degrees and titles was concluded between Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan. Within this framework, certificates of basic and middle education, as well as diplomas of university education and professional-technical education, are recognized according to the rules established by a common organ, the Council of Mutual Recognition. PhDs and Doctorates, as well as titles of Lecturer and Professor, are recognized according to bilateral conventions.

On the basis of this document, the Council of Mutual Recognition and Equivalence of Documents of Education, Scientific Degrees and Titles was created in 1999 and incorporated into the institutional structure of EURASEC after its establishment in 2000. So far, the Council has prepared and presented the following legal projects: (1) A Convention on the mechanism of mutual recognition and determination of the equivalency of documents for scientific degrees of Member States of EURASEC. It was approved by the Inter State Council of EURASEC (by heads of government) on 27 September 2005 with decision No. 260; (2) A Convention on cooperation in the sphere of attestation and accreditation of educational organizations/establishments (educational programmes) of Member States of EURASEC; and (3) A Proposition on the coordination of systems of requalification and the strengthening of qualifications for scientific-pedagogical cadres of EURASEC Member States.

In 2007, the Council initiated meetings of expert working groups for deepening and accelerating processes of elaboration of international documents and coordination with executive bodies of participating countries. From 1999 to 2007, the Council organized 13 such meetings. In addition, the Integration Committee of EURASEC decided to transform the Council on mutual recognition into the Council on Education (Decision No.773 of 7 June 2007). The main task of this Council is the elaboration of coordinated propositions aiming at: (1) contributing to the creation of a common education space within EURASEC; (2) enabling better quality professional education, and the increase of academic mobility of students and scientific-pedagogical cadres; and (3) elaborating and realizing international projects and programmes in the sphere of education.

In order to foster and coordinate educational and cultural activities in the Arab World, the Arab League Educational, Cultural and Scientific Organization (ALECSO) was established in Cairo in 1970. Among its education priorities ALECSO aims to create 'local bodies in charge of evaluating higher educational institutions at the state level, setting up mechanisms, criteria and standards for self and external assessment (…)'. The necessity to develop mechanisms to recognize academic qualifications and degrees is mentioned in a strategic paper in 2008, but so far no information exists with regard to concrete implementation (see League of Arab States, 2008).

The Member States of the Gulf Cooperation Council have an elaborate system of mutual recognition in place. Following a decision by the GCC Supreme Council in 1985, all GCC students in primary, intermediate and secondary education are granted the right to equal treatment in all Member States. Likewise, there is a mutual recognition of certificates and academic instruments issued by any official teaching institution. No attestation by the respective institutions of the host Member State is

required. Students in higher education institutions are granted equal treatment in respect to admission and care, provided that the applicant fulfils certain criteria.

1.6 Free movement of people – level of implementation

The purpose of this third and last section is to give an overview of the most severe obstacles on the road towards regional free movement in practice. Two main aspects of the practical implementation will be discussed. First, we will take a look at the problems or challenges *leading to* the actual implementation of a policy, including policy formulation and adoption. Second, we will outline problems *of* the implementation process.

1.6.1 Problems leading to implementation

Major challenges to the implementation of a policy include the level of success of an agreement regarding the scope and degree of liberalization of movement, as well as the incertitude of actual ratification of a signed agreement, which is necessary for its entrance into force.

Once a concrete legal text on the facilitation of movement has been drafted, the first challenge is to reach a consensus among Member States on its content. The example of SADC is illustrative in this regard. A Protocol on the Free Movement of Persons was drafted by the SADC Secretariat in 1995 aiming at the progressive abolition of internal border controls in the region. Due to various concerns from Member States, especially South Africa, Botswana and Namibia, the 1995 Draft Protocol was never put into practice (Oucho and Crush, 2001). One of the main arguments made by opponents was that the region was not yet ready for the free movement of people, given the considerable economic disparities between its Member States (Williams, 2006, p.7). As a consequence, the free movement protocol was abandoned and replaced by the more modest Draft Protocol on the Facilitation of Movement of Persons (Martens, 2007, p.358).

Once a legal text has been signed by Member States, it still needs to undergo ratification to enter into force. This step represents a major hurdle for the majority of regional arrangements. The above-mentioned SADC Draft Protocol on the Facilitation of Movement of Persons has been signed by the minimum number of nine Member States. However, only five Member States (South Africa, Botswana, Mozambique, Swaziland and Lesotho) have ratified it so far. The same is true for the third phase of the ECOWAS Free Movement Protocol (Right of Establishment), which has also not yet entered into force. Member States of COMESA agreed to adopt a Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Right of Residence. So far, Burundi, Kenya, Rwanda and Zimbabwe have signed the Protocol, however Burundi is the sole ratifying country. Until this protocol enters into force, Member States will continue to cooperate under the PTA protocol for the gradual relaxation and eventual elimination of visa requirements, which mainly focuses on bilateral agreements. In Latin America, this challenge becomes even more apparent.

The Member States of MERCOSUR have signed various agreements reaching from visa-free travel to residence rights to the fight against trafficking of migrants. Most of these agreements have been signed but not ratified. Within the Andean Community (CAN), both the Andean Labour Migration Instrument and the Andean Social Security Instrument need an additional regulation to be implemented.

These few selected examples give an indication that countries are willing to sign different instruments to facilitate intra-regional movement of their citizens but lack the political will or institutional capacity to put them into practice. The reason for this situation may vary from region to region, and a thorough analysis of each particular case is needed to give a well-founded explanation. One would need precise information on the ratification procedures and actors involved (e.g. national parliaments), as well as on the initial motivation of the acting government to sign a particular agreement (including possible changes in the balance of power after an agreement has been signed). One general remark shall however be made, as it may be valid for several cases: governments may have an interest in signing regional migration agreements even if the provisions are controversial among their own political or economic elite. In this way, they show activism *vis-à-vis* their electorate without committing to the actual consequences of such an agreement, anticipating that the agreement would probably not be ratified at the national level.

1.6.2 Problems of implementation

The implementation of regional free movement provisions has encountered severe problems across all world regions. Although a deeper understanding of these issues is needed to improve current practices, few studies exist which try to analyse this part of the policy cycle more systematically and in-depth. This is partly due to the political sensitivity of implementation problems and related difficulties in gathering relevant and publishable material. The following examples are therefore of an anecdotal nature and do by no means imply that the problems described appear within all regional organizations to the same extent.

One major issue when implementing free movement policies relates to the weak administrative capacity of implementing bodies and the general lack of financial and human resources. This can affect the regional, national and local levels alike. Key officials such as immigration officers or border agents must be informed and trained on a regular basis in order to assure that they act according to the latest legislation regarding regional free movement rights (especially in the case of revised national laws). As recommended by Adepoju (2009) in the case of ECOWAS, capacity building of officials both at the national and regional level must be a top priority if free movement is to materialize in West Africa. At the national level, successful implementation also requires consultation and cooperation between and among government agencies (or ministries) to assure the development of a coherent policy framework for migration.

Another related problem is the absence of monitoring mechanisms. Hardly any regional organization monitors systematically the implementation of regional

migration policies. Even in the case of the European Union, the free movement of workers has not been accompanied by systematic monitoring or evaluation of conferred rights. Violations of free movement rights have instead been revealed by the European Court of Justice (ECJ) or discussed by academic institutions in the framework of periodic reports (see for instance European Commission, 2012). A number of documents from the European Commission represent a new development in this regard. These are: 'Progress towards effective European citizenship' (COM (2010) 602/2), 'EU citizenship report 2010' (COM (2010) 603/4), and 'EU Citizenship Report 2013' (COM (2013) 269 final)[39]. These documents outline the most significant obstacles to effective Union citizenship, including free movement rights. Another example can be found in West Africa, where ECOWAS has urged Member States to establish so called national committees to monitor the implementation of the free movement protocols. However, despite this call, apparently only five countries have done so and their work has somehow remained opaque (Adepoju, 2009, p. 31).

Furthermore, a serious barrier to effective free movement is the absence of regional enforcement mechanisms and legal remedies. Multiple examples exist where mobility rights are openly violated by host Member States without any consequences. This is especially true during economic downturns where migrants are often the first to suffer from discrimination and (illegal) expulsion. A positive example in this regard is the EU, where both the ECJ and the European Commission (mainly through its infringement procedure) have substantially contributed to strengthening free movement rights laid down in primary and secondary law. Regional Courts do exist in other contexts as well (e.g. Court of Justice of the Andean Community, Central American Court of Justice, Caribbean Court of Justice, COMESA Court of Justice, East African Court of Justice, etc.), but their contribution to the effective enforcement of regional free movement rights has not been analysed thus far.

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Part II:

Perspectives from Africa and the Middle East

2

The Southern African Development Community: a walk away from the free movement of persons?[1]

Aurelia Segatti[2]

2.1 Introduction

The 2010 Windhoek Summit of the South African Development Community marked the fifth anniversary of its adoption of the Protocol on the Facilitation of Movements of Persons. In June 2010 the SADC Parliamentary Forum, held under the theme 'Facilitation of Free Movement of Persons in SADC', officially stated that 'the protocol is yet to come into force as only four countries [South Africa, Botswana, Mozambique and Swaziland] have ratified it' (Phiri, 2010)[3]. The media described discussions as having focused on the strengthening of socio-economic cooperation and regional integration, but also on Member States' 'fears regarding national security, the spread of communicable diseases, cross-border crimes and the influx of illegal migrants among others' (South African Development Community Parliamentary Forum, 2010).

The outcome of this summit encapsulates some of the misconceptions and obstacles which have poisoned the discussion of the 'free movement' issue across the region and fueled tensions between Member States and the SADC Secretariat (Oucho and Crush, 2001). This chapter will first consider free movement from the perspective of how, as a policy model, it has structured part of the institutional regional integration process within SADC, been contested, and then subsequently reshaped into a different agenda. It will then broaden its perspective by looking at the facilitation of movement outside of the framework of SADC in order to examine the current trend towards bilateral intergovernmental arrangements between Member States. This contribution

1 This chapter is based on research conducted within two major research programmes: ANR Mitrans (Transit Migration in Africa) funded by the French National Research Agency and Migrating out of Poverty-Research Programme Consortium funded by the British Department For International Development (DFID).

2 African Centre on Migration and Society (ACMS), University of the Witwatersrand. The African Centre for Migration and Society was previously known as the Forced Migration Studies Programme at the University of the Witwatersrand, South Africa.

3 Note of the editors: The protocol has since been ratified by Lesotho, bringing the total number of countries that have ratified the protocol to five. All the same, for the protocol to come into force it needs to be ratified by nine signatory countries.

will specifically consider whether populations' interests and their reasons[4] for crossing borders are taken into account in these bilateral agreements. This will help reassess the nature of SADC's regional integration and its engagement with the migration-development nexus.

2.2 'Free movement' as a policy model for regional integration

Migration across the Southern African region is a historical phenomenon emerging particularly with the demand for labour resulting from the development of extractive industries in the last two decades of the 19th century, first in the Rand region of South Africa and later in the Katangan (Congo) and Zambian (then-Rhodesia) copper belts. The need for low skilled migrants[5] from the region and the labour supply strategies pursued by mining conglomerates varied over time due to both the mining industry's dependence on globally determined commodity prices and the power struggles between governments and businesses defending their conflicting interests. For labour surplus countries (such as Malawi, Mozambique and Lesotho in particular), labour export[6] was long seen as a regulatory solution to deficient labour markets, bringing in liquidity and commodities that guaranteed a degree of social stability through poverty alleviation. For businesses, the diversity in labour supplies guaranteed independence from government pressure and unionization, which allowed for maximum profits and industrial stability and flexibility. Receiving countries' governments, such as South Africa, Botswana, Namibia and to some extent Southern Rhodesia (Zimbabwe), nevertheless put pressure on business to support local labour as much as possible, pressure that increased progressively with subsequent post-independence governments. As Table 2.1 shows, the proportion of foreigners working in the South African gold mines is currently at its lowest since 1990, but the actual decrease in foreign intake only materialized consistently from 2002. Interestingly though, while all SADC nationalities have seen their numbers dwindle in the 2000s, the figures for Mozambicans have remained fairly stable. Around 45 000 Mozambican miners

4 Note of the editors: There has traditionally been a strong focus on labour migration in the SADC region due to the economic opportunities to be had in South Africa, Botswana, Zambia and Angola. Most of those who migrate within SADC are men, often older and married household heads, whose reason for migration is economic improvement. Women on the other hand tend to migrate because of a wide range of social and reproductive reasons, although increasing numbers of women are migrating independently for work rather than as dependants or as spouses of male migrants (Dodson and Crush, 2013; Olivier, 2014).

5 Note of the editors: Female migrants tend to be better educated than their male counterparts. This lack of education seems to encourage male migration (Dodson, 1998).

6 Note of the editors: The dominant employment category for men is mineworker, whereas that of women is domestic worker. Female migrants also often end up in cross-border trade and informal sector activity. Cross-border permits are often difficult to obtain, which often results in malpractices towards women – the main cross-border traders. Marriages of convenience and irregular entry by many female migrants are also not uncommon (Olivier, 2009; Dodson and Crush, 2013).

attest to the existence of specific bilateral preferential agreements between the South African government and favoured neighbours (see Table 2.1). Migrant labour was, until the most recent period, strictly managed following the guest-workers model of: temporary migration with no perspective of settlement or family reunification[7]; time-bound contracts of a few months to two years; and government-to-government agreements, which in some cases survived the process of decolonization (e.g. the Portugal-South Africa agreement, which is still in place). The compulsory deferred-pay system simultaneously ensured a regular source of liquidities for sending countries and provided a guarantee that migrant workers would return home[8].

Table 2.1 Numbers and proportion of foreign miners on the South African gold mines 1990-2006.

Migrant Labour on the South African Gold Mines, 1990-2006							
Year	South Africa	Botswana	Lesotho	Mozambique	Swaziland	% Foreign	Total
1990	199,810	14,609	99,707	44,590	17,757	47	376,473
1991	182,226	14,028	93,897	47,105	17,393	49	354,649
1992	166,261	12,781	93,519	50,651	16,273	51	339,485
1993	149,148	11,904	89,940	50,311	16,153	53	317,456
1994	142,839	11,099	89,237	56,197	15,892	55	315,264
1995	122,562	10,961	87,935	55,140	15,304	58	291,902
1996	122,204	10,477	81,357	55,741	14,371	58	284,050
1997	108,163	9,385	76,361	55,879	12,960	59	262,748
1998	97,620	7,752	60,450	51,913	10,336	57	228,071
1999	99,387	6,413	52,188	46,537	9,307	54	213,832
2000	99,575	6,494	58,224	57,034	9,360	57	230,687
2001	99,560	4,763	49,483	45,900	7,841	52	207,547
2002	116,554	4,227	54,157	51,355	8,698	50	234,991
2003	113,545	4,204	54,479	53,829	7,970	51	234,027
2004	121,369	3,924	48,962	48,918	7,598	47	230,771

7 Note of the editors: Previously, national laws prohibited spouses from living together at the mines. Women lived in rural areas and worked in agriculture, and were thus exploited through the use of their unpaid labour (Moyo, 2011).

8 Note of the editors: Currently, reasons for migrants to return home are more often health related; migrants will mostly return 'back home' if sick or to provide care for others. Women have indicated more than men that they would return home in order to provide care, which emphasizes the reproductive role of women, as well as the importance of gender in the decision making related to migration processes. The number of female migrants who are assuming the role as head of their urban household is also increasing, leading to a double burden of care on these women (Veary et al., 2010).

Migrant Labour on the South African Gold Mines, 1990-2006							
Year	South Africa	Botswana	Lesotho	Mozambique	Swaziland	% Foreign	Total
2005	133,178	3,264	46,049	46,975	6,993	43	236,459
2006	164,989	2,992	46,082	46,707	7,124	38	267,894

Note of the editors: The mining sector employs mainly male workers due to several reasons. Previously, mineral-rich countries mainly employed males and introduced laws that prohibited spouses from living together at the mines. Even with these laws dismantled, female workers do not have the same access as men to the training and education needed to acquire skills to work in the mines. Moreover, there are policies of discrimination as well as negative cultural and paternalistic attitudes towards women. The result is that they have both limited access to employment as well as to other forms of revenue-generating activities such as ownership and equity participation. Female workers are also underrepresented in the governance and management of the mining business. There is only a minority of women in supervisory positions, senior management and company boards (Moyo, 2011).

Source: The Employment Bureau of Africa (TEBA). From Williams (2009, p. 10)

This low-skilled labour supply system, which represented the lifeblood of a regional economy based on a minerals-energy complex and import substitution (Fine and Rustomjee, 1996), was coupled with a settlers' immigration policy. It aimed at sustaining a regular flow of politically suitable immigrants in order to counter the effects of declining demographics among the 'white' settler communities and fill the already significant skills gap in a number of economic sectors, particularly in science and technology, but also in middle management (First, 1972; Peberdy, 2009). An immigration destination since its inception, South Africa reactivated its 'white' immigration policy in the early 1960s with the setting up of government agencies dedicated to creating attractive conditions for European migrants.

With the major political upheavals in the region from the early 1990s onwards, the steady decline of labour demand in the extractive industries, and the expansion of other economic sectors, such as commercial farming, construction and services, the migration context changed dramatically. New migration streams emerged alongside the traditional migrant labour ones, particularly of asylum seekers and refugees who first came from Mozambique during the civil war (1980s), then from Central Africa and the Horn (mid-1990s), and more recently from Zimbabwe (from 2002-3 onwards). The downscaling of mining industries[9], casualization of labour through labour brokers, and the boom in services and construction pushed many onto the road across the region in search of work outside of any institutional framework. Small-scale trade became a more common activity across the region. In parallel to a general increase in migration towards the wealthiest Southern African countries, another, less-publicized phenomenon became a source of concern for governments: that of skill

9 This sectorial change has led to a feminization of the intra-regional migration in SADC (Hughes, 2007).

loss or brain drain[10], including for labour-importing countries, which lost hundreds of thousands of skilled professionals in the past three decades (Crush et al. 2005; Crush et al. 2006). A poorly managed, highly politicized skills replacement system emerged, with the poorest countries' professionals gradually replacing South Africa, Botswana and Namibia's doctors, nurses, engineers and financial experts who had left *en masse* in search of greener pastures in the United Kingdom, Canada and Australia. More often than not, due to an official anti-brain drain position within SADC, this replacement has taken place through back door policies (in South Africa, through the asylum system), which is only aggravating already deeply corrupt administrations in charge of qualifications assessment (South African Qualifications Authority) and asylum cases (Department of Home Affairs).

To a large extent border control policies, which had never played a great role in organizing the region's international migration flows because they were by and large regulated prior to people's entry into national territories (through labour agreements, employers' contracts, etc.), became more functional. Alongside their traditional security focus, which was particularly high in a context of guerrilla warfare and clandestine liberation movements organized across the region between the 1960s and early 1990s, border control and the policing of migrants became the only migration management instrument for governments in the Southern African region. In South Africa, administrations in charge drew from their long-term experience in controlling internal migration under the homelands system[11]. Asylum policies had, in some cases, as in Zambia, been adopted quite early on but were only experimented with from the mid-1990s in South Africa. While a need may have been felt for migration policy reform across the region given the transformations in flows and the shortcomings in control systems, most national governments did not consider this a real priority. Instead, even when they did act, as in South Africa and Botswana for instance, migration reform took many years to be completed, often unsatisfactorily (Wa Kabwe-Segatti, 2006). It is in this context of dramatic regional transformation and greater opening to the rest of the world that support for institutionalized regional integration was revived.

10 Note of the editors: It is known that the health sector in particular is prone to brain drain. Many doctors and nurses are leaving (sub-Saharan) Africa, for there are better career opportunities and income prospects elsewhere (Bach, 2006). According to research from the 1990s by Dodson, even though the reasons for migrating for female professionals are similar to those for male professionals, women are less likely than men to want to migrate and more likely to want to migrate for a shorter period of time. This is influenced by the fact that they had less travel experience and were less likely to have contact with professional associations, combined with the impact of gender roles (Dodson, 2002).

11 The creation from 1958 onwards of self-governing homelands by the South African Apartheid government was a way of progressively denationalizing the Black South African population and resulted in large numbers of annual arrests and deportations. It was only in 1996 with the adoption of the definitive Constitution that the homelands were officially fully reincorporated into the South African territory. Between 1990 (President Frederik de Klerk's 2 February speech legalizing liberation organizations) and 1996, tens of thousands of South Africans continued to be arrested and deported to the homelands. This was one of the core functions of the South African Department of Home Affairs and of the South African Police.

Regional integration in Southern Africa emerged initially as a reaction to the protracted colonial domination of certain countries (Mozambique, South-West Africa, Southern Rhodesia and Apartheid South Africa) long after the wave of independence in the 1960s and the principal phase of European withdrawal from Africa. Southern African states opted for a free-market, democratic model of regional integration, first as a coalition of independent 'front-line' states under the Southern African Development Co-ordination Conference (SADCC), and later with the arrival of post-Apartheid South Africa, as a regional organization, the Southern African Development Community (SADC). Like elsewhere in Africa and the developing world, the end of the Cold War and the assertion of the European Union as a unified regional power counterbalancing the United States and Russia contributed to a new momentum for regional integration organizations (Bach, 2008).

Independently from the SADC process, the Preferential Trade Area (PTA) for Eastern and Southern Africa was created in 1981 with the Lusaka Treaty that came into force in 1982. In 1994, the PTA became the Common Market for Eastern and Southern Africa (COMESA). While originally conceived as a preferential trade zone, COMESA adopted free movement as one of its objectives from its inception[12]. This, however, did not transform into a concrete framework of implementation until relatively recently. It was only in the late 2000s that COMESA Member States began to envisage the facilitation of free movement through the COMESA Common Investment Area (CCIA), a joint COMESA-EAC-SADC Free Trade Area (2009), and (in terms of infrastructure) via transit transport facilitation programmes within the COMESA-EAC-SADC Tripartite Framework (COMESA 2009 Report). Technical assistance to the Secretariat is currently provided by the European Union to support feasibility studies. However, this may raise complex issues precisely given membership overlaps between COMESA and SADC, and SADC's conservative approach to free movement[13]. As Oucho and Crush have shown (2001), the specificity within SADC is the consistent opposition of South Africa to the idea of free movement. While other regions may have suffered setbacks in the implementation of free movement regimes, there is no open opposition on principle to the 'free movement' model, as is the case in Southern Africa. Indeed, South Africa is attempting to move away from the notion by imposing a different policy model: that of bilateralism, specifically tailor-made bilateral agreements geared to the facilitation of movement.

The 1992 SADC Treaty included among other things a commitment to lifting obstacles, not only to the circulation of capital and goods, but also, as in other

12 The COMESA Treaty devotes a whole chapter to the issue of free movement (Chapter 28) and indicates *inter alia* that: '1. The Member States agree to adopt, individually, at bilateral or regional levels the necessary measures in order to achieve progressively the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence by their citizens within the Common Market. 2. The Member States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Right of Residence.' (COMESA Treaty, Chapter 28, 1994).

13 The Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe have dual membership in the two organizations.

emblematic regions of the world, to that of people. However since the signature of the Treaty very little has happened on this front, and the initial apparent consensus around 'free movement' as a goal of regional integration now seems to have vanished in the span of less than ten years. There is clear reluctance from SADC's 'richest' Member States (South Africa, Botswana, Namibia) to institutionalize what is called, in international circles, 'free movement' (Oucho and Crush, 2001). The origins of and the developments leading up to the adoption of the Protocol for the Facilitation of Movements of Persons in SADC in August 2005 have been extensively documented by Oucho and Crush (2001), Oucho (2006), and Williams (2006 and 2009); consequently, the following section largely draws on their works.

Since the SADC Treaty adopted 'free movement' as an ultimate objective of Southern African regional integration, the position of SADC's Member States has instead moved towards mutual defiance, with a lack of political will to develop even a common understanding of the concept, and still less to develop practical implementation plans. Interestingly, Article 5 of the SADC Treaty explicitly called for the development of 'policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among Member States'. Meanwhile freer movement was only mentioned in passing in the 1997 Protocol for Education and Training (in Chapter 2. Article 3 (f)) and then vanished from other protocols where it would have applied. The 2003 Charter of Fundamental Social Rights in SADC for instance, despite largely encouraging Member States to become signatories to the various instruments of the International Labour Organization (ILO), does not make a single reference to migrant labour or to the portability of foreign workers' rights across the region[14]. The SADC Regional Indicative Strategic Development Plan (RISDP) adopted in 2003, only mentions migration in the framework of facilitating tourism in the region (Section 4.11.4.2, p. 82). As Cross and Omoluabi (2006, p. 9) note:

> It seems that the mainstreaming of migration issues into African policy-making has not proceeded far in the SADC region to date. Few of the most recent SAMCPD country reports (2004) mention migration as a policy priority under that label, though the region is an intensive sector of migration activity, and much of the economic performance and balance of trade depends on migration processes and the migrant earnings of SADC citizens.

14 Although the Charter does make explicit reference to the aim to promote the harmonization of social security schemes, it does not relate this to migrant labour.

The SAMCPD, the Southern African Ministers' Conference on Population and Development, is a regional cooperation body for government agencies that works in collaboration with but outside SADC. It began to recognize migration as a regional priority in 1999, when its population forum, the Southern African Forum for Population and Development (SAFPAD), began promoting migration research to establish the causes of international migration within the SADC region[15]. Although a resolution has been taken to integrate SAMCPD and its daughter organization SAFPAD into SADC structures and programmes, this has not happened as of yet (Cross and Omoluabi, op. cit., p. 5). More direct attempts at facilitating movement within the region have not seen greater success.

As in other regions, a migration dialogue was initiated in the late 1990s in order to sensitize governments in the region to migration issues and create space for migration reform and potentially even convergence[16]. Following an April 1999 seminar for SADC Member States – organized by the International Migration Policy Course initiative (now International Migration Policy) in collaboration with the International Organization for Migration (IOM), the Southern African Migration Project (SAMP)[17], the United Nations High Commissioner for Refugees (UNHCR), the United States Immigration and Naturalization Services (US-INS) and the South Africa Department of Home Affairs – the Migration Dialogue for Southern Africa (MIDSA) was created and met regularly throughout the 2000s. Open to both SADC and COMESA Member States, MIDSA has since organized numerous conferences and workshops, as well as training sessions over a range of migration issues for officials from the region[18]. It has however not achieved progress in supporting the emergence of binding mechanisms and clear implementation plans, or in building specific capacity within the SADC Secretariat.

The most revealing aspect of that general trend away from harmonization is exemplified in the process around the SADC Protocol on the Facilitation of People's Movement in the region, well described by Oucho and Crush (2001) and Oucho (2006). The first draft protocol, initiated from within the Secretariat in 1993, was inspired by the systems of free movement of the Economic Community of West African States and the EU. In fact, the original protocol was an initiative from former Secretary General, Dr Kaire Mbuende, and SADC Chief Economist, Dr Charles Hove, who commissioned a Belgian Schengen expert and a Zimbabwean lawyer to draft the document (Oucho and

15 Note of the editors: These causes are mainly work-related for men and differ greatly for women. Women don't just move for employment opportunities but also to visit family and friends, to trade and to shop, usually for informal businesses at home (Hughes, 2007).

16 For more on migration dialogues see Thouez and Channac (2005) and Hansen (2010).

17 Note of the editors: In 2002, SAMP initiated a research programme for understanding and awareness of the links between migration and gender. This includes researching the problems faced by female informal cross-border traders, migration and intra-household dynamics and collecting the experiences of female migrants (Lefko-Everett, 2007; Queen's University, 2008).

18 Note of the editors: In July 2013, a MIDSA conference on enhancing labour migration and migration management in the SADC region was organized in Maputo, Mozambique. Of the 62 senior government officials present, only 26% were female (MIDSA, 2013).

Crush, 200, pp. 142-143). Deemed by some as 'yet another false start in Africa' (Oucho, 2006), it was almost immediately opposed by South Africa, Botswana and Namibia with the result that the draft – which contained four phases, from visa-free entry to the right to establishment and eventually a 'borderless' SADC – was stalled. South Africa commissioned its own studies (from the Human Sciences Research Council, 1995 and from the Department of Foreign Affairs) which underscored the dangers of such a protocol and decided to draft its own protocol in 1997, this time no longer on free movement but on the facilitation of movement (Oucho, 2006). Commissioned to the same authors as those who had handed in a negative report on the Secretariat's draft, the new draft was essentially driven by three objectives:

> (a) to assert the sovereignty of national interests over regional considerations and place the emphasis back on policing and the control of national borders; (b) to halt the process of freeing movement across regional borders at the first stage (visa-free entry) and to avoid any further commitment particularly in regard to rights of residence and establishment; and (c) to avoid committing the South African government to a phased implementation and a fixed timetable, as well as to provide exit options if government did not agree with any proposal under the Protocol (Oucho and Crush, 2001, p. 149).

Besides having taken over ten years to draft without reaching any degree of actual free movement, the protocol only contains provisions that are subject to the domestic legislation and policies of Member States, which are merely encouraged to give effect to the protocol's provisions. The protocol's overall objective is to facilitate the movement of persons and to facilitate entry into Member States without the need for a visa for a maximum period of ninety days. The ultimate objective of the protocol is '... to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of State Parties'. It aims to do this by facilitating:

> ... entry, for a lawful purpose and without a visa, into the territory of another State Party for a maximum period of ninety (90) days per year for bona fide visit and in accordance with the laws of the State Party concerned; permanent and temporary residence in the territory of another State Party; and establishment of oneself and working in the territory of another State Party.

The protocol provides for three types of entry: visa-free entry, residence and establishment. As noted by Williams and Carr (2006, p. 10), it is not entirely clear what difference is made between the latter two. Furthermore, the protocol obliges Member States to conclude bilateral agreements on crossing points and border passes, as well as to provide the SADC secretariat with immigration staff, all of which is 'necessary to facilitate the free movement of persons'. As shown in Table 2.2, the protocol is only

partially binding; the core issues of access to labour markets, public services and settlement are not part of the obligations under the protocol. It is not even clear what a full visa-waiver across all SADC Member States for touristic purposes will be aimed at (Williams, 2009, Table 2.2). Nowhere does the protocol provide for actual binding mechanisms or a specific time frame prior to ratification. It also does not create any specific structure, but instead indicates in Article 29 that the Committee of Ministers is responsible for Public Security, and any other committee established by the Ministerial Committee of the Organ, will be in charge of the protocol's implementation[19]. In this context of general procrastination at the SADC level, a result in particular of the double agenda of South Africa (preoccupied with trade integration but anxious to protect its domestic labour), the day-to-day management of migration in the region is more and more regulated by a number of ad hoc arrangements between states.

Table 2.2 Summary of co-operative measures required to give effect to provisions of SADC facilitation protocol

* State Parties shall promote legislative, judicial, administrative, and other measures necessary for co-operation in the achievement of the protocol's objectives	*Requires domestic co-operation to promote the objectives of the protocol in all aspects of government
* Implementation framework will be agreed upon by State Parties 6 months from the date of signature of the protocol by at least 9 Member States	*Requires co-operation amongst signatories to develop an implementation plan, including an appropriate time frame
State Parties shall ensure that all relevant national laws, statutory rules and regulations are in harmony with and promote the objectives of this protocol * State Parties undertake to co-operate and assist the other State parties to facilitate the movement of persons in the Community as a vehicle for achieving economic integration	*Requires significant international legislative co-operation and communication regarding immigration policies and the movement of persons
* State parties shall take steps to achieve: 1. bilateral agreements to establish a sufficient number of border Crossing points with identical opening hours on each side of the border and at least one such post which remains opens 24 hours every day	*Requires co-operation between Member State governing bodies. between each Member State and the SADC secretariat, and amongst domestic legislative entities in order to: 1. reach agreements regarding border Crossing sites and border passes

19 For a detailed commentary of the 2005 Protocol in comparison with the previous one, see Williams and Carr (2006).

2. agreements to provide uniform border passes to citizens of State Parties who reside in border areas 3. Co-operation with SADC secretariat to provide senior immigration, customs and security officials as necessary to facilitate the movement of person within SADC	2. Provide the proper immigration, customs, and security staff
*State Parties agree to increase co-operation and mutual assistance in the following fields: 1. formulating policies and awareness programmes on the implementation of this protocol 2. Improving mechanisms for co-operation in safeguarding security by exchanging information among relevant authorities on security, crime, and intelligence 3. training competent authorities and educating communities on the protocol 4. providing sufficient and adequately equipped ports of entry 5. preventing illegal movement of persons into and within the region	*Requires international co-operation in achieving logistical requirements regarding the regulation of movement of persons
*The expenses involved in repatriation of an expelled Member State citizen to their home State shall be shared, as per bilateral agreements, by the receiving State Party and the State Party ordering expulsion	*Requires international co-operation to share costs incurred in repatriation
*State Parties agree to co-operate in harmonizing travel between Member States whether by air, land or water	*Requires international co-operation to coordinate travel between SADC States

Source: Williams (2009, p. 14).

2.3 Bilateralism as the pragmatists' choice

An examination of bilateral migration arrangements beyond the SADC protocol allows for a different perspective on regional integration, one that reveals not the ideal objectives of models borrowed from elsewhere but the pragmatic practices of governments in the region. It is in any case a direction which the 2005 Protocol on Facilitation encourages as an important step towards integration.

Apart from the Bilateral Labour Agreements (BLAs) which have – with minor amendments – been in place between South Africa and some of its neighbours (Mozambique, Lesotho, Swaziland) since the colonial period, other more recent agreements have been concluded across the region. A review of these agreements shows that they either attempt to regulate irregular movement at particular ports of

entry[20] (Malawi-Mozambique; South Africa-Mozambique; South Africa-Mozambique-Swaziland; South Africa-Lesotho)[21] and therefore acknowledge some kind of back door entry into labour markets, or that they aim to facilitate survival trade through cross-border passes. For example, the 2005 agreement between South Africa and Mozambique, providing a 30-day visa to Mozambican nationals entering South African territory, has had a decisive impact on thousands of Mozambican migrants' lives (Agreement on visa waiver, 2005; Vidal, 2008). Although it does not give them access to the South African labour market, this visa measure now allows them to legally enter and move around the country. Thus, the numbers of Mozambicans deported from South Africa as undocumented migrants has decreased significantly. This is in fact part of a strategy currently developed by the South African Department of Home Affairs to establish visa waivers with all SADC Member States, except Angola and the Democratic Republic of Congo (DRC), due to reluctance from the former and South African hesitation over the absence of a population register in the latter[22]. Another area of bilateral cooperation has been that of migration management. This has mostly consisted of exporting South Africa's control expertise in the field of documentation through technical assistance and support to migration policy development, often in partnership (or in competition) with the European Union (Rwanda, DRC)[23].

With a regional context so focused on control and so tightly framed by bilateral agreements for the extractive industries (and to some extent commercial farming through specific permits), it is unsurprising that labour market integration has not progressed much either. The thorny issue of brain drain – a phenomenon affecting all states in the region – is complicated by the attractiveness of the South African, Botswanan and Namibian labour markets which have become great recruiters of regional professionals and the highly skilled in general. Therefore, in spite of anti-brain drain positions within SADC[24], the regional skills market is in fact characterized by emigration towards OECD countries[25] and the replacement of skilled émigrés from South Africa, Namibia and Botswana by skilled nationals from the rest of the continent (SADC and non-SADC). In 2002, the South African institute of statistics indicated that 322,499 South Africans had emigrated between 1970 and 2001 (Statsa,

20 Note of the editors: There has been a lot of trafficking activity in this region. Children are often trafficked from Lesotho's border towns to South Africa. Women and girls are often trafficked from Mozambique to South Africa. From Malawi, women and girls are trafficked to both South Africa and Northern Europe. However, measures are being taken in form of the SACTP (Southern Africa Counter-Trafficking Programme) (IOM, 2005).

21 For a fairly detailed review of these agreements, see Crush and Tshitereke (2002) and Williams (2009).

22 Communication from George Shikwanbane, Director, Office of the Director General and Sihle Mthiyane, Director for Policy Development, Immigration Directorate, Department of Home Affairs, NEDLAC meeting, 4 May 2010.

23 Comment made by an official from the European Commission in Kinshasa, DRC in 2008.

24 While there is no national comprehensive policy on anti-brain drain positions, South Africa has for instance already implemented such measures in its recruitment of health professionals from the region. For more on this, see Department of Health (2010).

25 For example, from South Africa there are many registered nurses moving to the UK (Bach, 2006).

2003), a gross underestimate according to many analysts as departures are in fact unrecorded. In 2006, the Mbeki government acknowledged that South Africa would have to face a net skills deficit of 1.2 million positions until 2014 (Accelerated and Shared Growth Initiative for South Africa–ASGISA, 2006). Although on paper this had led to an official change in attitude on the side of the South African government towards the immigration of skilled labour to South Africa, it has not changed policies drastically. In fact, legal immigration from the rest of SADC countries to South Africa has remained very limited (approximately 15 000 permits delivered in ten years, between 1994 and 2004) (Crush et al., 2006, p. 4). Instead, other migration channels, such as asylum, are used as a backdoor to settlement and access to the job market. A 2005 UN report received much media coverage for revealing, among other things, that there were more Malawian doctors practicing in Manchester, UK, than in Malawi itself; and in 2005 it was found that 550 of the 600 Zambian doctors trained since independence had emigrated abroad (UN, 2005, p. 18). In a 2001 study of scientific diasporas, Meyer indicated that the proportion of PhDs in the South African Network of Skills Abroad (SANSA) was twice as high as in the graduate population at home (2001, p. 99), a situation which does not seem to have improved over a decade later. Finally and even more worrying, is the propensity of young skilled professionals[26] from the region to emigrate. All recent surveys show very high intentions to leave. While South African and Congolese students aim for Europe and North America, South Africa's immediate neighbours (Swaziland, Lesotho, Zimbabwe) aim for South Africa (Crush et al. 2005; FSMP African City Survey 2006; University of Johannesburg / IFAS Survey DRC 2007).

Over a decade into the SANSA experience, results in terms of skills mobilization and circulation are slim. If one takes the crucial example of the medical sector in South Africa – a magnet for the region's medical students as well as a transit platform towards the Western European, North American and Australian public health systems – measures have been left to the discretion of the national Department of Health and medical professionals' organizations (Council of Medical Doctors and Nursing Council) which, in their complex attempts to regulate the influx of foreign candidates while keeping up standards, have in fact created multiple avenues for corruption rings, within the South African asylum system, the South African medical orders, the South African Qualifications Authority and in countries of origin[27]. Since the change in government in 2009, the ASGISA project does not seem to have received much attention or resources and the skills issue has been relegated to the bottom of the political agenda.

On the labour side, and despite the existence of a regional union movement (the Southern African Trade Union Congress (SATUC)), there is little unity. This perhaps reflects existing divides at the national level within South Africa and other countries.

26 Based on graduating rates in tertiary education in the SADC region, we can say that the number of young professionals has been increasing over the past 10 years and that there are increasing numbers of women graduating (SADC, 2012).

27 Interviews with foreign applicants to medical test in South Africa, Gauteng, August 2010.

The unions' rank-and-file and their political leadership hold conflicting views on access to national labour markets for the low-skilled and are broadly reluctant and undecided on access for the highly skilled. The fact that the ILO's presence in the region has not led to an increase in the number of signatories of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)[28] is a sign of its weak organizational capacity and lack of engagement with the labour movements in the region. The 2003 Charter of Fundamental Social Rights in SADC, despite largely encouraging Member States to become signatories to the various ILO instruments, does not make a single reference to migrant labour or the portability of foreign workers' rights across the region. Bilateral agreements between Member States are therefore the sole spaces for the protection of such rights, which are in fact left to the discretion of governments in place, and potentially to the activism of pressure groups. However, apart from South Africa, which has a thriving, experienced and organised advocacy community around migrants' rights (Handmaker, 2009; Polzer and Wa Kabwe-Segatti, 2011), other countries are far less likely to cater to these concerns.

Similarly, in the field of humanitarian intervention and protection of vulnerable populations (e.g. women and children) the absence of a binding SADC framework has led to a predominance of ad hoc bilateral arrangements (Landau, 2008)[29]. In a region marked by several protracted civil conflicts until the mid-1990s (Angola, Mozambique), chronically unstable countries (DRC, Zimbabwe), and natural catastrophes in the face of which states have little capacity to intervene, different humanitarian crises have impacted inter-state relations at regular intervals. These resulted in streams of refugees from Angola into the DRC in the 1980s and 1990s, from the DRC into Angola and Zambia in the late 1990s, from Mozambique into Malawi, Zambia, Zimbabwe, and South Africa in the 1980s and 1990s (and regularly due to floods), and more recently of political refugees and economic migrants from Zimbabwe into South Africa, Botswana and Namibia[30] ; this is by no means an exhaustive list. In none of these cases did SADC play a prominent role in the organization of relief. In general, agreements were passed between states and the UNHCR for the management of camps, documentation processes and sometimes voluntary repatriation programmes. This is the case for

28 Mozambique is the only country in the region to have signed and ratified the convention.

29 Note of the editor: The SADC binding framework encompasses a Protocol on Gender and Development. It includes commitments made at the regional, continental and global levels for achieving gender equality and generally deals with the protection of vulnerable populations. By the 2013 Heads of State summit 13 countries had signed and 12 countries had ratified this SADC Gender and Development Protocol. Notable actions as part of this protocol include the launch of the SADC Gender and Development Index (SGDI) in 2011 and the launching of the SADC Protocol Barometer in 2014 (SAGPA, 2014).

30 Note of the editors: Zimbabweans often migrate in search of work; however, the high levels of unemployment in the four countries often lead to high levels of unemployed migrants. Among others, this leads to the fact that a substantial number of women, involved in informal trade, are engaged in the sex industry as a means of providing for themselves. Trading sex for food is not uncommon (Kiwanuka and Monson, 2009).

instance regarding the repatriation of 40 000 Congolese refugees from Zambia between 2007 and 2010 or for Mozambicans across the region in the late 1990s and in 2001[31]. Relatively recent instances of refugee crises in the region (between DRC and Angola in 2009 and 2010, and between South Africa and Zimbabwe since 2005) have again not triggered any specific reaction from SADC beyond the usual declarations of intent and encouragement of negotiated solutions. Bilateral arrangements between states have been found, but often after large-scale forced removals and deportations, which have affected several thousand people and entailed gross human rights abuses at the hands of police forces[32]. The September 2010 agreement between South Africa and Zimbabwe (consisting of the legalisation of undocumented Zimbabwean migrants in South Africa before resuming deportations) illustrates quite well the SADC Member States' preference for flexible, non-binding arrangements in crisis situations.

Bilateral agreements and ad hoc arrangements between SADC Member States have multiplied in the past fifteen years alongside pre-existing labour agreements between South Africa and its neighbours. This preference for bilateralism and the ineffectiveness of SADC instruments and processes is not specific to the area of movement. The impact of SADC on trade relations for instance was considered so poor that a 2010 review concluded that:

> Generally, SADC seems to have only modest or no influence on the trade patterns in Southern Africa. Intraregional trade was, and is, negligible [...] Although some SADC Member States managed to increase their exports at the beginning of the new millennium, it is unlikely that this success is due to the SADC. It is more likely that extraregional trade increased due to the bilateral trade agreement between the EU and South Africa and increasing Chinese demands for raw materials from Angola and Congo. (Fink and Krapohl, 2010, p. 18).

As far as migration is concerned, the current state-of-play reveals two factors: the low level of priority assigned to migration issues by states in the region, and the lack of trust between them on the issue. While the political and socio-economic dimensions explaining this have been partly explored so far, the final section of this chapter will now embark on a more technical assessment of the scope of migration policy convergence between the SADC Member States.

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31 For a complete overview of Mozambican protection and amnesties in South Africa, see Johnston (2001) and Handmaker and Schneider (2002).

32 On the 2009 deportations of Congolese from Angola and of Angolans from Congo, see UNHCR (2009). On Zimbabweans' treatment at the hands of South African authorities, see FMSP (2009).

2.4 Migration policy convergence beyond the SADC framework

The systematic analysis of available national public policy documents of SADC Member States reveals a number of regional features regarding overall migration policy frameworks as well as migration mainstreaming in other policy sectors, in Poverty Reduction Strategic Programmes (PRSPs)[33] and in National Adaptation Programmes of Action on climate change (NAPAs)[34]. If legislation on migration control and asylum are in place in all countries of the region (see Klaaren and Rutinwa, 2004) and key policy directions available in most, this does not necessarily imply that governments have produced recent policy documents comprehensively framing government intervention and linking it, on the one hand, to a ruling party's development vision for instance, or on the other, to parliamentary control. Interestingly, a number of countries do not have a single reference document on migration policy. This is the case of Angola, Botswana and the DRC. By contrast, South Africa has produced several reference documents and its ruling party, the African National Congress, has consistently devoted some measure of attention to the issue in its policy conferences throughout the past 20 years. Even in the absence of extensive policy documents, most countries assert some migration policy directions (at least on their governmental websites). Apart from Mauritius, which mainly sees migration as a skills import and enhancing tool, and South Africa which mentions skills import, almost all other countries (including South Africa but except Mauritius) focus essentially on two aspects: border control and the fight against illegal immigration. The DRC and Lesotho have specific concerns concerning the use of skills and resources from the diaspora, but these do not seem to have been translated yet into substantial structures.

In terms of the mainstreaming of migration concerns in other sectors of public intervention, the overall analysis reveals low levels of mainstreaming in all areas under review (housing, health, planning, economic development, local government and decentralization, PRSPs and NAPAs). Regarding health policies for instance, only South Africa, Namibia and Zambia have integrated mobility as a dimension of their Public Health plans (either on HIV issues, access of mobile populations to public health systems, or on issues related to the loss of skilled medical personnel). Housing is typically ignored by migration mainstreaming except for restrictions on foreigners' access to it or to land ownership (as in the case of Mauritius, Madagascar and Malawi). PRSPs make no consistent reference to mobility or migration and their impact on poverty reduction, except in the cases of DRC (2007), Lesotho (2006) and Mozambique (2007). This broad

33 Note of the editors: It is acknowledged that the majority of the poor in the region are female and suffer disproportionately from the burdens of poverty. Improving the status of women is central to any strategy to reduce poverty; poverty reduction strategies therefore generally advocate for gender equality and gender mainstreaming (SADC, 2008).

34 This desktop review of SADC countries was undertaken with the assistance of Marguerite Duponchel, associate researcher at the Forced Migration Studies Programme, University of the Witwatersrand in late 2009. It covered all SADC Member States to the exception of Madagascar for which no information could be identified, probably due to the ongoing political instability.

and rather oversimplified overview of migration policies in the SADC countries reveals at least three elements: first, that migration is not a prominent item on countries' agendas; second, that despite varied situations and an unprecedented complication of migration situations, most countries continue to emphasize primarily border control and the fight against illegal immigration, and in addition have not reformed their immigration policies recently (only two cases mention skills-related issues and envisage migration as a development tool); and third, that South Africa, despite the lacunae of its own policies, emerges as the country with the most consistent interest in migration, through agenda-setting, policy formulation, legislation and mainstreaming. In sum, South Africa has some capacity for policy proposals in the field.

2.5 Concluding remarks and perspectives for free movement in Southern Africa

The current state of affairs reviewed in this chapter underscores the enduring prevalence of sovereignty in the face of weak institutional capacity at the SADC level, and an actual preference for the integration of labour markets and security management through bilateral agreements. To date, the development of migration policies[35] remains the sole mandate of national government departments (usually Home Affairs). In the absence of the Protocol's ratification, and apart from the externally funded and coordinated MIDSA, SADC has not created a single internal (or even external) structure devoted to migration policy development at the regional level. The MIDSA, as a consultative dialogue, cannot fully play a policy development role. Chronic instability and growing socio-economic disparities within and between Member States are the main challenges currently informing policy-makers' reluctance to create and implement a more collective approach. Even in a sector like humanitarian intervention, which calls for collective reactions and relies on shared international legal frameworks (Klaaren and Rutinwa, 2004; Wa Kabwe-Segatti, 2006), 'burden sharing' does not seem to be on the agenda, neither at the SADC nor UNHCR level, except in terms of sharing deportation costs for undocumented migrants, a measure clearly intended to relieve South Africa of its massive deportation expenditures (probably in the range of 500 million Rand annually, excluding policing costs)[36].

The current situation calls for a reassessment of SADC's actual capacity to foster policy convergence in the region. The minimalist, non-binding, progressive approach that was pushed by South Africa through the 2005 Protocol has not succeeded in

35 Note of the editors: Overall, the gender dimension of migration has not been addressed in the migration policy framework of the region. The Protocol on the Facilitation of Movements of Persons doesn't take a specific gender perspective into account and the Protocol on Gender and Development has no specific mention of the situation of migrating females. Issues that could be addressed in migration policy are the growing feminization of migration flows, the increasing levels of temporary instead of permanent migration, and increasing transnationalism, for example of various household forms, which are 'stretched' across national borders (Dodson, 2001).

36 Estimates drawing on official costs recorded in the South African Department of Home Affairs Annual reports (2010).

rallying non-signatory states almost ten years after its adoption. More research is currently needed within SADC Member States to better understand the nature of national concerns and the resistance to the Protocol, as well as the potential avenues for the realization of implementation measures. Understanding these issues implies a finer grasp of the rapidly changing power struggles in the region's political economy and their impact on labour needs.

Migration management is certainly a very hard issue for governments in the region, if only because it is a complex, multi-sector area of public intervention. There is generally very little data available, including data disaggregated by sex. Statistics on migration stocks in the region are limited to census data, which is outdated for many countries (the last DRC census for instance was undertaken in 1984) and is known to capture poorly undocumented migrants in particular. Where migration services are centralized there are annual records; however, this is not the case in all countries in the region. This provides very limited and unreliable data on flows. The UN Department of Economic and Social Affairs (UNDESA) obtains statistics through extrapolations from previous censuses or from the latest migration statistics available. There is no centralized migration data system at the level of SADC (UNDP, 2009). Besides the data issue, there is also no clear international tool-kit for states with little capacity to innovate and whose situations and interests are varied, as observed in Southern Africa. This variety perhaps explains why the preferred route so far has been to turn to bilateral rather than regional solutions.

The fairly recent development of a bilateral agreement relating to the establishment of a migration and development dialogue between the European Union and South Africa (2008) could give new momentum to migration issues at the regional level. However, its bilateral nature, and the way it actually marginalizes SADC, as well as its current focus on control and the fight against undocumented migration, does little to reinforce a regional approach to migration and development issues. Whether the result of a general EU bilateral strategy with regional host and transit countries in Africa, or of an ad hoc move under the French Council Presidency of 2008[37], this bilateral dialogue has not

37 Neither the comprehensive Trade, Development and Cooperation Agreement (TDCA) between SA and the EU signed in 1999 and implemented in 2004, nor the European Commission Communication on a Strategic Partnership with SA (2006) and its Multiannual Indicative Programme (MIP) 2007-2013 or the Joint Action Plan for Implementing the Strategic Partnership (May 2007) or subsequent communiqués in 2007 and early 2008 made any explicit reference to setting up a bilateral 'migration dialogue'. This was quite logical in an overall bilateral policy agenda in which migration was totally marginal, the two pillars or focal areas of EU-SA cooperation being 'employment creation' and 'capacity development for service delivery and social cohesion' (MIP, 2006, pp. 4-5). It is only in July 2008, in the context of the French presidency of the Union and at the Bordeaux EU-SA Summit, that migration was explicitly referred to as part of the discussions on 'regional and security issues' (alongside two other points on the agenda which were 'economic partnership' and 'global issues') (Joint Statement, 2008, p. 2): Both sides agreed that migration required a global approach and welcomed the idea to establish a structured dialogue, covering issues such as legal and illegal migration, including admission rules and respecting the dignity and rights of migrants, capacity building as well as the linkages between migration and development (op. cit., p. 2).

proven very fruitful since the 2009 Mogôbagôba Summit[38]. Finally, while the African Union Minimum Integration Programme (MIP) does contain a SADC Plan of Action that identifies different areas for intervention, these are limited to visa exemptions for diplomats and other, extremely vague, non-binding commitments to implementing the 2005 protocol (African Union Commission, 2010, p. 75).

Divergence rather than convergence is therefore likely to continue if people's migration strategies and decision-makers' fears and concerns remain poorly understood, as they currently are. As common as this divergence may be by global standards – the European Union itself is struggling to adopt a common policy on migration *vis-à-vis* Third Country Nationals and even Member States' nationals, as seen in 2010 with the case of Roma in France – it calls into question the role played by the Southern African regional integration project in ensuring that migration management contributes to populations' development needs.

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3

Regional management of migration in West Africa: the case of ECOWAS and UEMOA

Lama Kabbanji[1]

3.1 Introduction

Since the end of the 1970s, West Africa has been notable for the development of an institutional framework aiming to establish the free movement of persons inside the region. This development has been led principally by ECOWAS.

This chapter first presents the context in which the free movement of persons became a major element of regional integration in West Africa, looking at the creation of the West African Economic and Monetary Union (UEMOA) and the Economic Community of West African States (ECOWAS). The main characteristics of the framework developed by these two organizations will be described. The chapter then recalls briefly the obstacles encountered during the implementation of the different arrangements adopted by the Member States of UEMOA and ECOWAS up until the 1990s.

This chapter's second section analyses the changes taking place recently in the migration policy agenda of the two organizations. These are, most notably: (1) a growing importance afforded to migration management between West Africa and Europe; (2) the adoption of more restrictive measures applying to the movement of persons; and (3) the involvement of external actors in the region in both the design and implementation of the measures adopted.

3.2 Free movement in West Africa: A brief history

In 2013, West Africa hosted the largest number of international migrants on the African continent, with around 6.7 million people[2] (UN, 2013). In relative terms, West Africa falls behind Southern Africa, with international migrants accounting for 2%

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2 Of whom 3.1 million were female and 3.6 million were male.

of its total population[3]. Since the 1980s, this proportion has fluctuated in West Africa rising to 2.5%, therefore scoring somewhat below global trends.

3.2.1 Migration in West Africa: Characteristics and sources of data

International migration in West Africa remains inadequately documented (Tabutin and Schoumaker, 2004). The main source of statistics providing a general overview of international migrants on a regional scale in West Africa is the United Nations database[4]. It brings together data on migrants, generally from population censuses[5]. Data on migration flows however are more difficult to obtain, since they are based on specific surveys focused on migrations. The surveys by the Network of Surveys on Migration and Urbanization in West Africa (NESMUWA), conducted at the beginning of the 1990s based on the same methodology, allowed a study of intra-regional exchanges for the period 1988 to 1992 among the countries where the surveys took place: Burkina Faso, Ivory Coast, Guinea, Mali, Mauritania, Niger, Nigeria and Senegal (Bocquier and Traoré, 2000). The quantitative surveys conducted at a subregional level in certain countries has also yielded further information on certain intra-regional migratory flows[6]. For example, in Burkina Faso, two retrospective national surveys were conducted at 25-year intervals. This generated a picture of 40 years of migration between Burkina Faso and the Ivory Coast[7]. Immigration statistics from the OECD provide further information on migration between West Africa and OECD countries, with variations in quality and availability of data depending on the country (Tabutin and Schoumaker, 2004). Some specific quantitative studies also allow a closer analysis

3 In 2013, the total population of Western Africa was estimated on 331.3 million people, of which 164.1 million females and 167.2 million males. In 2015, the UN expects these numbers to have risen to 349.8 million, 176.6 million and 173.2 million respectively (UN, 2013).

4 Available at the following website: http://esa.un.org/unmigration/TIMSA2013/migrantstocks2013.htm

5 The assessment of number of migrants from censuses comes from questions on place of birth and is defined as the number of individuals living in a country that were born abroad (international immigrants) as compared to the population of that particular country (proportion of migrants).

6 Note of the editors: Intra-regional migratory flows in West-Africa have generally been dominated by a North-South movement from landlocked countries to the plantations, mines and cities of coastal West Africa. Traditionally dominated by male labourers and professionals, these migratory streams are becoming more feminized (Yaro, 2008). Female migrants are drawn to the productive labour market to contribute to the family income, although they are also drawn to the commercial sector, both formal and informal. Commercial migration (self-employment and entrepreneurship) in the region is female-dominated. Especially in the trading sector, migrants are mainly female. Women also often end up in the informal sector as care or domestic workers or as sex workers (Adepoju, 2005). Research by De Vreyer et al. (2009) shows that men are not more likely than women to migrate but are more likely to participate in the labour market.

7 National Survey on migratory movements in Upper Volta, conducted in 1974-1975; and the Dynamique migratoire, insertion urbaine et environnement au Burkina Faso (EMIUB) Survey, conducted in 2000. See Kabbanji, Piché and Dabiré (2007) as well as Kabbanji (2011) for more information on these studies.

of different aspects of West African migration, such as the study on Migration between Africa and Europe (MAFE), conducted between 2008 and 2010[8].

West African migrations are principally intra-regional, and largely concern neighbouring countries. The migrations of the labour force[9] seen today were initiated by colonial powers and then further encouraged following independence. These migratory flows are especially in the direction of coastal regions (Ouedraogo, 2002). Until the 1980s, three overarching migratory systems could be identified, based around the Ivory Coast, Senegal and Nigeria (Lalou, 1996). Data from the NESMUWA studies indicate that, for the period 1988 to 1992, a million individuals a year changed their country of residence. In addition, the international migratory flows took place largely between the seven francophone countries covered by these studies: Burkina Faso, Ivory Coast, Guinea, Mali, Mauritania, Niger and Senegal (Bocquier and Traoré, 2000). Furthermore, the Ivory Coast proved to be the migration hub, with close to half of the international flows beginning or ending in the country. The most important exchanges took place principally with Burkina Faso. Today, in terms of volume, the majority of the migrations in the subregion remain focused around the Ivory Coast, Nigeria and Senegal (Gnisci and Trémolières, 2006).

Migration between West Africa and the rest of the African continent, as well as with the rest of the world, are proportionally much less important than intraregional migration. However, since the 1960s, these longer migratory journeys have both increased and become more diversified (Black and Tiemoko, 2003; SOPEMI, 2007)[10]. These longer migrations are largely in the direction of Europe, North America as well as the Gulf States and Libya. At the start of the 2000s, according to OECD estimates, the registered number of West African nationals in OECD Member States rose to 1.2 million, that is, seven times less than the number of intra-regional migrants in West Africa (SWAC-OECD, 2006).

3.2.2 Migration and regional integration in West Africa

According to several authors, West Africa is one of the sub-Saharan regions to have recorded the most significant results regarding the creation of an area of free movement of persons (Adepoju, 2007; UN, 2004). In this regard, studies note the primary role played by migration in promoting the regional integration process, underlining that the traditional population movements within West Africa are reinforced by the new

8 This study focused on migration from DR Congo, Ghana and Senegal. Data was collected in the countries of origin and the destination countries in Europe.

9 Note of the editors: Economic and work-related reasons are the main reasons for migrating for both sexes. Many high-skilled migrants such as doctors and engineers but also nurses and teachers migrate in search of better living conditions, both within and outside of the region. More recently, women have started to migrate independently, in order to fill their economic needs, rather than simply joining their husbands. Further, more and more high-skilled women migrate unaccompanied, leaving their husbands behind (Adepoju, 2005). Adepoju also points out that this development marks a turn-around in traditional sex roles (ibid.).

10 Such as the feminization of the migration streams.

regional framework, in particular that of ECOWAS (Konseiga, 2005; Ouedraogo, 2002). This is cited as an example for other economic clusters of the region. Some, such as the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) have been inspired by the protocols to develop their own legislation on the subject (Oucho, 2006).

This willingness to include the free movement of persons into the framework of the regional integration process goes back to the end of the 1970s, with the signing of an agreement between the Member States of the West African Economic Community (CEAO). The CEAO was created in 1972 and was the forerunner of the UDEAO. The CEAO included Benin, Burkina Faso, Ivory Coast, Mali, Mauritania, Niger and Senegal. This agreement guaranteed 'the free exercise of economic, professional or social activity' (Article 4), the nationals of Member States having the right to free establishment of professions, to move for work reasons and to remain on the territory of any Member State after having worked there (Article 5). However, this agreement never got up and running. The CEAO later became UEMOA and invested more in the free movement of goods chapter of the agreement, leaving ECOWAS to take care of the free movement of persons (Ricca, 1990).

Nowadays, ECOWAS, and to a lesser extent, UEMOA, are the principal regional integration organizations in West Africa involved with the management of migration. In the last few years, ECOWAS has seen its role reinforced since it has been designated the institution responsible for the implementation in West Africa of the New Partnership for African Development (NEPAD) and the Economic Partnership Agreements (EPA) with the European Union (OECD, 2006). These agreements, once ratified, will lead to the creation of an EU-Africa free trade area[11].

3.2.3 The Economic Community of West African States (ECOWAS)

ECOWAS was established by the signing of the treaty of Lagos on 28 May 1975. This treaty was revised in January 1993. The organization includes two distinct economic groups, (1) the eight countries of UEMOA, forming a monetary and customs[12] union, and (2) the seven non-UEMOA countries, each one having its own currency (ECOWAS, 2006). In July 2005, five countries[13] formed the West African Monetary Zone (ZMAO). It is envisaged that, in time, this Zone will merge with UEMOA in order to form a single West African monetary union. ECOWAS is one of the eight regional economic communities (CER) recognized by the African Union.

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11 Note of the editors: At the time of editing (December 2014), the Member States of ECOWAS have signed but not ratified the EPA with the EU, despite the passing of the ratification deadline on 1 October 2014.

12 The customs union involves free trade (including the removal of barriers to the free movement of goods and services between partner countries) and the application of a common external customs tariff towards all third countries. An economic union is defined by the establishment of a common market (involving the liberalization of movement of all factors of production) and the harmonization of economic policies.

13 The Gambia, Ghana, Guinea, Nigeria, Sierra Leone.

According to its constitutive treaty, ECOWAS has set itself the mission of promoting integration in 'all domains of economic activity'. With this in mind, the Member States have to agree to the removal of barriers to the free movement of persons, goods, services and capital. ECOWAS has developed different legal instruments related to intra-community migration. These instruments, under the terms of the treaty, have to be incorporated immediately into the national legislation of all Member States and represent the only framework regulating international migration within these countries. The protocols and conventions[14] signed by the Member States enter into force after ratification by nine of the Parties under the terms of the treaty as revised in 1993[15].

Freedom of movement of persons

Under the terms of the first treaty of 1975, Member States had to commit themselves to remove obstacles restricting 'freedom of movement and of residence within the community' as well as to provide 'citizens of the community with tourist visas and residence permits, and allow them to work and participate in commercial and industrial activity on their territories'.

In order to secure the implementation of the arrangements of the constitutive treaty, six protocols were signed between 1979 and 1990, focusing specifically on migration. These protocols were annexed to the founding treaty of the ECOWAS. The first protocol, A/P1/5/79 was signed in Dakar on 29 May 1979 and entered into force on 8 April 1980. This Protocol fixed a deadline of 15 years to implement at the Member State level the steps leading to, first, the right to entry and abolition of entry visas for stays under 90 days, then to a residence right, and finally to the right of establishment (Article 2). The first stage had to take effect by 4 June 1985, the second by 4 June 1990 and the last by 4 June 1995. The protocol reveals arrangements at the first stage, which guarantee entry rights to the territory of a Member State for Community citizens holding travel documents[16] and valid international vaccination certificates (Article 3). Visas are only required for a stay longer than 90 days. However, Article 4 recalls the primacy of state sovereignty in the area, and specifically that 'member states reserve

14 Note of the editors: Part of the ECOWAS protocols and conventions is also their Gender Unit, the EGDC or ECOWAS Gender Development Centre. Their aim is to develop, coordinate and follow up on programmes about gender equality and about woman promotion. Their mission includes to implement the ECOWAS gender management policy, to strive for the increase in the performance of women in their fields of activities and to build the necessary capacity to execute the MDG on gender equality (ECOWAS Gender Development Centre, 2014).

15 In the constitutive treaty of 1975, the required number of ratifications was seven.

16 Travel documents are defined in the Protocol (Article 1) as being: a passport or all other valid travel documents, establishing the identity of its bearer, with a photograph, issued by or in the name of the Member State of which the bearer is a citizen and on which stamp of the immigration services can be placed. A *laisser-passer* issued by the Community to its civil servants and establishing the identity of its bearer is also considered a valid travel document.

the right to refuse entry to their territories to all Community citizens coming within the category of inadmissible immigrants under their existing laws and regulations'.

In 1985, the Member States agreed on the need to adopt a harmonized travel document for travel within the ECOWAS. This document was established by Decision A/DEC.2/7/85, which was 'to simplify the formalities of the movement of persons across frontiers between Member States'. (Preamble of Decision A/DEC.2/7/85). In addition, Decision C/DEC.3/12/92 established a common entry and exit form to further ease and simplify the movement of persons across borders between Member States of the Community[17].

Right of residence and of establishment

The arrangements for residence rights of nationals of Member States of the ECOWAS are included in the additional Protocol A/SP1/7/86 related to the execution of the second phase of the Protocol of 1979, and which entered into force on 12 May 1989. The right to reside in the territory of an ECOWAS Member State is recognized for those citizens of the Community wishing to take up salaried activity and carry it out (Article 2). This does not include public administration jobs, in the absence of national regulation to the contrary (Article 4). This right includes the ability

> to respond to job offers, to move freely on the territory of member states, to spend time and to reside in a member state in order to carry out a job conforming to the legislative, regulatory and administrative arrangements governing domestic workers, to remain, in conditions defined by legislative, regulatory and administrative provisions of the host member state, on the territory of a member state after having worked there (Article 3).

This protocol reserves the right of residence solely for migrant workers for whom an employment relationship was established in a host Member State (Preamble).

Nationals of ECOWAS states have to acquire a residence card or permit (Article 5) which they can obtain from the host Member State's immigration authority. This authority reserves the right to expel migrant workers and members of their family in certain situations, among others, for reasons of 'national security, public order and accepted standards of behaviour' (Article 14). Article 17 specifies that the Member State must allow migrant workers to transfer their earnings and savings, but this is

17 Note of the editors: At the time of editing (December 2014), the Ebola outbreak in the region is placing free movement in the region under severe strain: Senegal has closed its border with Guinea; Guinea has closed its borders with Sierra Leone and Liberia; Sierra Leone has closed its borders with Guinea and Liberia; the Ivory Coast has banned certain flights to and from Guinea, Liberia and Sierra Leone, and has closed its borders with Guinea and Liberia; and Nigeria has banned certain flights to and from Guinea, Liberia and Sierra Leone. See http://www.theguardian.com/global-development/ng-interactive/2014/aug/22/ebola-west-africa-closed-borders-travel-bans.

always subject to the terms of that Member State's legislation. An important section is added to this protocol addressing the responsibility of Member States to work together over the long term to harmonize their employment and labour policies. Article 22 recalls the need to prevent and eliminate the 'movement and illegal or undeclared employment of workers in irregular situations' through sanctions against employers held responsible. Finally, the rights of legal migrant workers to be treated in the same way as domestic workers is recognized in Article 23, relative to the 'exercise of their employment or their profession' as well as in other respects (Article 23).

Additional Protocol A/SP1/6/89 covers the remedies available to a Member State for denouncing regular failures of another Member State under the arrangements of the 1979 Protocol[18]. Finally, the right to establishment, that is:

> The right afforded to a citizen, national of a member state, to install or establish himself in a member state other than his state of origin, to participate in economic activity, to exercise as well as set up and manage companies, particularly companies set up under the laws of the host member state for its own nationals (Article 1),

is the object of the additional Protocol A/SP2/5/90 relating to the implementation of the third stage (right of establishment). Within this, the principal arrangements necessary to favour investments from nationals of ECOWAS Member States are set out.

3.2.4 West African economic and monetary union (UEMOA)

The West African Economic and Monetary Union was created by a treaty signed in Dakar on 10 January 1994. Seven West African countries, Benin, Burkina Faso, Ivory Coast, Mali, Niger, Senegal and Togo, all of which used the CFA franc, were the original signatories to the Treaty. On 2 May 1997, Guinea-Bissau also joined. ECOWAS and UEMOA entered into a cooperation agreement with the aim of ensuring that their actions did not cut across each other. As such, Article 2, paragraph 1 of the revised treaty, states that ECOWAS must, in time, become the only West African economic community. In addition, the UEMOA treaty specifies that, in order to fulfil its objectives, the organization must take into account 'the expertise of African subregional organizations of which its Member States are part' (Article 100). In fact, UEMOA incorporated in its founding treaty the main points concerning migration that ECOWAS covers on its own different protocols.

18 Note that this was prior to the setting up of the Community's Court of Justice. The founding protocol for the Court was signed in 1991 and entered into force in 1996.

The principle of free movement of persons, rights of residence and of establishment

The first UEMOA treaty[19], in its Article 4, sets, among other objectives, the creation of 'a common market based on the free movement of persons, goods, services, capital and the right of establishment of persons carrying out an independent or salaried activity, as well as on a common external tariff and a common commercial policy' (Article 4c). Then, Article 76, stating the general arrangements aimed at the creation of a common market, features 'the implementation of the principles of freedom of movement of persons, of establishment and of delivery of services as well as that of freedom of movement of capital required for the development of the regional financial market' (Article 76d). Articles 91 to 100 set out the provisions relating to the free movement of persons, of services and of capital. The revised treaty of 29 January 2003 contains the same provisions related to the freedom of movement, of residence and of establishment.

UEMOA nationals, under the provisions of Article 91 of the treaty, 'benefit from freedom of movement and of residence across the whole territory of the Union'. More specifically, this right involves the possibility of: taking up all types of employment in the territory of a UEMOA state, except that of a public function; moving to that state; spending time there; and residing there after having worked (Article 91.1). However, certain exceptions apply to the rights of Member State nationals, at the discretion of each state. In particular, exceptions exist for reasons of public order, security and public health (Article 91.1). With regard to the right of establishment, nationals may carry out unremunerated activities and set up a business (Article 92). UEMOA nationals may also supply services and benefit from the same conditions applying to domestic workers (Article 93). Again, these rights are subject to the same exceptions listed above (those of Article 91.1).

Following the entry into force of this treaty, the Commission had to develop regulations or directives aimed at regulating free movement and the right of establishment and to facilitate the effective use of these rights (Articles 91 and 92). For this reason, in 1998, a draft regulation was developed relating to the freedom of movement of persons, of residence, of the provision of services, and of the right of establishment within the UEMOA region. However, this draft never came into force.

3.2.5 The tools for implementation and monitoring of the ECOWAS and UEMOA frameworks

The first stage of the implementation of rights granted in the respective treaties of the two organizations was the drafting of legislative texts[20]. These aimed at regulating free movement and the rights of residence and of establishment, as well as facilitating the

19 The UEMOA treaty completed the Treaty on West African Monetary Union (UMOA) signed on 14 November 1973 and which had been signed by Benin (at the time, Dahomey), Burkina Faso (Upper Volta), the Ivory Coast, Niger, Senegal and Togo.

20 Regulations or directives, in the case of UEMOA; protocols and decisions in the case of ECOWAS.

effective use of these rights. These legislative instruments have binding force over the signatory states, who are required to adopt the instruments relating to migration at a national level as well as adopting any other legislation necessary for their effective application, including bringing any existing national laws on the subject into line.

In addition, ECOWAS has established bodies to monitor the implementation of the provisions relating to the free movement of persons, rights of residence and of establishment. First, in 1975, this body was the Commission of business, customs, immigration and of monetary questions and payments. This body was required to 'present periodically reports and recommendations through the Secretariat to the Council of Ministers' (Article 9.4a, 1975 Treaty). Then, in 1993, the Commission on 'political, judicial and legal affairs, regional security and immigration' replaced the previous body and its mandate was extended (Article 22.1f, 1993 Treaty). This body was responsible for 'preparing projects and community programmes' (Article 23a), 'ensuring harmonization and coordination of projects and community programmes' (Article 23b), and 'monitoring and facilitating the implementation of the provisions' of the treaty and its protocols (Article 23c). A supervisory body was also created in case of disputes: the ECOWAS Tribunal. Additionally, Member States had to 'take all appropriate measures in order to allow Community citizens the full enjoyment of rights' and, more specifically, they had to put in place at the national level 'the necessary arrangements to ensure the effective implementation of the provisions' relating to migration (Article 59, 1993 Treaty). These arrangements are set out in more detail in the protocols.

ECOWAS also planned the creation of national committees to follow the implementation of decisions and protocols on the free movement of persons and transport. These committees would be made up of the National Director of Land Transport, the National Director of Road Security and of representatives from the policy in question, the national office of the ECOWAS 'brown card', the National Guard, the President's Office, the National Customs Office, the Union of West African Transporters (UTRAO), and the national unit of ECOWAS. According to Adepoju (2009), six countries were going to create national committees: Benin, Burkina Faso, Mali, Niger, Nigeria and Togo. However, these committees have not been very active.

Turning to the UEMOA, the Council of Ministers is the body responsible at the Union level for the implementation of treaty provisions. As such, from the entry into force of the constitutive treaty, the Council must settle through regulations or directives the relevant provisions for facilitating the effective use of the draft laws on freedom of movement of persons, of establishment and of delivery of services. In order to do this, the Council must, acting on the initiative of the Commission, obtain a majority vote of two-thirds of its members, always with the approval of the Parliament[21]. In addition, under Article 91, the Council must adopt rules: 'specifying the laws applying to the family members of those persons making use of these rights; securing for migrant workers and their dependents the right to continued enjoyment of the available

21 A change introduced by the 2003 Treaty.

benefits granted to them during successive period of employment on the territory of all Member States; and specifying the nature of the limitations justified on grounds of public order, public security[22] and public health'. Eventually, Member States must harmonize their national legislation to allow for the effective implementation of these rights. UEMOA therefore introduces an additional actor into the process of migration management: the Parliament.

Both organizations have dispute resolution mechanisms in case of differences between Member States regarding the interpretation or implementation of the provisions of the treaties, protocols or regulations. In the case of ECOWAS, if an amicable settlement is not reached by direct agreement between the parties, the dispute will be taken 'by one of the parties before the Community tribunal, whose decision is final and without appeal' (Article 7, 1979 Protocol). The 1989 protocol completes this mechanism and envisages the setting up of a commission of enquiry by ECOWAS, while waiting for the establishment of the Community tribunal. This commission of enquiry will be active in the states concerned while the action is brought forth by one of the parties to the dispute. The commission would have to submit a report to the President of the Conference of Heads of State and of Government, as well as to the governments of all of the Member States, with a view to finding a solution to the dispute. The revised treaty of 1993 added a further step of a hearing before the Court of Justice of the Community in the event that an amicable settlement is not reached. The UEMOA envisages the same type of mechanism, with a hearing before the Court of Justice of the Union and, as an ultimate sanction, the eviction of the offending Member State from the organization.

3.3 Implementation of the provisions of ECOWAS and UEMOA

From the end of the 1970s therefore, an institutional framework aiming to manage intra-regional migration has been developed under the auspices of ECOWAS and UEMOA. But how successful has its implementation been? Despite the body of legislation introduced to address the free movement of persons, problems remain, particularly as regards the right to reside and to establishment (Adepoju, 2007; Ba, 2006). Regarding the ECOWAS provisions, entry visas for Member State nationals have been effectively abolished. However, the travel document has only been issued in 7 of 15 countries: Burkina Faso, the Gambia, Ghana, Guinea, Niger, Nigeria and Sierra Leone (Adepoju, 2009; Robin, 2009). This travel document must still, in the long term, be replaced by an ECOWAS passport, the uniform template which was adopted during the Conference of Heads of State and of Government in 2000. This has yet to be issued in most Member States.

22 Note of the editors: In 2006 the Women Peace and Security Network Africa (WIPSEN-A) was established. This organization has a presence in Ghana, Ivory Coast, Liberia, Nigeria and Sierra Leone. They aim to promote African women's leadership and rights to participate in security, peace and sustainable development (WIPSEN-A, 2014).

At the beginning of the 2000s, according to ECOWAS (2006), many obstacles to free movement of persons still remained on the principal West African transport routes and at the frontiers of Member States. Corruption among public officials remains an impediment to movement between different checkpoints existing between Member States; in some countries, such as Niger, migrants are liable to hand over money at each checkpoint, whether ECOWAS nationals or not, and whether in possession of travel documents or not (Brachet, 2009). This is one of the reasons for which ECOWAS has reduced the number of border posts: Member States are obliged to dismantle all posts not listed in legislation. For this reason, in 1995, a basic action plan was set up by the Council of Ministers, aiming essentially to reorganise the checkpoints of different monitoring units into one mixed checkpoint, to reduce the many roadblocks to a single checkpoint between the border and the first significant town, as well as to establish greater collaboration between the authorities in neighbouring countries.

Regarding the rights of residence and of establishment, ECOWAS planned to issue a residence permit. However, this permit has not been issued by all Member States, and even where it has been issued, the majority of migrants remain completely ignorant of its existence, or do not have the necessary papers in their possession to obtain it. Next, it was specified in the framework of provisions relating to the right of residence that it was possible for Member State nationals to participate in a job or salaried activity, with the exception of public functions, on the territory of another Member State. Despite this, access to several professions remained barred, particularly self-employed professionals. The adoption of different ECOWAS protocols did not prevent the expulsions of West African nationals during economic recessions such as in Nigeria in the 1980s (Adepoju, 2009). Finally, a large section of nationals from the subregion live in ECOWAS countries, having established themselves well before the entry into force of the protocols. However, no effective measures have been adopted to account for their situation. The crisis which rocked the Ivory Coast for several years illustrates the problems brought about by the non-possession of documents, denoting the right to remain in the countries of the subregion.

The right to work: the case of Burkina Faso

In some cases, such as that of Burkina Faso, employment laws do not specify that preferential treatment should be granted to nationals of ECOWAS and UEMOA Member States. All foreign workers are treated the same way (Soulama, 2003). Thus, ECOWAS citizens are liable, in the same way as all non-nationals, to the cost of a work visa. Moreover, in Burkina Faso, employment legislation from 1992 stipulates that the employer must apply for a visa, for which the related costs have been revised upwards since 22 June 2004. A new law was introduced, fixing graduated tariffs according to the net monthly income of the worker. Thus, for foreigners earning less than 100 000 CFA francs per month, the visa tariff was set at 25 per cent, while, for those with a salary between 100 001 and 500 000 FCFA, the tariff rises to 30 per cent (Article 1). The costs linked to getting a work visa would be an indirect method of limiting the entry of foreigners on Burkina Faso soil, nationals not being subjected to this necessity (Interview 3, Department of Professional Relations and Labour Standards and Relations, Ministry of Employment of Burkina Faso). Employers, who have the responsibility to cover these costs, will prefer to rely on the services of these workers without signing a contract. Considering the small number of work visas granted in Burkina Faso, it seems that the majority of foreign workers do not have the papers required by law to carry out their job.

The case of UEMOA illustrates even more clearly the difficulties encountered by these organizations in the implementation of their arrangements at the Member State level. Practically speaking, the UEMOA Commission was obliged, following the entry into force of its constitutive treaty, to enact regulations or directives with the aim of regulating free movement and the right of establishment, and facilitating the effective use of these rights (Articles 91 and 92). Thus, in 1998, a draft law relating to the freedom of movement of persons, right to residence, provision of services and the right to establishment within the UEMOA region was developed, with its adoption planned for 2002. This regulation proposed to draw up 'measures facilitating the use by nationals of the Union, of the privileges conferred upon them by the UEMOA Treaty' (UEMOA, 2006).

Had this law been signed, it should have entered into force on 8 July 2004, rendering obsolete all conflicting national provisions. The reason why the implementation of this law was not successful was the 'important number of sensitive concerns' that were included within it (UEMOA Commission, 2005). Also, this law envisaged at the same time: to allow the movement of UEMOA Member State nationals with the simple presentation of a piece of identity; to take back the provisions of ECOWAS concerning the freedom of residence; to set up a residence card for a stay over 90 days; and to ensure the right of establishment, with its implications for employment in the private sector, self-employed professionals, commercial activity, and access to the public services of the host state.

According to A. Diop, diplomatic advisor to the President of the UEMOA Commission (Interview, 2005), when it came to regulate these wide-ranging provisions, they realized that there were certain difficulties of interpretation between the Member States. This was particularly the case in the Ivory Coast, where a narrow interpretation had been taken of the Convention on establishment. A Commission Note (UEMOA Commission, 2005) indicated that the draft law had been reviewed twice by the Council of Ministers during meetings on 22 December 1998 and 25 March 1999, without success. This was due to 'reservations by certain Member States of the Union, whose concerns, as well as the socio-political climate which had prevailed in the UEMOA environment for several years, did not permit the adoption of the community text' relating to the movement of persons, of residence, of delivery of services and the right of establishment.

Following the Council meetings, the Ivory Coast had produced a Declaration in which it expressed its reservations regarding the draft proposed by the Commission. In particular, it requested recognition on the part of the Member States of its particular situation in terms of immigration (the elevated number of foreigners on its territory, calculated to be 30% of the population according to this Declaration), as well as the need for a national plan of appropriate measures aimed at controlling, rather than preventing, the migratory flows on its territory. For these reasons, the Ivory Coast requested the possibility to derogate temporarily from certain provisions of the draft text relating to these concerns.

Various factors are listed in the literature to explain the difficulties of implementing ECOWAS and UEMOA legislation in the area of migration management. These

include: political and economic instability of the Member States; the refusal of Member States to agree to a transfer of sovereignty to the regional level; weak intra-regional trade; the inability of regional integration organizations to enforce their laws; the coexistence of several regional groups tripping over each other, with each one having their own programmes and calendars; and the absence of harmonization between community and national legislation (Adepoju, 2009; Hugon, 2003; Sawadogo, 1999). Several authors note that regional agreements on migration have generally been relegated to a position subsidiary to the primary objective of regional economic integration (Channac, 2006), without taking into account other fundamental aspects: the political, demographic, social and cultural aspects of integration (Oucho, 2006; Ouedraogo, 2002). Sawadogo (1999) and Ouedraogo (2002) highlight a final point – the lack of participation of the relevant populations in the regional integration process and the implementation of a regional framework for migration management in the ECOWAS and UEMAO regions.

In addition to these obstacles, it seems that the current political dynamic of the region in West Africa is largely attributable to changes on the global level in the management of international migration, in particular the development of Africa-Europe relations over the past few years. The following section will be an illustration of this, focusing on an examination of recent trends in the ECOWAS and UEMOA migration policy agenda.

3.4 Recent trends in regional migration management in West Africa

During the 1990s, questions about migration occupied a secondary position on the political agenda of ECOWAS and UEMOA. It was not until the middle of the 2000s that a change in attitude by the two organizations could be seen. This involved a process of formulating, and then putting into action, new strategic plans. The following section sets out the principle changes taking place in the last few years, analysing them in the context of the growing involvement of the European Union (EU) in the management of African migration.

3.4.1 Euro-African cooperation on the agenda

The 2000s were characterized by the multiplication of multilateral and bilateral initiatives in Euro-African cooperation in the area of international migration. It is the signing, on 23 June 2000 at Cotonou, of the Partnership Agreement between the members of the group of African, Caribbean and Pacific states (ACP countries) and the EU[23] that institutionalized the role of migration in the partnership framework between the two regions. The Cotonou Agreement essentially develops an approach aiming to

23 Partnership Agreement between the members of the group of African, Caribbean and Pacific states (ACP countries), on one side, and the European Community and its Member States, on the other, signed at Cotonou on 23 June 2000.

institutionalize the division of responsibility between the ACP countries and the EU in the fight against illegal immigration[24] towards Europe. It also committed the ACP countries to developing their zones of origin in the hope of reducing the incentives to leave. From this moment on, several multilateral initiatives on questions of migration, concerning the EU and its African partners, monitored and developed these different themes: the Intergovernmental Conference on Migration and Development at Rabat in July 2006; the Ministerial Conference in Libya in November 2006[25]; the second EU-African summit in December 2007; the EU-African Ministerial Conference on Migration and Development at Paris in November 2008; and so on.

A bilateral dialogue between ECOWAS and the EU on migration and development was also initiated during these years. According to a Communication from the Council of the European Union, the two organizations 'have underlined the great importance of migration in their cooperative relations and as a development factor' (Council of the European Union, 2008, p. 8). An ECOWAS-EU working group on migration was thus created in 2006, with the aim of: facilitating 'political dialogue between ECOWAS and the EU on questions of migration'; serving 'the interface between African and European regional expertise and the political level'; and identifying 'the areas of action in order to achieve concrete cooperation' (ibid., 2007*a*, p. 6). The two parties envisaged a deepening of their cooperation in six specific areas: migration and development; legal migration; illegal migration; the reinforcement of operational cooperation in the field of migration; migration and diasporas; and migration and gender (ibid., 2007*b*).

Bilateral cooperation agreements in the fight against illegal migration were also signed during this period between certain European and African countries. For example, Spain signed several bilateral agreements, notably with Morocco, Algeria, Mauritania, Gambia and Guinea linking aid to development cooperation in the fight against 'illegal' immigration and the readmission of nationals who made it to Spain illegally. In the case of Senegal, Spanish aid was increased from 5 to 15 million euros to provide the means for a greater control over emigration and the setting up of a coastal surveillance service (Rossi, 2006). France also signed agreements of this nature with several African countries, including Benin, the Republic of Congo, Gabon and Senegal. These agreements link three essential branches of migration management: the organization of legal migration (movement, visas, labour immigration, the welcome

24 Note of the editors: Trafficking of women and children has been increasingly reported throughout the region. Women are often taken away from Ghana, Nigeria, Mali and Sierra Leone, to be exploited as sex workers to the countries of the European Union. Children are also trafficked, often from plantations in Togo, Nigeria and Côte d'Ivoire, to become domestic workers in Gabon (Yaro, 2008).

25 Note of the editors: In the Joint Africa-EU Declaration on Migration and Development that was discussed at Tripoli in November 2006, special attention was devoted to the situation of women and children in migration processes. For example, it was recognized that one of the major components of managing migration is the protection of the rights of migrants, including those of female migrants and children. Also it was decided that the provision of information regarding human rights – especially for women and children – should be promoted, and that all policies and programmes on migration should take the increasing feminization of migration and the vulnerability of female migrants and children into account (UNHCR, 2008).

and stay of students); the fight against illegal immigration (readmission of nationals in irregular situations, police cooperation in terms of the monitoring of frontiers, the dismantling of smuggling networks and the fight against document fraud); and migration prevention through development assistance.

Thus, from the 2000s onwards, multilateral and bilateral initiatives aimed at reinforcing cooperation between ECOWAS and the EU on the questions of migration have increased in number. These initiatives aim particularly at unifying West African countries in the fight against illegal migration towards Europe (through the externalisation of the control of European borders). In return for their cooperation, African countries see funding in the framework of development aid. These themes are transposed in the documents produced both by UEMOA, but also, and especially, in ECOWAS during this period, as the next section will explore.

3.4.2 Adoption of new approaches for managing migration

In June 2006, during the 30th ordinary summit of the Heads of State and of Government of ECOWAS, the Commission was given the mandate to define a common regional position on migration. This was due to the concerns relating to emigration of young West Africans towards Europe (ECOWAS, 2006*a*). ECOWAS effectively devoted itself to a common position on migration during the 33rd ordinary session of the Conference of Heads of State and of Government, held in Ouagadougou, 18th January 2008. This Approach involved:

> a regional mechanism to overcome the challenges of intra-community mobility and emigration to third countries. This mechanism takes into account the regional dimensions of migration, especially the development of the departure points of migrants, and the creation of a regional planning strategy for the territory (ECOWAS, 2008, p. 2).

This approach had the general objective of 'finding the ways and means of optimizing the advantages of migration for development, and to reduce its negative impact' (ECOWAS Commission, 2008, p. 2). In order to achieve this, the Migration and Development Common Approach was annexed to the document. Six priority issues were identified: the optimization of the gains of intra-regional mobility and the guarantee of free movement within ECOWAS; the promotion of local development in the departure zones and in other potential host areas; the optimization of legal migration to third countries, notably Europe, North America, Africa and the rest of the world; the fight against irregular migration; the protection of the rights of migrants,

of refugees and of asylum-seekers; and the inclusion of the gender dimension in migration policies[26].

UEMOA, since its creation, has not been very involved in the area of migration. However, according to the organization, migration featured heavily in interviews conducted in 2003 by the President of the Conference of Heads of State and of Government, Mamadou Tandja, with the political authorities of UEMOA on his tour of Member States (UEMOA, 2005). This also forms part of the priority actions of the road map the President put before the Commission on 23 January 2004. Since then, the organization adopted in 2005 a more flexible and progressive approach on migration management. This consisted of several community texts in place of the single Regulation proposed previously. This step was approved during the Conference of Heads of State and of Government of the Union, during its session of 30 March 2005. The objective was to 'result in the implementation of a Code of freedoms and of the right to establishment, within the UEMOA' (UEMOA, 2006, p. 23).

This approach is based on four principal limbs. Firstly, it involves the application of the right of establishment in its section relating to self-employed professionals (lawyers, notaries, bailiffs, auctioneers, doctors, nurses, pharmacists, architects) in Member States. Then, given the important disparities remaining which deal with tuition fees at the level of higher education in UEMOA countries, the second limb concerns equality of treatment for nationals of the Union. Third, a community visa is planned for individuals that are not nationals of the UEMOA and ECOWAS. The objective of this is the 'creation of a community environment conducive to business (investments, tourism, etc.)' (UEMOA, 2005, p. 3). In order to achieve this, it is proposed to draft an 'additional Act affirming the principle of freedom of movement of persons who are not nationals of the Union and of ECOWAS'. The fourth limb features the construction of checkpoints next to the borders of Member States of UEMOA 'with the objective of raising non-tariff barriers to commercial exchanges and, more generally, to the free movement of persons' (ibid.). These initiatives take place in a context characterized by the involvement of new actors, external to the region, in the development and the implementation of recommendations.

3.4.3 Multiplication of actors

During the first years of building an institutional framework for regional management of migration in West Africa, the only actors involved in the development and the implementation of this framework were the Member States and institutions of the two organizations. On the side of ECOWAS, this mainly involved the Conference of the Heads of State and of Government, of the Council of Ministers and the Executive

26 Note of the editors: Although migration in the region has become increasingly feminized over the past few decades and resolutions have been made to account for this in policy decisions, in many cases women's mobility is still determined by gender inequality. Unequal gender relations either force them to leave their homes or restrain them from moving. As Awumbila (2009) points out, 'the gendered nature of migration drivers and processes in West Africa needs to be recognized' (ISS, 2009).

Secretariat; in the case of UEMOA, it involved the Commission and the Council of Ministers. However, over the last few years, a growing number of actors have become involved as much in the development as in the implementation process.

For ECOWAS, the group of experts charged with supporting ECOWAS in the development of its common approach included representatives of the Sahel and West Africa Club (SWAC), the Organisation for Economic Co-operation and Development (OECD) and the International Organization for Migration (IOM). The proposed action plan envisages also joining non-member states of ECOWAS, especially in the implementation of action relating to the fight against irregular migration and human trafficking. As for the implementation of the ECOWAS action plan on Migration and Development, a Spain-ECOWAS fund was created in 2009, making an initial sum of 10 million euros available, of which four million is 'for the institutional support of the *Common Approach on Migration* of ECOWAS'[27]. This fund will be administered by a pilot committee composed of representatives of the Spanish Development Cooperation and of ECOWAS. UEMOA also plans to broaden its scope relative to its new sectoral approach 'to ministers and actors in the interested sectors, within the Member States, as well as to partners of the development of the Union' (UEMOA, 2005, p. 2).

3.4.4 Changing objectives

The growing involvement of external actors in the region has had an important effect on its reconfiguration of priorities of migration. This has been shown by the measures adopted in the framework of the Common Position of ECOWAS on migration. A comparative analysis of documents developed by the organization before and after 2000 reveals three principal changes: an increased importance given to the management of migration between West Africa and Europe; an increase in the tools for restricting migration; and an increase in development strategies aiming at population retention[28].

During the 1970s and 80s, ECOWAS was primarily invested in the implementation of mechanisms allowing the freedom of intra-community migration through the granting of three sets of rights for the nationals of Member States: the right to be admitted on the territory of one of its States without an entry visa for stays of less than 90 days; the right to reside there; and the right to establish there.

However, the adoption of the Common Position in January 2008 refocused the objectives of the organization in the area of migration. It was no longer only a matter of establishing free movement of persons within the community space, but also of adopting measures relating to interregional migration, particularly between West Africa and Europe. This was illustrated by the press release of the Mediation and Security Council of ECOWAS, which invited the President of the Commission to 'continue to reflect upon all dimensions of the definition of the common position on the management of migration both intra-regional and towards Europe' (ECOWAS

27 Source: http://www.unhcr.org/49e47c8f11.pdf.

28 For a more detailed analysis, see Kabbanji (2011*a*).

Commission, 2007, p. 3)[29]. In addition to this, an analysis of the action plan annexed to the ECOWAS Common Position – in the section relating to migratory flows – reveals that liberalization measures no longer only address the reduction of red tape in travelling by land through border posts between Member States. Other measures aim to liberalize temporary residence and the establishment of specific categories of migrants. For intra-regional migration (within West Africa), students must receive equal treatment in the teaching institutions of Member States. Further measures ensure freedom for self-employed professionals, the promotion of immigration into certain under-populated zones identified by ECOWAS, and the facilitation of entrepreneurial activities of female migrants[30]. For interregional migration, the measures aimed once more at facilitating the access of West African students to universities and institutions, such as the top schools in Africa, North America, Europe and Asia. It likewise aimed to sign exchange agreements for young professionals in order to enhance their linguistic and professional knowledge and to acquire experience of paid work in another country. Actions are also planned to facilitate the return to the country of origin for students at the end of a university programme, and for 'assuring' the return of young professionals at the end of their stay.

Establishment is therefore encouraged in the Common Position framework in the ECOWAS zone, but only in the case of self-employed professionals and in under-populated areas. In parallel, information and acclimatization campaigns are planned to inform potential migrants, as well as those not benefitting from rights as migrants. They will be advised as to potential work opportunities, particularly in Europe, and to the dangers of illegal migration and smugglers networks. Finally, the protection of migrants is taken up solely in general terms. For example, ECOWAS Member States are encouraged to ratify the UN Convention on the Rights of Migrants and to put in place mechanisms aimed at granting the rights to residence and establishment for refugees from the ECOWAS region, although concrete actions are not proposed in this regard.

On the other hand, analysis of the action plan reveals that the tools for controlling and restricting migration are disproportionally more numerous. First, they consist of, in relation to migration flows, measures to reinforce internal border controls within the West African area, particularly regarding ECOWAS travel documents. Additionally, there are systems planned to monitor flows and the causes of intraregional and interregional migration. The plan also deals with promoting technical cooperation between ECOWAS countries and with non-member countries. The different aspects of this cooperation are based on the following points: (1) cross-border cooperation and the setting up of joint border controls between ECOWAS Member States, and (2) the reinforcing of the institutional and operational capacity of ECOWAS and its Member States in the fight against irregular migration and people-trafficking.

29 ECOWAS, *Meeting of ministers on ECOWAS common approach on migration*, Abuja, 14 June 2007.

30 These activities usually take place in the trading sector.

Measures aimed at limiting the number of migrants usually take the form of population retention measures. They tend to promote the development of the least-favoured emigration zones, notably through diaspora investment, facilitating the transfer of income. They also involve establishing systems for monitoring social indicators in certain ECOWAS zones in order to (1) initiate investment policy, (2) develop institutional capacity within the ECOWAS space (universities, training centres etc.), and (3) rearrange cross-border areas (e.g. putting in place border markets, common health posts, shared schools, cross-border development activities for neighbouring populations); all this with the aim of reducing the motivation to leave. In parallel, a series of indirect measures aim to promote the return of migrants, 'illegal' as well as legal, back to the country of origin. This justifies the development of pilot projects welcoming, acclimatizing and accompanying returning migrants; the promotion of the voluntary return of migrants in transit countries; and the implementation of rehabilitation programmes for illegal migrants to return.

3.5 Implications for free movement of persons in the region

Since their creation, UEMOA and especially ECOWAS have adopted a global approach, aiming to legislate on all aspects of migration.

For ECOWAS, this has translated into the development, between 1975 and 1993, of a legal framework comprising several documents - a constitutive treaty, protocols, and decisions - accompanied by attempts to define the steps leading to the implementation of freedom of movement. On the part of UEMOA, the organization has included in its constitutive treaty arrangements provided for by ECOWAS regarding migration.

The framework of regional management of migration developed in West Africa bases itself largely on the model of what was formerly known as the European Economic Community (EEC) and has now become the EU. Thus, the legal texts of ECOWAS and UEMOA on the free movement of persons have largely been inspired by the EEC Treaty of 1957, as well as by the Treaty of the European Union published in the Official Journal No. C191 on 29 July 1992. In its current state, the approach of both ECOWAS and UEMOA continues to be strongly influenced by the EU, as can be seen by the principles set out in Article 13 of the Cotonou Agreement and the involvement of the EU and its Member States in the development and implementation of recent initiatives on migration management in West Africa. While the institutional framework developed before the 2000s legitimized to a certain extent migratory habits by giving them a legal basis, recent trends in the migration policy agenda of ECOWAS and UEMOA seem to be less in step with the realities of migration in the subregion.

First, migration in West Africa is principally intra-regional. According to census data compiled in 2000 by the World Bank and the University of Sussex, out of 100 migrants born in a West African country, 61 lived in another country of the subregion, 9 elsewhere in the African continent, and 30 in other countries, of which 15 were in Europe (Lessault and Beauchemin, 2009). In addition, according to OECD estimates, the number of West African nationals in OECD Member States rose at the beginning

of the 2000s to 1.2 million, that is, 7 times lower than the number of West African migrants in West African itself. The principal OECD destinations were Europe and North America (SWAC-OECD, 2006). Yet, since the beginning of the 2000s, ECOWAS and UEMOA have placed more and more emphasis on the management of interregional migration, even though free movement within the subregion has yet to be consolidated.

Second, tools designed to liberalize migration gave way to methods of restricting it, shrinking the area of free movement of workers, especially those less qualified. In fact, the only measures aiming to promote the movement of persons concerned the category of migrants that were least represented in West Africa, that is, highly qualified migrants and investors. Thus, the large majority remains excluded from the privilege of legal mobility.

Third, the emphasis placed on the fight against irregular migration obscures key dimensions of the issues in West Africa. Social and economic integration of immigrants in host states in West Africa, and the consolidation of their legal status, particularly in the case of unqualified workers, does not take priority for political decision-makers. In fact, the regulation of the status of immigrants established in the countries of the subregion before the 1979 ECOWAS protocol no longer features on the agenda. However, the recent crisis in the Ivory Coast has revealed the vulnerability of the status of nationals of the subregion, of whom a large number do not have the correct identification papers.

This confirms that the rights envisaged in the ECOWAS protocols have still not been granted to the nationals of the countries involved. In the end, the protection of the rights of migrants is no longer treated as the secondary objective of migration management in the region. This was evident due to the fact that the measures put in place in this area were hardly developed in the ECOWAS action plan, in contrast to the fight against irregular migration.

However, on the topic of irregular migration, several initiatives have already been implemented with the aid of the EU and its Member States. In 2008, a centre of information on, and management of, migration (CIGEM), financed by the 9th European Development Fund (EDF), was set up in Mali following the signature of a joint declaration on Migration and Development between Mali, ECOWAS, France, Spain and the European Commission (Republic of Mali, 2008). This centre is a perfect example of the practical application of the global approach of the EU and illustrates well the introduction of security questions into the framework of development aid. In effect, its mission is: (1) to inform on the legal framework of migration, and to prevent irregular migration; (2) to welcome, orientate and accompany candidates for migration/job-seekers and returning migrants; (3) to increase the value of the human, financial and technical capital of the diaspora; (4) to raise awareness of migratory phenomena (Republic of Mali, 2008, p. 21).

The creation of other centres of the same nature is also envisaged elsewhere in West Africa. Still under the framework of the 9th EDF, 5.5 million euros were granted to Mauritania (3 million) and to Senegal (2.5 million) for a 'rapid reaction mechanism'. In Senegal, this consisted of support from the European Commission to countries

'fighting against illegal immigration to the European Union […]' (EU and Republic of Senegal, 2009, p. 11).

In a further development, the planned signing of agreements to manage migratory flows between West African countries and European countries has led to 'a militarization of arrangements at West African border checkpoints by FRONTEX' (Ndiaye and Robin, 2010, p. 33)[31]. In this respect, Gonin and Robin (2009, p. 165) show how Senegal, having become a buffer state, 'is nowadays trapped between the ECOWAS free movement area and that of Schengen'. In effect, from one side, the externalization of border control gives certain West African states an increased role in the control of emigration originating from their territory; while on the other hand, these same states are committed to supporting free movement through regional agreements. Through different arrangements, such as airport transit visas[32] and the concept of a safe country of origin, African countries see themselves granted the responsibility to control foreigners on their territory, whether they are West African nationals or not (Robin, 2009).

Another consequence coming out of the literature is the redirection of migratory routes as a result of FRONTEX-coordinated control measures, which has increased both the risks and costs of migration (Gonin and Robin, 2009) and contributed to the strengthening of trafficking networks (Adepoju et al., 2010). Finally, many human rights violations are taking place in the different zones where migrants find themselves 'in transit' (CIMADE, 2009; MIGREUROP, 2009).

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31 FRONTEX's full title is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

32 From 1996, nationals of certain countries are required to carry an airport transit visa for Schengen states (in 1996, this was two countries from West Africa: Ghana and Nigeria).

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4

Prospects for free movement of particular persons in the East African Community: The feasibility and dilemmas of integration[1]

John O. Oucho[2]
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4.1 Introduction

Regional integration and migration have been inter-linked in East Africa since World War II. Through successive phases – from the colonial period to the present – migration in the East African Community (EAC) has been a persistent feature of life in the region. However, without a prescribed protocol, the management of migration faces serious challenges that even the EAC Protocol on the Establishment of the EAC Common Market – which provides for free movement of goods, labour, services, and capital – might not be able to overcome. In the colonial era, labour migration was mainly from Rwanda, Burundi and Democratic Republic of the Congo (DRC) to Uganda, Kenya and Tanzania, and more recently from Sudan and the Horn of Africa to the Middle East (De Haan 2000).

The history of regional integration in East Africa dates back to the conference of the colonial governors of each of the three states who, from 1917, formed the East Africa High Commission. The High Commission was succeeded by the East African Common Services Organization in 1962-1966, which was in turn transformed into the first episode of the East African Community (EAC) in the decade 1967-1977. Although the region experienced a lull in regional integration when the EAC I collapsed in 1977, it crafted yet another episode of regional integration in form of the EAC II as the new millennium began, expanding to include Burundi and Rwanda in 2007. From its colonial roots, the EAC is the first and longest serving regional economic community (REC) in sub-Saharan Africa. It is recognized by the African Union (AU) and United

1 This chapter has benefited immensely from previous articles authored by the first author since 1995 specifically Oucho (1995, 1998, 2009a and 2009b in the references). It differs from previous articles in one notable aspect: it analyses the migration of particular persons which the East African Community Protocol on the Common Market identifies, albeit only implicitly.

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Nations Economic Commission for Africa (ECA) as one of the eight African RECs. These RECs are regarded as the most logical step towards building stronger blocs from weak economies, initiating economies of scale, broadening trading entities, and strengthening the bargaining power of African nations *vis-à-vis* the developed world (ECA, 1997).

Colonial labour laws enforced patterns of circulatory migration. They divided the areas of production and reproduction, moving African families into labour reserves from which men were recruited to work in cities or on plantations. The rest of a family had to remain in the reserves, subsisting on crops grown in the area without the help of the most active out-migrant family members. In this context, cash remittances from family members working in the colonial economy assumed considerable importance (Gould 1995). During the 1980s, labour circulation decreased and refugee flows started to dominate movement (Oucho 1995). According to the International Organization for Migration's (IOM) Migration Policy Framework for sub-Saharan Africa, the EAC subregion has been, and still is, experiencing increased movements of refugees and internally displaced persons (IDPs). Much of the voluntary migration that characterized the EAC I countries of Kenya, Tanzania and Uganda ceased by 1978 and an upward trend in involuntary migration flows set in with the emergence of the EAC II.

African management of international migration received further impetus with several regional developments in sub-Saharan Africa. Since 2006, the AU has adopted several landmark strategic initiatives: the African Common Position on Migration and Development (AU, 2006a) and the Migration Policy Framework for Africa, which was adopted in Banjul, The Gambia, in July 2006 (AU, 2006b). The Inter-Governmental Authority on Development (IGAD) has gone a step further to develop its Regional Migration Policy Framework which, on adoption by the Member States, is expected to influence the development of national migration policies. The EAC II faces an acid test as its Partner States enjoy either double or triple membership of other RECs, namely the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC) and (in the case of Kenya) The Community of Sahel-Saharan States (CEN-SAD).

This chapter examines the prospect of the free movement of particular persons (FMOPP) as opposed to the much-hyped all-inclusive protocol on free movement of persons (FMOP) which the East African Community (EAC), indeed all the RECs in sub-Saharan Africa, tend to favour. The focus on 'particular persons' is likely to be more appealing than free-for-all movement and may be more feasible. The paper consists of six main sections. The introduction has already portrayed the background to the idea of 'free movement' and why it is considered necessary, and has offered clarification of some conceptual issues. Section two reviews the concept, instances of, and rationale for the 'free movement of persons' in the context of the EAC; section three highlights the models of regional integration and their relevance to the evolution, nature, and scope of EAC integration; the fourth section focuses on the migration of particular persons within and between EAC Partner States; section five examines the major shortcomings of FMOP within the EAC; and section six speculates on the future

of EAC integration and concomitant migration. The chapter concludes that FMOP in the EAC region provides important opportunities and challenges that the EAC Partner States must address not only between themselves but also with their neighbours, which are Member States of other RECs.

A cautionary remark is appropriate at this point. The information on which this chapter is based has two main limitations. The first is the lack of consultation with individual cross-border migrants and other stakeholders, including border-post personnel; a detailed field survey and consultations with a broader range of stakeholders would certainly have enriched the study. The second limitation is the over-reliance on secondary data and issues examined through a diverse array of lenses – economic, political, demographic, and sociological, including previous work on the subject. The research on regional integration keeps shifting which renders a number of important developments intractable.

4.2 The concept of 'free movement of persons'

This section sheds light on two issues. First, it traces the origins and gives an interpretation of the concept of the 'free movement of persons' in various settings. Second, it traces the evolution of FMOP in the EAC over the years, including how it has evolved over time.

4.2.1 Free movement of persons: Review of origins and interpretations

The 'free movement of persons' concept is inherent in two pertinent articles of the Universal Declaration of Human Rights of 1948. Article 13 states that 'everyone has the right to freedom of movement and residence within the borders of each state'... [and] 'the right to leave any country, including his own, and to return to his country'. This underscores the right to any type of emigration and return migration without any inhibition. Article 14 states that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'... [and] 'this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'. Inherent in this article is the outflow of refugees and asylum seekers. In contemporary nomenclature, the two articles underpin international forms of voluntary and forced migration respectively. Essentially, a complete protocol on the free movement of persons must necessarily recognize both types of migration.

From Europe's experience, which left a strong imprint on governance in Africa, the European Commission's Directorate-General for Employment, Social Affairs and Inclusion makes an unequivocal statement on the 'free movement of workers' and the principle of equal treatment, stating that: 'Every citizen of the EU has the right to work and live in another Member State without being discriminated against on grounds of nationality'**.** For workers, this freedom has existed since the foundation of the European Community (EC) in 1957. According to Article 39 of the EC Treaty,

this freedom consisted of five principal rights: the right to look for a job in another Member State; the right to work in another Member State; the right to reside there for that purpose; the right to remain there; and the right to equal treatment in respect of access to employment, working conditions and all other advantages which could help facilitate the worker's integration in the host Member State.

Pécoud and de Guchteneire's (2007) book, *Migration without Borders*, contains insightful essays on the free movement of people, addressing theoretical issues and regional perspectives. It interrogates Article 13-2 of the Universal Declaration of Human Rights, arguing that only emigration is recognized as a fundamental right, whereas immigration is not (ibid., p. 1). It contends that 'the right of emigration remains problematic as long as restrictions on immigration keep people from migration, or even travelling, to other countries' (ibid., p. 2), citing Weiner's (1996, p. 171) assertion that there is a fundamental contradiction between the notion that emigration is essentially a human rights matter while immigration is a matter of national sovereignty' (cited in Pécoud and de Guchteneire, 2007, p. 8). On migration and the inequalities between people and countries, the authors note that while citizens from developed countries can travel and settle undeterred almost everywhere in the world, those from less-developed countries are dependent upon uncertainties such as the issuance of visa and residence permits to migrate (ibid., p. 9). This observation lies at the core of the *problématique* of the free movement of people; whereas less-developed countries hardly discourage the emigration of their citizens, their more-developed neighbours are keen to restrict immigration. It happens even in sub-Saharan Africa where the more developed countries impose restrictions on the entry of people from their less developed counterparts.

Ugur (2007, pp. 66-8) examines three issues that are central to the free movement of people, namely ethics, economics, and governance. On ethics, he states that while restricting immigration may benefit some groups (for example, low-wage, low skilled labour), it may adversely affect employers, the highly skilled, or those who favour a more cosmopolitan society. He argues too that 'collective action failures' favour small groups who are able to organize and lobby policy-makers better than larger groups with diffused membership, and furthermore, that the role of government may be motivated more by electoral considerations than by social welfare ones (ibid., p. 67). Ugur also analyses the ethics of immigration restriction from a libertarian perspective, discounting property rights as a poor basis for restriction on four grounds: that the right to own and enjoy property cannot be separated from the way in which the property was appropriated originally, especially when aggrieved parties have not been compensated; that from a natural law perspective, private ownership is a historical construct which was not a universal right before the emergence of capitalism; that the libertarian approach does not allow for possible conflicts between the maximization of the individual and that of social welfare; and that it does not address adequately the issues that arise because of the existence of a 'public space' outside the realm of private property[4].

4 The example cited is the delivery of essential public services (e.g. health, education or social welfare), which may require the employment of foreign labour that might be construed as a threat to the 'club benefits' of the host community (Ugur, 2007, p. 69).

Regarding the economics of free movement, Ugur (2007, pp. 76-82) reviews theoretical perspectives and empirical findings on international migration. On theory, he draws attention to two theoretical frameworks: the Harris-Todaro (1970) rural-urban migration model, which hypothesizes that migration, can improve welfare because it eliminates labour misallocation between regions, especially if wage differential exists between the two; and Borjas' (1987) refinement of this model, which considers the extent of migrant self-selection. In Borjas' (1987) theoretical construct, migration is not a random process; a migrant makes two decisions before moving: firstly, emigration from his/her country, and secondly, immigration to one country rather than another. To him, 'positive selection' occurs when people with earnings higher than the average income in the country of origin emigrate; 'negative selection' on the other hand occurs when potential migrants have lower skills and earn less than employees with comparable skills in both the countries of origin and destination (76-7). Borjas' theory has however been criticized for lacking support from empirical evidence. Pécoud and de Guchteneire (2007, p. 77) conclude that, theoretically, 'there is no economic case against free movement of people'. Yet African RECs have faltered on account of the economic disparities that exist between Member States, with some states supplying labour and others attracting it.

On governance, Ugur (2007, p. 83) states further that 'free movement is often equated with a massive influx of "foreigners" into developed countries' – in sub-Saharan Africa into the relatively more developed countries within the respective RECs. Empirical findings suggest that the barrier to embracing free movement as a feasible and ethical policy choice might be 'ideological' rather than 'real'. With the advance of democracy on the continent, awareness of the need to 'manage' rather than 'control' international migration may be increasing (ibid., p. 84). The role of the state is seen as regulating the free entry of migrants with legitimate purposes, such as employment and service provision, with a view to increase welfare (ibid., p. 85).

Against the various issues considered, Ugur (ibid., pp. 89-90) draws three conclusions. First, the existing ethical considerations against free movement are based on non-objective and non-quantifiable criteria, indicating that the narrow focus of arguments against free movement fails to capture the interactions between the actors at different levels and with different interests, as well as the implications of such interactions for social welfare (p. 89). Second, free movement is likely to increase social welfare in the country of destination, albeit modestly. Finally, there is no sound economic basis for rejecting the free movement of people as a policy option for the countries of destination (p. 90). These conclusions amount to hypotheses that should be tested in empirical research on the free movement of people.

4.3 Models of regional integration and relevance to the EAC

4.3.1 Perspectives and contradictions

The concept of 'regional integration' by discipline and in its general usage among the integrating Member States' citizens varies considerably by time period, region and type. Deutsch et al. (1957) defines integration as 'the attainment, within a territory, of a sense of community'. This explains why epithets 'European', 'Asian', 'African', 'Latin American' and 'Caribbean' define respective communities of their Member States (Oucho, 2009a). Haas (1958) on the other hand, underlines national political actors' 'shift of loyalties' as they become committed to a more all-encompassing entity.

The economist Lindberg (1963) defines regional integration as a 'process whereby nations seek to make joint decisions or to delegate the decision-making process to a new central organ'. This definition underscores why the process never stops as new members join and some old members withdraw. De Lombaerde and Van Langenhove (2006, p. 13) consider regional integration 'a process in which units move from a condition of total or partial isolation towards a complete or partial unification'. The general trend towards regional integration is considered a 'process of large-scale territorial differentiation characterized by progressive lowering of internal boundaries and the possible rising of new external boundaries'. While this definition underscores the coming together of states, it does not explain the purpose of integration (Oucho, 2009b).

From a political perspective, Olivier (2010, p. 19, quoting Groom and Heraclides, 1985, p. 174) underlines the point that 'integration is much more a process of becoming than it is a clear outcome or a definite political end state'; and O'Neill (1996, p. 5, quoted in Olivier, 2010, p. 19) argues that 'regional integration … is a multifarious rather than a uni-dimensional process … its dynamic or momentum is neither theologically induced nor fixed, but infused with mixed motives and variable influences'. To this end, Schulz, Söderbaum and Öjendal (quoted in Olivier, 2010, p. 19) caution that:

> [T]here is no single universal criterion that defines regions … geographical, historical, cultural and economic variables as well as patterns of conflict/security and other criteria all create patterns of interactions and produce conceptions of regionness (sic!).

The definitions above underscore the fact that the analysis of regional integration has to be selective on what to emphasize for a particular purpose. The stage of integration reached by any given regional institution reflects both theoretical perspectives and empirical realities. This explains why the EAC protocols have tended to emphasize different perspectives that have informed its regional integration orientation at different times.

Table 4.1 suggests that RECs operate at different levels, which complicates comparing them unless they are at a similar phase of development. The EAC is

spiritedly trying to forge a political union in the form of an East African Federation. However, despite attempts to fast track the process, it is still stalling.

Table 4.1 Features of regional integration arrangements

Type of cooperation	Main features				
	Free trade among Members	Common Commercial policy	Free factor mobility	Commercial monetary and fiscal policies	One government
Preferential trade area	No	No	No	No	No
Free trade area	Yes	No	No	No	No
Customs union	Yes	Yes	No	No	No
Common market[1]	Yes	Yes	Yes	No	No
Economic union	Yes	Yes	Yes	Yes	No
Political union	Yes	Yes	Yes	Yes	Yes

1. Note of the editor: The EAC will have reached this stage with the full implementation of the Protocol on the Establishment of the EAC Common Market, which is set for 2015.

Source: ECA (2004), box 1.1, p.10, based on El-Agraa (1997).

4.4 Regional integration and migration in the EAC region

4.4.1 Origins and changing perspectives

During the colonial period, residents of the current EAC Member States moved freely in the region[5] without the need of travel documents or entry visas, and the right of residence and establishment of any kind. By the end of British rule, nationals of the three East African countries had become accustomed to free movement within the subregion. Meanwhile, Burundi and Rwanda, their poorer and less politically stable neighbours in the Great Lakes region, saw their citizens move freely to the three countries for employment (Otunnu, 1999). In 1994-95, the two countries underwent unprecedented genocides (Aldeman and Suhrke, 1999) before re-establishing peace and embarking on national reconstruction with the help of their EAC neighbours. This effort led to the two countries joining the EAC II.

5 Note of the editors: In 2013 The East African Community hosted 2.5 million migrants, of whom 1.23 million were male and 1.27 million female. Female migrants account for 51% of the total migrant stock in the region (UN, 2013). These figures indicate that the participation of women in migration processes is very important in the East African Community, which opens up research opportunities to better understand this phenomenon and its social implications, such as gender equality and mainstreaming, empowerment of women and children's education (ACP, 2011). Mwalimu (2004) points out that female migrants are particularly vulnerable to various forms of discrimination, exploitation and abuse, for being female, foreign and working in a gender segregated labour market.

Scholarship on African regional integration (ARI) often underscores regional economic integration. In Maardorp's (1994, p. 3, quoted in Oucho, 1998, p. 271) view:

> Put succinctly in economic literature, the term economic integration refers to a state of affairs or a process involving the combination of separate economies into larger regions, and is built around market integration, progressing in a hierarchy from a free trade area at the bottom to an economic union.

With some progress since Maardorp's (1994) work, the EAC became a Customs Union on 1 January 2005 with the introduction of the EAC Customs Union Protocol. In 2010, the organization heralded the launch of the East African Common Market as another step towards an East African Federation. Unfortunately, this ambition may not be fulfilled soon, as the EAC Partner States still disagree even on the most trivial of issues, including certain historical accidents thought to advantage some and disadvantage others. For example, Kenya's dominance and control of the EAC's main seaport of Mombasa on the Indian Ocean is not looked upon kindly by the landlocked countries, while Kenya and Uganda continue to fight over territorial boundaries.

Initially, 'most African leaders gave ideological support to integration because its doctrines were consistent with pan-Africanism (Robson, 1968, p. 12, quoted in Oucho, 1998, p. 271) *which aroused euphoria in the first decade of independence*' (author's emphasis). An ardent analyst of East African 'economic integration' identified four types of economic cooperation (Ndegwa, 1985, quoted in Oucho, 1998, p. 265): (i) *sectoral cooperation*, which is limited to a particular sector – for instance, joint development authorities such as the Nile River Agreement or the Niger-Chad Authority, the entertainment-based Union Radio diffusions et Televisions Nationales d'Afrique (URTNA) or the sports-based All Africa Games or the Confederation of African Football (CAF); (ii) a *free trade area* (FTA) in which there is free movement of all goods produced within an area without a common external tariff on goods from all third countries; (iii) a *customs union*, which, like the FTA, permits the free movement of goods but with a common external tariff imposed on goods from third countries; (iv) a *common market* which observes the features of a customs union and which permits the free movement of the factors of production, including labour, within the common market's area of jurisdiction. Ndegwa (1985, p. 148, quoted in Oucho, 1998, p. 265) points out that in these four types of economic cooperation there is 'no requirement for direct coordination and harmonization of economic and social policies pursued by the Partner States'. Clearly, his schema falls short of the penultimate phase – the economic union – which has several economic components and, ultimately, the political union which involves integration in all spheres (see Table 4.1). The EAC has gone full circle, becoming a Common Market that other RECs will no doubt emulate.

Three East African countries – Kenya, Uganda and Tanzania – have been partners in regional integration since the colonial period during which they were under one metropolitan power, Great Britain. They are 'inseparable' in more ways than one – politically, economically, socially, and culturally. During the colonial period, the

Governors of the three countries formed the East Africa High Commission (EAHC) to spearhead development in the period 1948-1961. The EAHC was replaced by the East African Common Services Organization in 1962-1966 as the East African countries were gaining independence. It was succeeded by the first East African Community (EAC I) in the decade 1967-1977, breaking up when the presidents of the three countries failed to foster integration any longer (Oucho, 1995). For the inseparable three neighbours, the free movement of their citizens is a given, something that has always enriched their solidarity and made them view East Africa with ecstatic nostalgia with hope for better things to come (Oucho, 2009b).

The EAC states seem to have been most persuaded to join these successive RECs on the basis of the trade theory dominant within bigger and stronger blocs, as well as between these blocs and their trading partners. The traditional 'trade theory' of the customs union enunciated in the Benelux (Belgium, the Netherlands, and Luxembourg) and European integration has been criticized for its inapplicability and irrelevance to developing countries (Seers, 1963, quoted in Oucho, 1998, p. 272). Seers also noted that the theory fails to recognize the huge imports into African countries from developed countries, African countries' dependence on various kinds of aid, and the influence that information and insurance of the market often has on the flow of goods traded (p. 272).

Against that background and the formation of the defunct East African Common Services Organization in 1962, Robson (1968, pp. 34-5, quoted in Oucho, 1998, p. 272) hypothesized that the gains of regional integration would be larger: (i) the stronger the regional preference; (ii) the steeper the private cost of industrial development; (iii) the greater the differences in the cost ratios of producing industrial goods in different countries; and (iv) the larger the economies of scale.

On realizing that traditional trade theory does not address the distribution of the benefits and costs of integration, some scholars have proposed other theories – for example, Johnson's (1995) 'economic theory of protectionism' and Cooper and Massel's (1965) 'general theory of customs unions' (Oucho, 1998, p. 273). Taking cognizance of the centrality of natural resources, Myrdal (1957) refers to 'backlash effects' and Hirschman (1958) to 'polarization effects' as determining the concentration of the growth of industry in one country after the formation of a customs union. This brings to the fore the modern 'location theory' which stresses four groups of factors, namely natural resources, nearness to markets, transportation costs, and external economies. Advocating this theory, Ndegwa (1968, quoted in Oucho, 1998, p. 273) argues that Kenya's privileged position in the East African union merits its consideration as an unequal partner throughout the history of economic integration in the region.

Two main conclusions have been drawn on economic theories of integration: first, that they dwell 'on the economics of the whole process, paying no attention to political, demographic and social conditions that may sustain or counter efforts at integration' and, second, that they suggest that 'regional integration in post-colonial sub-Saharan Africa was modelled along the lines of the European Economic Community … probably an irrelevant concept' (Oucho, 1998, p. 273). Critically reviewing the EAC's situation, Olivier (2010, p. 23) concludes that 'regional integration in Africa could at

best be regarded as 'work in progress', en route to deeper regional integration and creating greater cooperation and more welfare, security and stability in the fields of politics, economics, security and culture'. Whereas the EU took many centuries to evolve (ibid.), African integration on a continental level (i.e. the OAU/AU) has been operational only since 1963, and has been lacking in the symmetry – epitomized by the Franco-German axis – found in the European integration process.

4.4.2 Diverse views of EAC integration

After a two-decade lacuna following the failure of the EAC I in 1977, a second process was mooted in 1997, becoming the EAC II in 2001. In 2007, the two Great Lakes region neighbours, Burundi and Rwanda, joined the organization. EAC II aims at promoting and strengthening the balanced and sustainable integration of economic, social, cultural, and political aspects of its Partner States. To this end, it has established cooperation in seven main areas: (i) trade liberalization and development; (ii) investment and industrial development; (iii) monetary and financial matters; (iv) development of infrastructure and services; (v) development of human resources; (vi) development of agriculture and natural resources; and (vii) provisions of a conducive environment for development (Musonda, 2006, p. 32)[6]. As in the case of other RECs, these areas of cooperation are the standard templates of regional integration in sub-Saharan Africa. The EAC Treaty on FMOP drew particular attention to the Free Movement of Persons, Labour, Services, Right of Establishment and Residence (see Box 4.1) before being refined in Appendices I-VI in the Protocol on the Establishment of the East African Community Common Market.

6 Note of the editors: Part of this is the EAC Gender & Community Development, a sectoral committee on Gender and Community Development that aims to provide strategies and possible actions to mainstream gender in development. In 2012, a strategic plan for gender, youth and children, persons with a disability, social protection and community development was established that will run until 2016. It mentions that, despite the progress made, gender inequality still manifests itself in many ways in the East African Region. There is a lack of access for women to adequate health services and financial services, a high unemployment rate of women in the informal sector as compared to men, high illiteracy rates among women, low levels of economic empowerment and involvement, and limited participation in decision-making processes. Meanwhile, gender-based violence and trafficking of girls and women are still problems. To tackle these issues, the strategic plan has a specific gender focus. This includes focusing on a better implementation and higher ratification of international Gender Protocols such as the Beijing Platform for Action and the African Union Protocol on rights of women.

Box 4.1 Main provisions of the EAC II treaty on FMOP protocol

Chapter 17 of the EAC II treaty, Article 24, makes provision that the Partner States shall:

- Ease border crossing by citizens; maintain common standard travel documents;
- Effect reciprocal opening of border posts and keep posts opened and manned;
- Harmonize their labour policies, programmes and legislation including those on occupational health and safety;
- Establish a regional centre for productivity and employment promotion and exchange of information on the availability of employment;
- Make their training facilities available to persons from other Partner States; and
- Enhance the activities of employers' and workers' organizations with a view to strengthening them

Source: F.M. Musonda (2006), p. 33.

The Partner States agreed that in view of the socio-economic disparities among them, they would adopt the FMOP protocol at an appropriate time determined by the Council of Ministers (hereafter the Council). Unlike all other RECs in the neighbourhood, EAC II is attempting to accelerate progress towards an East African Federation, in what has been termed Fast Tracking the East African Federation[7]. Much as this political move might appear captivating, it remains an undertaking of governments of the Partner States at the highest level, which requires a lot more research – for example on citizen perceptions and attitudes, on the willingness of governments to cede national sovereignty, and on how to moderate nationalistic ambitions – to realize.

Apuuli (2006) raises some difficult issues that could complicate the 'fast-tracking' of an East African Federation. The author cites Mukanda's (2000) four-fold classification of politically oriented integration, namely federation, integration and cooperation; *political federation* (the fourth) being 'a union of groups, united by one or more common objectives, but retaining their distinct group character for other purposes … in their loosest form [requiring] a certain degree of direct surrender of political jurisdiction to the federal authority'. Specific issues include: Museveni's grip over Uganda's presidency and his apparent designs to lead the East African Federation; the possibility of increased ethnic divisions with the accession of Burundi and Rwanda to EAC II, despite the pledge of the federation to eliminate ethnicity; the fear expressed in the report of the Wako Committee on Fast Tracking the Federation which would reduce individual states to provinces of the federation; a reluctance to compromise nationalism and the sovereignty of the EAC Partner States; and finally the question of how the states would fit into the federation while retaining membership of other RECs (Apuuli, 2007). Although the current EAC II leaders are unanimous about advancing

7 Article 5(2) of the EAC II treaty declares that '… the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, A Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation'.

towards the highest level of regional integration (see Box 4.2), their views are personal and in no way reflect their citizens' sentiments. Therefore, one wonders whether the East African Federation might not be a big step backwards, especially as all RECs march resolutely towards the African Economic Community (AEC), scheduled to emerge by 2028 to replace all of Africa's respective RECs.

Box 4.2 East African leaders' sentiments on the East African Federation

'The balkanisation of Africa into 53, mostly sub-optimal states, has meant that Africa cannot have a large market under one Political Authority; have no power to negotiate with the rest of world … This balkanisation must stop' – **President Yoweri Museveni, Uganda**.

'We have everything to gain in the East African Federation in terms of political stability, greater feeling in safety in numbers and as an economic entity better able to fight poverty' – **Benjamin Mkapa, Former President of Tanzania**.

'I firmly believe that regional integration is not a choice but a necessary strategy for sustainable development … On a cultural level, regional integration solidifies the unity of communities with personal ties and common history, language and culture' – **President Mwai Kibaki, Kenya**.

As such, there are many difficulties facing the East African Federation (Oucho, 2009b); indeed, Museveni's zealous call for a wider political union belies facts on the ground[8]. Even the AU, which galvanizes the region's states into a powerful bloc, finds it hard to sell a unanimous agenda to them because its Member States tend to observe bilateral and multilateral agreements with other organizations – for example, the Economic Partnership Agreements with the EU. Therefore, it is unrealistic to expect a political federation of five economically weak states to exercise their economic muscle effectively in a globalizing world. Tanzania's former President Mkapa's hope for political stability under the federation seemed misplaced in the context of the post-election violence in Kenya and persistent instability in the Great Lakes region. Finally, Kenyan President Mwai Kibaki's talks of the cultural enrichment of the East African federation appeared to be contradicted by the situation in his country, where ethnic strife among the country's ethnic groups temporarily crippled democratization and good governance and appeared to threaten the gains made during the previous decade (Okello and Kanyiga, 2010)[9]. Overall, these are political statements by a leadership that is out of touch with their citizens' perceptions and apprehensions are about the federation.

8 Take the case of the small Migingo Island on the Kenyan part of Lake Victoria to which Uganda has laid claim and over which it has even hoisted the Ugandan flag when all maps since 1926 show it to be in Kenya. Negotiations between the two countries have never been conclusive, underlining the depth of deceit among the EAC Partner States as they clamour for the federation. As if that were all, Idi Amin had warned that he could claim Kenya up to Naivasha (fewer than 100 kilometers from Nairobi), arguing that it had been in Uganda up to 1902.

9 Note of the editors: The situation in Kenya has since stabilised. In 2013 Kibaki peacefully handed over presidential power to his former rival, Uhuru Kenyatta.

4.4.3 Protocol on establishment of the EAC common market and the FMOP

A Common Market is a merger/union of two or more territories to form one common territory in which there is a free movement of goods, labour, services and capital. The basic elements of a common market are: a smoothly functioning Customs Union including complete elimination of all tariff and non-tariff barriers plus a common external tariff; free movement of persons, labour, services and right of establishment and residence; free movement of capital within the Community; enhanced macro-economic policy harmonization and coordination particularly with regards to fiscal regimes and monetary policy; and the setting up, strengthening, and empowering of the necessary Institutions/Organs supportive of the Common Market operations (in the context of the EAC these include the East African Court of Justice and the East African Legislative Assembly).

Negotiations on the EAC Common Market Protocol (CMP) commenced in February 2008 and were concluded in September 2009 when the Multi Sectoral Council of Ministers adopted the Draft EAC Common Market Protocol and its annexes. The Draft was then considered for its legal content by the Attorneys General under the Sectoral Council on Legal and Judicial Affairs and approved in October 2009.

The Protocol was signed by the EAC Heads of State on 20 November 2009 at a colourful ceremony in Arusha, Tanzania. Following the signing of the Protocol, the East African Community Secretariat, as expected, has been inundated with calls from various quarters, investors, traders, transporters, and students among others, eager to know what the signing of the Protocol means for them. The Protocol was subsequently ratified by the Partner States and entered into force on 1 July 2010[10]. The Protocol on the Establishment of the EAC Common Market, in accordance with the provisions of Articles 76 and 104 of the Treaty, provides for the (i) free movement of goods; (ii) free movement of persons; (iii) free movement of workers; (iv) the right of establishment; (v) the right of residence; (vi) free movement of services; and (vii) the free movement of capital to be progressively implemented (see Table 4.2).

In addition, the Protocol provides for cooperation in the following areas that are necessary for the effective functioning of the Common Market and maximizing the benefits derived therefrom: (i) protection of cross-border investments; (ii) economic and financial sector policy coordination; (iii) competition and consumer welfare; (iv) commercial policy; (v) coordination of transport policies; (vi) harmonization of social policies; (vii) environmental management; (viii) statistics; (ix) research and technological development; (x) intellectual property rights; (xi) industrial development; and (xii) agriculture and food security.

10 Despite ratification of the Protocol, the EAC states have lukewarm reaction to a freed movement of persons in all its phases. Some are enthusiastic while others want to maintain the status quo of bilateral arrangements between neighbouring states that are reviewed from time to time.

Table 4.2 Provisions relating to free movement in the protocol of the EAC common market

Article	Measure	Main Provisions
Free Movement of Persons and Labour (Article 6)		
Article 7	Free Movement of Persons	Entry visa waiver for Partner States' citizens; unrestricted stay and exit; invocation of national laws and guaranteed protection of immigrants; prosecution and extradition of criminals; check of FMOP on grounds of public policy, public security or public health; assured reciprocity of Partner States; and FMOP to be governed by relevant international conventions
Article 8	Standard Identification System	Partner States to establish a common standard system of issuing national identification documents to their nationals.
Article 9	Travel Documents	Migrants' use of valid common standard travel documents; substitution of machine-readable and electronic identity cards for travel documents.
Article 10	Free Movement of Workers	Non-discrimination of workers from Partner States on the basis of nationality. In relation to employment, remuneration and other conditions; employees will accept employment, move freely, conclude contracts and take up employment in accordance with the contracts, national laws and administrative actions, without any discrimination; enjoy freedom of association and collective bargaining for improved working conditions; rights and benefits of social security; right to be accompanied by spouse and child, both free to be employees/self-employed, based on national laws; be subject to same assistance and treatment as nationals; encourage exchange of young workers among the Partner States. The provisions of this article inapplicable in the public service unless national laws of the immigration country do permit.
Article 11	Harmonisation and Mutual Recognition of Professional Qualifications	Mutual recognition of academic and professional qualifications granted, experience obtained, requirements met, licenses or certifications granted in other Partner States; the Partner States to review and harmonise their national social security policies, laws and systems for employees and self-employed persons who are eligible citizens. All these are subject to directives and regulations of the Council.
Article 12	Harmonisation of Labour Policies	Harmonisation of Partner States' labour policies, national laws and programmes to facilitate the FMOL within the EAC region; undertake to review and harmonise their national social security policies, laws and systems to provide social security for self-employed citizens of the Partner States. All these are subject to directives and regulations of the Council.
Articles 13-15	Rights of Establishment and Residence	

Article	Measure	Main Provisions
Free Movement of Persons and Labour (Article 6)		
Article 13	Right of Establishment	Partner States to ensure non-discrimination of nationals of counterparts; right of residence to EAC citizens to pursue economic activities as self-employed persons and to set up and manage economic undertakings where resident, those concerned permitted to join a social security scheme of a Partner States in accordance with national laws. Right applicable to a worker's or self-employed person's spouse, child and dependant. Removal of all restrictions to individuals or their firms, without introducing new restrictions. Partner States' mutual recognition of the relevant experience obtained, requirements met, licenses and certificates granted to a company/firm in their counterparts. Removal of administrative procedures and practices emanating from national laws or previous inter-Partner State agreements.
Article 14	Right of Residence	Applies to a worker or self-employed person, the spouse, child and a dependant as per Articles 10 and 13 of the Protocol. Residence permits granted to the Partner States' eligible partners based on limitations imposed by the country of immigration on grounds of public policy, public security and public health and not affecting any provisions of national laws, administrative procedures and practices of any given Partner State. Permanent residence to be governed by the national policies and laws of the Partner States.
Article 15	Access to and Use of Land and Premises	Access to land shall be governed by the Partner States' national policies and laws.
Free Movement of Services		
Article 16	Free Movement of Services	This covers the supply of services (in any sector except those supplied in the exercise of governmental authority, provided for remuneration) from one Partner State to another for consumers, through commercial presence of a service provider and by the presence of a service supplier, who is a citizen of a Partner State, into another; ensure the measures by local governments and authorities and non-governmental bodies in the Partner States and their application of any laws and administrative actions. Partner States to progressively remove existing restrictions without introducing new ones except those provided in the Protocol.
Article 17	National Treatment	Every Partner State to accord to services and service suppliers of its counterparts, treatment not less than favourable; les favourable would be if it modifies the conditions of competition in favour of services or service suppliers of other Partner States.
Article 18	Most Favoured National Treatment	Each Partner State shall accord unconditionally to services and service suppliers of other Partner States treatment no less than that it accords to similar services and service providers of its counterparts or any Third party or a customs territory.
Article 19	Notification	Each Partner State to promptly notify the Council of measures affecting the free movement of services, including: measures of general application; international agreements; and new national laws and guidelines. Each Partner State shall respond promptly to any request from another Partner State for specific information on any of its measures of general application or international agreements.

Article	Measure	Main Provisions
Free Movement of Persons and Labour (Article 6)		
Article 20	Domestic Regulation	The Partner States may regulate their services sectors in accordance with their national policy objectives provided that the measures are consistent with the provisions of this Protocol and do not constitute barriers to trade in services.
Article 21	General Exceptions on Trade in Services	Where it is necessary to: protect public morals or to maintain public order; to protect human, animal or plant life or health; to secure compliance with laws or regulations concerning individual privacy, anti-corruption efforts or safety.
Article 22	Security Exceptions on Trade in Services	Partner States not required to disclose any information deemed vital to their essential security interests.
Article 23	Implementation of the Free Movement of Services	The implementation of Article 16 of this Protocol shall be progressive and in accordance with the Schedule on the Progressive Liberalisation of Services (Annex V). The Partner States undertake to make additional commitments on the elimination of restrictions on the services sectors and sub sectors that are not specified in Annex V of this Protocol.

To give effect to the above freedoms and areas of cooperation, the Protocol on the Establishment of the East African Community Common Market (EEACCM) has six annexes which detail how the various phases of the protocol will be realized. The six annexes are on: Free Movement of Persons (FMOP); Free Movement of Workers (FMOW); Right of Establishment; Right of Residence; Free Movement of Services (FMOS); and Free Movement of Capital.

The FMOP regulations are detailed in Annex I of the protocol. These pertain to: (1) citation; (2) purpose of regulations; (3) interpretation; (4) scope of application; (5) entry, stay and exit; (6) stay of students; (7) limitations; (8) border management; and (9) registration of citizens of EAC Partner States in accordance with their respective national laws (see Table 4.3).

Annex II deals with the Free Movement of Workers (FMOW) that specifies the arrangement of regulations and provides the schedule for the free movement of workers[11]. This Appendix specifies fifteen regulations: (1) citation; (2) purpose of regulations; (3) interpretation; (4) scope of application; (5) entry, stay and exit; (6) procedure of acquiring work permit; (7) denial of work permit; (8) cancellation of work permit; (9) employment of spouse and child; (10) expulsion of worker; (11) deportation; (12) access to employment opportunities; (13) equal treatment in employment; (14) monitoring of the labour market; and (15) implementation of regulations. The schedule for the FMOW is provided by respective EAC Partner States (see Table 4.3).

11 Note of the editors: The main reason for emigration of East African countries' nationals is labour opportunities and high unemployment rates in the home country, but also political instability and personal projects such as family visits or education. Labour migration of men is mainly oriented towards labour intensive industries, whereas women are more involved in cross-border migration for trade activities. Cross-border labour migration is very intense within the EAC, which could explain the high numbers of female migrants (ACP, 2011).

Annex III focuses on a crucial dimension of FMOP, namely the Right of Establishment. Annex III is elaborated in 13 regulations: 1-8 that bear the same titles as in Appendix II and the rest addressing registration and licensing (9); removal of restrictions (10); cooperation between competent authorities (11); professional and trade organizations (12); and certification (13).

Annex IV relates to the most contentious aspect of FMOP, the Right of Residence. While its first four regulations bear the same title as the last two Appendices, others address the following: (5) basis of residence; (6) procedure for application of residence permit; (7) duration of residence; (8) procedure for acquiring dependant pass; (9) denial of residence permit; (10) cancellation of dependant pass; (11) expulsion of a resident; and (12) deportation.

Appendix V deals with Free Movement of Services (FMOS). It details the schedule of commitments for the progressive liberalization of services by respective EAC Partner States. This Appendix is closely linked to Appendix II on FMOW.

Appendix VI focuses on the schedule for the removal of restrictions on the Free Movement of Capital (FMOC). On attaining FMOC, the EAC Partner States expect other free movement components (FMOP and FMOW) as well as the rights of both establishment and residence to complete the Common Market. It is hoped that the completion of the East African Common Market will help fast track progress towards an East African Federation.

Table 4.3 Freedom of movement features in the EAC and pertinent aspects

No.	Annex I	Annex II
	Free Movement of Persons	Free movement of Workers
1	Citation: Free movement of persons	Citation: Free movement of workers
2	Purpose of regulations: Uniformity among Partner States in implementation of the FMOP	Purpose of regulations: As in FMOP
3	Interpretation: Execution by 'competent authority' an entry with a 'pass'	Interpretation: As in FMOP
4	Scope of applications: Visitors, patients, transit, students, other lawful entry	Scope of application: Entry, stay and exit of workers, workers' spouses and workers' children.
5	Entry, Stay and Exit: Entry, transit and exit at designated points as stipulated by immigration authorities, backed by information on these.	Entry, Stay, Exit: Observance of the national law of the immigration Partner State, backed by proper standard travel documents, evidence of employment contract, possession of a work permit; spouse and children to possess passes for 6 months prior to issuance of a dependant's pass without a fee.
6	Stay of students: A student is one admitted in an approved training establishment, eligible for a student's pass and in possession of a national identity card, evidence of sponsorship; minors to have evidence of guardianship.	Procedure for acquiring permit: Requirement of work permit for a period exceeding 90 days, a new permit required on change of employment; to be in possession of standard travel documents.

No.	Annex I	Annex II
	Free Movement of Persons	Free movement of Workers
7	Limitations: Students and interns forbidden from employment; status cancellable; afresh application for status change (e.g. from student to worker).	Denial of work permit: Applies when reason for denial is given to the work permit applicant; the latter can appeal against the dispensed action; rejection of appeal results in exit of worker and worker's dependants.
8	Border management: Easing of cross-border movement on a reciprocal basis, mutually approved border-opening hours, well human resourced; installation of requisite infrastructure; harmonisation of immigration laws; and evaluation of operations.	Cancellation of work permit: On a worker's expulsion or deportation; ceases to or declines work; or obtains work permit fraudulently; departure from or regularisation of status in the country within 30 days.
9	Registration: Required registration of citizens of Partner States in another in accordance with immigration country's national laws.	Employment of spouse and child: Those dependent on a worker shall apply like the latter; those from non-Partner States to apply like any other worker.
10		Expulsion of worker: A competent authority may expel a worker, the spouse, child and dependant of a worker where the worker does not regularise his/her status, the expellee given adequate notice and time to leave.
11		Deportation: Applies to a worker or the stated dependants who fails to leave a Partner State when the competent authority has instructed
12		Access to employment opportunities: Partner States shall collect and disseminate information on job vacancies and publicise labour market information for the benefit of the EAC citizens, enabling them to register with the competent authority; the Partner States shall exchange and share such information, possibly establishing a framework/machinery for vacancy clearance for workers' and their dependants' protection against potential abuse.
13		Equal treatment in employment: Partner States shall undertake regular labour inspections and any other appropriate measures for purposes of according the same treatment to immigrant workers from other Partner States. These will entail: terms and conditions of service; equal access to employment for both men and women; occupational health and safety; contribution to social security scheme; access to vocational training; the freedom of association and the right to collective bargaining; access to dispute resolution mechanism; and any other right accruing to a worker under the provisions of the national laws of the Partner State.

No.	Annex I	Annex II
	Free Movement of Persons	Free movement of Workers
14		Monitoring the labour market: Responsibility of implementation shall rest with the EAC Secretariat which shall act on the basis of the findings of manpower surveys, develop ma database to facilitate monitoring of the labour market, undertake regular baseline surveys and submit regular reports to the Council on implementation of this regulation.
15		Implementation of regulation: Shall be done in accordance with the Schedule of these Regulations.
Source: EAC, Protocol on the Establishment of the EAC Common Market, pp. 30-61.		

The point to emphasize is that all phases of the Protocol on the Establishment of the EAC Common Market are inextricably linked and cannot be realized without the FMOP.

Currently, the provisions of the Protocol are effective, having been ratified by the five Partner States. After ratification, the Protocol entered into force on 1 July 2010. However, to promote wider understanding of the Protocol, the EAC Secretariat, in conjunction with the coordinating Ministries of EAC Affairs, intended to hold sensitization workshops on the EAC Common Market Protocol for a wide range of stakeholders in all the Partner States, beginning in February 2010. Such workshops have not been held, regularly resulting in the Partner States as well as the EAC secretariat losing the momentum previously generated[12.]

In accordance with Article 76 (3) of the Treaty, a comprehensive study on the necessary institutional reforms of the Community is ongoing. An extraordinary meeting of the Council of Ministers was held by the end of April 2010 to consider the institutional reforms and the budget necessary to implement the provisions of the Protocol.

EAC II has introduced the 'East African passport' and temporary passes to accelerate movement across common borders[13] ; it has abolished charges on the temporary importation of private vehicles across regional borders; and it has established special immigration counters for the citizens of its Member States at its regional airports. Also being considered are policies pertaining to the access of health

12 Note of the editors: That being said, such workshops are still taking place. A recent example is The EAC Regional Programme for Sensitization of Border Communities, which began on 25 June 2014. The objective of the workshop is to 'raise awareness among cross-border communities within the EAC region, with particular focus on small-scale traders to enhance their understanding of the EAC integration agenda' (EAC).

13 Note of the editors: While provided for by the Protocol, common EAC passports are only expected to be issued in 2015. See https://www.standardmedia.co.ke/article/2000185449/eac-states-to-use-common-passport-for-global-travel

and education[14], as well as training and telecommunications by the EAC II citizens (Musonda, 2006: 32). Indeed, even before the two Great Lakes region countries joined the EAC II, well-trained nationals of the three other states were already providing vital services to the war-torn states, helping them weather the challenges of post-conflict reconstruction and peacebuilding.

4.5 Migration of particular persons

4.5.1 Student migration for the pursuit of education

An interesting feature of East African migration is the circulation of children in order to obtain an education. Migration for education means that secondary-school pupils can circulate each term over very large distances, and may also encourage onward migration once schooling is completed. Yet education also appears to be a major focus of the community and remittances are often invested in children's education. Those whose educated relatives reside in urban areas also appear to receive larger remittances and are therefore able to send a higher proportion of their children to school, perpetuating inequality from one generation to the next.

The circulation of children in East Africa for the purpose of education has longstanding historical precedents in the pre-colonial and colonial education systems. The colonial system encouraged the exchange of students between Kenya, Tanzania and Uganda. These patterns were maintained at least until the 1980s, despite the greater availability of schools within daily commuting distance (Gould, 1985; Mukyanuzi, 2003). Migration for education may also encourage onward migration once schooling is completed. The higher availability of formal sector jobs and higher wages which characterize urban areas continue to encourage the movement of persons in the region (Gould, 1985; Mukyanuzi, 2003).

The Protocol on the EEACCM recognizes student migration, giving the phenomenon even more impetus in the future. Students constitute a particular category of migrants and during their schooling are bound to develop strong networks which endure even after school migration.

14 Note of the editors: Despite progress towards gender parity in education in the region over the past decade, there are still large gender gaps. Whereas in all EAC countries most girls and boys are enrolled in primary education, this number drops for secondary education and even more for tertiary education. In Uganda for example, the total female enrolment in tertiary education, regardless of age, expressed as a percentage of the number of girls who had left secondary school in the five previous years, was only 4%. For men this was 15%. In Burundi, only 2% of woman and 4% of men enrolled in tertiary education. In Tanzania, this figure is 3% and 5% respectively. Regarding access to decision-making functions, the EAC countries do not score highly either. There are only half as many women as there are men in the parliaments of Burundi, Tanzania and Uganda. Kenya scores worse with a female/male ratio of ¼. Regarding ministerial positions, in Burundi and Uganda there are half as many female ministers as there are male ones. In Kenya there is only 1 female minister for every 5 male ministers (WEF, 2013).

4.5.2 Skilled labour migration to post-conflict partner states

In the recent past, all EAC Partner States have been both generators and recipients of refugees and asylum seekers[15]. Most affected in the displacement process were highly educated and skilled individuals, who were considered potential opponents by national governments engaged in repression, detention without trial, unlawful imprisonment, and even murder[16]. Since the end of the 1990s, the situation has improved drastically, creating a window of opportunity for intra-EAC movement of the highly educated and skilled.

4.5.3 Migration of transborder ethnic communities

Virtually every EAC Partner State is inhabited by ethnic groups that, due to a lack of recognition by colonial administrators, span common borders. Ethnic Maasai, Kuria, and Taveta are on the Kenya-Tanzania border, ethnic Samia on the Kenya-Uganda border, Burundi-speaking peoples on the Tanzania-Burundi border, and Rwandans on the Uganda-Rwanda border. Even before the adoption of the FMOP, these ethnic groups were criss-crossing common borders, often disregarding national legislation. All that may be required is to inform them of the requirements of the FMOP, and especially of special citizen categories such as students and skilled workers. The EAC secretariat, as well as the governments of individual Partner States, should stock such data for periodic analysis to gain insights into the structure and trends of migration, as well as of imbalances worth rectifying.

4.5.4 Refugees and asylum seekers

The EAC protocol falls short of addressing the issue of refugees and asylum seekers, categories which have traditionally dominated migration flows in the region. This is a major shortcoming which the EAC Partner States should address among themselves and for which the EAC secretariat should constantly engage the attention of neighbouring RECs, namely IGAD, COMESA and SADC, to which some of the Partner States belong. It is a surprising omission because Tanzania, for instance, has granted permanent residence to Burundian refugees in the north-west part of the country where they have been residing and undertaking farming and other activities to take care of both their household and communal needs. In addition, many Rwandans refugees have assumed Ugandan citizenship.

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15 Note of the editors: In 2013, the EAC hosted 928 162 refugees (UN, 1013). Out of the different African regions, East Africa hosts the most refugees, which creates significant challenges for their protection and integration. Special attention should be paid to unaccompanied minors and victims of sexual and gender based violence in refugee camps (ACP, 2011).

16 Idi Amin's dictatorship in Uganda (1971-1979) and genocide in Burundi and Rwanda in 1994-5 displaced many citizens who took refugee status and asylum both in other African countries and farther afield in Europe and North America. While some of them eventually returned to their home countries, others relocated to third countries and still others are yet to embrace political changes for the better in the countries

As the flow of refugees and asylum seekers cannot be projected, it would be prudent that the EACCMP be revised to recognize them and to determine how best to handle their movements and requests for temporary and permanent residence. In any case, the current period of peace and relative stability in the region should give the EAC Partner States the impetus to consider integration, repatriation, and the reintegration back home of former refugees and asylum winners, including their children who might have become *de facto* 'stateless' in their host countries. More importantly, it is time educated and skilled refugees and asylum winners were deployed in host-country economic endeavours or even in EAC-wide engagements.

4.6 The future of FMOP in the EAC

4.6.1 Major shortcomings of the EAC's FMOP

The FMOP protocol is unnecessarily presumptuous. It presumes that the EAC Partner States will strictly adhere to it, and that their responses and actions will not flounder in a context where they are subject to pressure from the other RECs to which they belong to implement other FMOP protocols. This is a frustrating shortcoming that the EAC Partner States can ill afford to ignore or leave to chance.

4.6.2 Lack of coherent national migration policies

Individual Partner States of EAC, with the exception of Rwanda, lack coherent national migration policies on a variety of types of migration affecting them. This implies that the EAC does not espouse a regionally negotiated coherent FMOP, and that the development of the protocol itself did not envision the need for coherence of an EAC-wide policy. It might be prudent to reformulate the EAC protocol once the Partner States have formulated coherent national migration policies. Perhaps the EAC secretariat should emulate the IGAD Regional Migration Policy Framework developed in early 2011.

4.6.3 Lack of research on citizen perceptions of and attitudes toward RECs:

Despite great promise, the Protocol on the EEACCM represents a case of 'putting the cart before the horse' in that it ignores the sentiments, perceptions, and apprehensions of EAC citizens. Research on and policy interest in the diasporas of the EAC Partner States has concerned what they do and for what purpose in their respective countries of origin. Absolutely nothing is known about the non-migrant EAC citizens' perceptions of and attitudes towards the diaspora. The latter is an unhealthy state of affairs, as strong anti-diaspora sentiments, silent animosity, and suspicion, based on a lack of accurate information, tend to exist. Here, more research is required to inform

suitable policy development[17]. Moreover, nationals of the EAC Partner States might have legitimate apprehensions about each other, which negatively impact working in tandem to treat migration and non-migration as synergetic in national, as well as regional, development.

4.6.4 Inadequacies in the EAC

The EAC secretariat has certain fundamental inadequacies that it must address if it is to be able to wade through the migration management quagmire. For instance, it lacks the financial and human resources to adequately cater for the implementation, monitoring and evaluation of FMOP alongside the other 'freedoms' that the Protocol on the EACCM underlines. The tendency for respective EAC Partner States to employ 'immigration officers' rather than 'migration officers' whose portfolios combine both emigration and immigration, seems too simplistic to facilitate the proper management of FMOP in entirety. Immigration officers are often at a loss whenever their attention is drawn to emigration matters because their duties are confined to ministries of home/interior/internal affairs, with emigration duties ceded to ministries of foreign affairs that often deal with diaspora issues[18].

4.6.5 EAC partner states' economic disparities and political incompatibilities

Between the EAC Partner States, there exist considerable economic disparities and political incompatibilities. These factors explain why virtually all the Partner States detest Kenya's dominance and why they envy Rwanda's reconstruction programme. These and many more constitute real challenges that the EAC has to resolve. Yet the EAC secretariat can be best informed by research and policy dialogues focusing on these two areas, to which the secretariat should direct some of its resources.

4.6.6 What the future portends

Tensions persist especially because of the dominance of one or two Member States. For example, Kenya dominated the EAC I and still dominates the EAC II, a fact reflected by its trade balance with the other Partner States, its superior infrastructure, and its highly educated and skilled human resources. In the EAC, an excessive dependence on politicians, particularly on the Summit of Heads of State to take all major decisions

17 The African Migration and Development and Policy Centre (AMADPOC) in Nairobi has undertaken such a study in Kenya and Tanzania, albeit on a small scale, provides useful insights worthy of an EAC-wide research. It is advisable for the EAC secretariat to commission such a study sooner than later if the REC is to realize strong collaboration between the diaspora and the citizens left behind.

18 Note of the editors: In an overview on South-South Migration and Development in East Africa, the ACP Observatory for Migration (2011) points out how the living conditions of diasporas residing in other developing countries and overall and the gender impacts of migration remain poorly covered in research. There are many opportunities for further research on these topics.

(Nyirabu, 2004, pp. 25-6), seems misplaced. The case of the EAC I attests to this fact: it collapsed in 1977 after enduring a decade of acrimony among the presidents of the three Partner States, with Jomo Kenyatta of Kenya and Julius Nyerere of Tanzania having a strained relationship, and Nyerere and Idi Amin of Uganda refusing to meet each other regardless of how crucial EAC matters were (Nyirabu, 2002, quoted in Nyirabu, 2004, p. 26). The dying years of the EAC I thus saw a three-dimensional verbal 'guerrilla' war waged by the EAC I Partner States, which nearly became physical as Tanzania 'drifted' progressively southwards to champion the liberation of Southern Africa (Mugomba, 1978, p. 262; Hazlewood, 1979, p. 54). The EAC II is also facing a difficult time with attempts to fast-track the East African Federation thwarted by suspicions and incidents such as conflicting claims over Migingo island on the Kenyan side of Lake Victoria (to which Uganda lays claim and is currently occupying)[19].

It has also been noticed that protocols of respective RECs are by no means binding even when they have been signed. They are seldom ratified and implemented through tangible national decisions and programmes. As Nyirabu (2004, p. 26) puts it, 'the Achilles heel of national mechanisms explains the inability of African governments to convert their regional treaties and arrangements into substantive changes in national policies, legislation, rules and regulations'. In some instances, overlapping membership in RECs complicates the situation of the Partner States as they try to adhere to conflicting protocols of two or several of the RECs to which they belong.

4.6.7 Strategies worth pondering

The AU Migration Policy Framework, adopted in Banjul, The Gambia, in 2006, provides an instructive template of the objectives that the EAC should pursue. Some aspects of it are summarized below.

Inter-state and interregional cooperation: The ever-growing number of migrants and the complexity of migratory movements within and across regions highlight the need to develop cooperative inter-State and interregional approaches to managing migration in Africa. Such cooperation can be fostered by developing clear objectives, providing opportunities for exchange of experiences, views and best practices, and working towards co-coordinated implementation of policies and programmes. The need to develop a 'common language' when addressing migration and forced displacement issues is critical, but it is an ongoing and evolving process. Other actors in civil society and the international community provide important contributions in this regard. Such cooperation and collaborative partnerships extend throughout the African continent and beyond, to other States and regional entities such as the European Union. Sadly, there is no strong inter-REC cooperation among the African RECs.

Regional cooperation and harmonization of labour migration policies: Bilateral and multilateral efforts to strengthen cooperation on labour migration assist in ensuring

19 See footnote 8.

systematized and regular movements of labourers; responding to the supply and demand needs of domestic and foreign labour markets; promoting labour standards; and reducing recourse to irregular transit. Successful bilateral arrangements on the continent (e.g. between Swaziland and Mozambique and between Lesotho and South Africa where SADC's perspective has failed) are instructive for the EAC Partner States not only as regards cooperation between each other, but also between them and neighbouring IGAD and COMESA Member States.

*Labour movement and regional economic integration***:** On-going processes of regional economic integration in Africa are increasingly taking into account managed cross-border labour movements that lead to better labour allocation within larger labour markets. RECs constitute a key factor for facilitating cooperation in the area of labour mobility at the regional level and for promoting economic development. The EAC has recognized the importance of labour migration, which lies at the core of the FMOP provision.

National labour migration policies, structures and legislation: Labour migration is a current and historical reality in Africa, impacting directly the economies and societies of African States in many important ways. Establishing regular, transparent and comprehensive labour migration policies, legislation and structures, at the national and regional levels, can result in significant benefits for States of origin and destination. For States of origin, for example, remittances, and skills and technology transfers can assist with overall development objectives. For the countries of destination, labour migration can help satisfy important labour market needs. Labour migration policies and legislation that incorporate appropriate labour standards also benefit labour migrants and members of their families, and can have a positive impact on society generally. The EAC must ensure that its Partner States adopt labour migration policies and structures, and enact appropriate legislation for uninhibited labour migration.

Border Management: Effective border management is a key element in any national migration system. The strategic goals of border security are to control: (i) the movement of prohibited and restricted goods including drugs, weapons, etc.; (ii) the appropriate use of import and export permits, quotas, exchange controls, etc.; (iii) the movement of persons to eliminate illegal border crossings, human trafficking[20] and smuggling; and (iv) the illegal smuggling of goods.

In the EAC, as in other parts of the world, border management systems are coming under increasing pressure from large flows of persons, including irregular and 'mixed flows', moving across regions and/or national borders. Specific challenges to border

20 Note of the editors: Irregular migration and trafficking is a serious concern within the region. Women are reported to be trafficked to the Gulf States, while young boys and girls are forced into agricultural and domestic work. Despite efforts undertaken by the Eastern African states to eradicate the problem, a 2010 report on human trafficking indicated that many countries in the region do not fully comply with the minimum standards for the elimination of trafficking. These countries include all of the countries that are part of the East African Community (ACP, 2011). A study by the International Organization for Migration (2008) pointed out that girls and women – for example, those fleeing a forced marriage or fleeing from gender based violence – are at more risk of being trafficked in Eastern Africa.

management mechanisms and personnel include building capacities to distinguish between those with and those without legitimate reasons for entry and/or stay.

Approaches to border management globally have been and will continue to be strongly affected by security concerns. Some regions in the world have been the target of attacks by international terrorist networks and the possibility that they might constitute targets for further assaults, transit, or be organising points for further attacks elsewhere thus cannot be excluded. Consequently, the strengthening of border management systems in terms of technology, infrastructure, business process for inspection of travelers, and training of staff has become a primary area of concern. East Africa remains a region of insecurity given the sporadic cases of terrorism in Kenya, Tanzania and Uganda[21].

An important component of border management is the provision of international standard travel documents through well-structured registration and issuance systems. These travel documents include passports, visas, and temporary travel documents, such as emergency passports and *laissez-passers,* and in some cases identification cards that can be used to cross borders on the basis of specific bilateral agreements. The provision and use of travel documents of high integrity supports efforts to make cross-border movement easier for most travelers. As the EAC has embraced all of these, it needs to monitor and evaluate their proper usage, detect cases of fraud and eliminate any problems in the course of adoption.

4.7 Conclusion

This paper has underlined the point that the free movement of particular persons in the EAC marks the most ambitious aspect of FMOP in the REC which continues to blaze a trail in regional integration in Africa by committing itself to political federation sooner rather than later. The Protocol on the Establishment of the East African Community Common Market forms the basis for even freer movement within the region, provided certain dilemmas are addressed. Yet, with the ratification of the Protocol realized only since mid-2010, it is perhaps too early to conclude whether it will succeed or fail[22]. From the macro-level perspective that the Protocol itself underscores, it is advisable for the EAC secretariat to grapple with a myriad of micro-level concerns that would most likely constrain its implementation. Among them, research on the implications

21 The recent wave of bomb attacks attributed to the Somali terrorist group Al-Shabaab in Kenya is prominent among these cases.

22 Evidence suggests that the East African states are dragging their heels in the implementation of the protocol, which was originally intended to be fully operational by 2015. Harmonization of the labour and employment laws of the Member States is a particular issue, with many financial and administrative barriers to free movement still in place. Temporary visitors' passes issued by the governments in the region limit the duration of stay to fewer than the six months envisaged by the protocol. Meanwhile, it is expected that the EAC passport will be introduced in 2015 at the earliest. See http://www.theeastafrican.co.ke/news/EA-Common-Market-limps-towards-2015-deadline/-/2558/1709378/-/item/1/-/n8posu/-/index.html.

of uninhibited movement of persons for national citizens whose hyper-nationalisms tend to frustrate regional interests.

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5

Free movement of people within the Gulf Cooperation Council

Zahra R. Babar[1]

5.1 Introduction

Established by an agreement signed in Riyadh on 25 May 1981, the Gulf Cooperation Council (GCC) is the regional organization that brings together the six Member States of Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates and Oman. Originally envisaged as a body to enhance security cooperation amongst the Arab States of the Gulf, over time the rationale was reconceived to reflect the idea of an association promoting greater regional economic cooperation.

A principal ambition of the GCC is to foster regional integration by establishing cooperative policies for trade and economic development. According to the founding agreement of the GCC (1981), the free movement of nationals among the six Member States constitutes a major objective to be implemented over time[2]. The free movement of people within a regional integration agreement allows special rights and privileges to be conferred on the nationals of Member States. The many experiences of the various regional integration instruments around the world demonstrate that the complete freedom of intra-regional movement of citizenry is expected to be established progressively over a considerable period of time. Under the original GCC charter, the long-term goal was for nationals of Member States to be given full and complete rights in terms of the right to entry, residence and employment. The six states party to the agreement committed to ensuring the establishment of these rights in appropriate phases as well as at developmentally suitable stages in the region's movement towards full economic integration.

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2 Chapter II, Article 8: 'The Member States shall agree on executive principles to ensure that each Member State shall grant citizens of all Member States the same treatment as is granted to its own citizens without any discrimination of differentiation in the following fields:
- Freedom of movement, work and residence.
- Right of ownership, inheritance and bequest.
- Freedom of exercising economic activity.
- Free movement of capital.'

This chapter attempts to address some of the following questions:

- What protocols for freedom of movement have been adopted and successfully implemented by the GCC Member States?
- Is the objective of further regional harmonization being furthered through the freedom of mobility protocols in the GCC?
- What are the challenges limiting the effectiveness of freedom of mobility as an instrument for further economic integration in the GCC and how are the Member States responding to these challenges?

For the purposes of this chapter, existing protocols of free mobility within the GCC-adopted instruments have been examined and the measures for implementation reviewed. In addition, an assessment of regional challenges that are relevant to both the implementation of the freedom of mobility protocols and their impact within the GCC is offered[3].

5.2 Rationale behind free movement of people: GCC context

Liberalizing the movement of persons is one of the fundamental issues addressed through many regional integration agreements. The primary rights conferred to citizens under regional protocols are usually:

- The right to move within the region without the need of a visa;
- The right to reside and remain in any of the Member States, for any purpose;
- The right to seek gainful employment in any of the Member States;
- The right to full and equal treatment in terms of access to employment, workers' benefits, social benefits and other benefits that normally accrue to citizens of the host state.

How regional instruments manage the process of freeing up the movement of citizenry varies, and mobility provisions, as listed above, have been subject to limitations as per the needs and constraints of the participating states. In general, free movement is a notion that arises out of the economic imperative of integration processes, however over time has many social implications for the participating states. Opening up a national labour market, and according the legal entitlements and social security benefits usually reserved for nationals to all the citizens within a region, can potentially pose a challenge to the host state. This is particularly relevant within a region where there are variations in the economic conditions among Member States.

The principal aims of the GCC economic integration process are to facilitate regional economic cooperation, to enhance trade amongst the Member States, to secure more favourable and competitive terms in economic negotiations with non-member states, and to plan and develop effective means by which some of the

3 The lack availability of data on labour market mobility of GCC nationals, clearly presents a challenge to any examination of the extent to which intra-regional labour mobility has increased through the implementation of the GCC instruments.

common challenges faced by the GCC states may be addressed. It is within this context that regional agreements to enhance peoples' movements within the Gulf region have been articulated and adopted.

Compared to other regions there do not seem to be heightened political, economic, or social obstacles within the GCC the might preclude the Member States from embracing free and open movement of their people. The six Member States display comparable structures of governance, share linguistic, cultural, historical and social ties, and also have similar economic identities and practices arising from the resource-driven construction of their national economies. In addition, aside from occasional disagreements arising out of minor territorial disputes, the GCC states have, for several decades, largely enjoyed harmonious relations with each other.

Despite the fact that the regional environment is fairly conducive towards the free movement of citizenry, such movement today remains minimal. Indeed, what movement does occur is usually temporary in nature, limited to visiting and tourism, rather than for the purpose of employment. An overall assessment of the regional socioeconomic and political milieu indicates that despite the easing up of restrictions to intra-regional labour mobility the GCC states have not seen huge changes in migrant flows amongst their nationals.

5.3 Supporting articles in the GCC economic agreements

Proposals adopted by the GCC frame freedom of mobility within the broader process of strengthening and deepening economic unity within a region. Articles within the GCC Charter, in both the original United Economic Agreement of 1981 as well as the new Economic Agreement of 2001 contain specific provisions allowing full and complete freedom of movement for citizenry, with the overarching aspiration being to create a GCC-wide employment arena. This approach towards freedom of movement replicates similar efforts towards regional economic integration which have been carried out in Europe and enshrined in other regional instruments (Baert et al., 2008).

Under Article Three of the new Economic Agreement signed in December 2001, all GCC natural and legal citizens were given the right to participate in all the spheres of economic activity within Member States. The specific rights stated in the agreement of December 2001 include, amongst other things: the rights to movement and residence; the right to avail of employment opportunities in both the public and private sectors; the right to a pension and social security benefits; and the right to engage in all professions, economic, investment, and service activities (GCC, 2001, ch. II). Chapter Five of the same charter delineates the commitment of the GCC states to coordinate efforts for improving the capacity of the region's population. For instance, several articles focus on the need for implementing cooperative strategies for human resource development, education, training, and the expansion of a skilled regional manpower base. Chapter Five clearly recognizes and seeks to address

certain region-wide peculiarities, such as the limited role of women in the economy[4], the segmentation between the public and private employment spheres, and the demographic imbalance between nationals and non-nationals in the labour force.

Cooperative efforts to enhance the intra-regional mobility of skilled workers may prove one of the means by which the GCC's national labour forces are able to achieve their full potential. However, freedom of mobility can only be useful if nationals have the necessary skill-sets that allow them to take advantage of the liberalization of the region-wide labour market. Implementing shared strategies to address the deficiencies in regional human resource development must be a key area of economic cooperation amongst the Member States. Chapter Five specifies that regional coordination of capacity-building initiatives which enhance education, training and skill levels to improve the pool of skilled labour amongst GCC nationals are essential for meeting the needs of the region (GCC, 2001, ch. V, Arts. 13-17).

A resolution adopted at the 23rd Session of the Supreme Council of the GCC in December 2002 set out the schedule for the completion of the requirements of the GCC Common Market and stipulated specifically the timeline for according equal treatment to GCC citizens in a variety of fields. Under this resolution, by 2003 all natural and legal citizens of the GCC were to be accorded equal treatment in the field of private sector employment, to be allowed stock ownership, and to be able to form corporations. Equal treatment of GCC citizens in terms of full eligibility to government jobs and access to social insurance and pension benefits was meant to be implemented by 2005[5].

5.4 GCC COMMON MARKET

The GCC Common Market (CM) was launched in January 2008. One of the primary purposes of establishing the common market was to provide the smaller countries of the GCC with greater collective bargaining power in conducting trade agreements with other, larger, external partners. The common market includes the free movement

4 Note of the editors: For example, the amount of women in the migrant workforce in the GCC is one of the smallest in the world. Naithani (2010) points out this is due to the fact that professional female migrants have limited opportunities in GCC, since most of them work as domestic servants. Social and cultural factors contribute to the lack of work opportunities, especially for single migrant women, as the GCC does not easily allow work permits for both single expatriate women and married but unaccompanied expatriate women. Therefore, the majority of female, professional migrants in the GCC have accompanied a working spouse or other family members on a family visa and have later managed to find a job. Naithani adds that, to become a more attractive destination for a qualified expatriate workforce, the GCC should promote the participation of female expatriates in the workforce, among others by reducing gender differences in the migration process, i.e. simplified work visa rules for female workers.

5 It is interesting to note that unlike other regional integration protocols on freedom of movement (see for example the ECOWAS Protocol Relating to Free Movement of Persons, Residence and Establishment, 29 May 1979) the GCC documentation does not establish requirements for expulsion or clarify the conditions under which Member States reserve the right to refuse admission to GCC citizens.

of goods and services and provides for easier movement of labour and capital flows. Freer movement of capital allows funds to seek out the highest rates of return and increases investment efficiency. The CM reiterates that GCC nationals have the right to real estate ownership across the region and same treatment in all economic spheres[6].

The CM established a number of liberalization policies to ease restrictions on the factors of production. Amongst other things, the Common Market clearly articulated the freedom of mobility for GCC nationals seeking to move within the region for purposes of travel, residence, employment, or business. GCC nationals have full rights under the Common Market to work in either the public or the private sector in any of the Member States and across a range of occupations. In addition, GCC citizens moving between borders are able to accrue full access to social services, educational opportunities, health, insurance, and retirement benefits (International Social Security Association, 2010).

5.5 Implementation and achievements[7]

The GCC-adopted protocols and resolutions towards establishing full freedom of mobility within the region have to date translated into a number of visible achievements.

5.5.1 Abolishing of visa and entry permits/right of movement and residence

GCC citizens enjoy the right of residence and movement amongst the six Member States as is stated in the GCC protocols and reiterated through bilateral agreements between Member States. For GCC nationals, transit and entry/exit into the six states is permitted by showing national identification cards, removing the need for presenting valid passports or obtaining entry visas. All Member States have taken active steps towards removing barriers to transit and entry and easing border-control procedures to ensure that the movement of citizens is seamless[8].

A multi-purpose 'smart card' to serve in lieu of the national ID cards has already been issued in certain Member States and further progress is under way to extend this throughout the region. These smart cards are electronic identity cards which can be used as travel documentation by GCC citizens at special electronic gates installed at airports and other points of border entry. In 2010, Bahrain and Qatar were trailing the smart cards, with the UAE to shortly follow suit (*Travel Arabia*, 2010)[9]. Eventually the

6 See Arabic reference at http://fgcc.org/, or English version at http://fgccc.org/en/, which will be available as of 1 Jan 2018.

7 Most of the information relating to how successfully freedom of movement has been established under the GCC instruments, has been sourced from the Secretariat's publically available achievement and progress reports, along with a variety of website sources.

8 See http://www.gccegov.org/en/.

9 Note of the editors: By its own account, the UAE is now spearheading the smart card initiative. There are also plans to launch an 'Interoperability' project between the digital authentication centres of the GCC states so that the smart cards can be used at e-gates across the GCC (UAE, 2014).

system will be linked to all six of the Member States and there is discussion under way concerning the possibility of extending the smart card scheme to include non-national residents. In addition, there is ongoing consideration of issuing a joint GCC-issued passport for citizens of the region, though at this stage it remains merely a prospect for the distant future. Another matter under deliberation is the issuing of joint, common, or 'unified' tourist visas for non-nationals who wish to travel to and/or holiday in one or more of the Member States (see *Arab News*, 2014).

5.5.2 Employment: Working in the private and public sectors

During the 14th Session of the Supreme Council, held in Riyadh in 1993, a resolution was passed providing all GCC nationals employed in the private sector within Member States 'equal treatment to that of nationals'. In 2002 in Doha, the Supreme Council met for its 23rd Session and passed a resolution which stated that 'full and equal treatment shall be accorded to GCC nationals in the field of jobs in the private sector and elimination of restrictions preventing that'[10]. This resolution was adopted and the deadline for its implementation was given as 2003.

The GCC Ministries of Labour and Social Affairs have also been working on schemes to facilitate the movement of citizens for the purpose of employment in the private sector within the region. The GCC Executive Office of the Council of Ministers of Labour and Social Affairs has actively implemented programmes to increase employment opportunities and support the free movement of workers in the private sector. On an annual basis, a report is submitted by the Executive Office to the Supreme Council to provide updates on progress made and to highlight any of the obstacles and challenges faced in terms of implementation.

The GCC has moved comparatively further than many other regional integration organizations in terms of allowing full access to employment in the public sphere. Equal treatment for GCC citizens in the public sector was accorded and reinforced through a series of resolutions passed by the Supreme Council at various annual meetings[11]. All barriers preventing equal treatment in the government job sector were meant to be eliminated and restrictions removed by 2005. Several ministerial level committees within the GCC have been active in adopting resolutions towards implementing the necessary measures needed to support free movement for employment purposes for GCC nationals amongst the Member States. It has been clearly stated that, wherever possible, GCC government departments and ministries should attempt to give preference to employing GCC nationals instead of foreign workers. The Supreme Council has urged GCC governments to adopt a joint policy of prioritizing the employment of GCC nationals or substituting foreign non-GCC hires with the region's citizens.

10 See http://www.gcc-sg.org/en-us/Statements/SupremeCouncil/Pages/TwentyThirdSession.aspx

11 GCC Supreme Council, Session 21, Manama 2000 & Session 23, Doha 2002.

5.5.3 Social insurance and pension

As a result of their natural resource wealth and relatively small populations, most of the six states of the GCC are well placed to offer their citizenry a high level of social security and a range of social insurance and pension benefits. It is particularly important given this context that the governments of the GCC are able to assure their nationals that living and working elsewhere in the Gulf and outside their country of origin will not prevent them from maintaining the same level of social security as they have at home. In order to address this issue the GCC Supreme Council has taken several steps to ensure coordination in planning region-wide social insurance and pension programmes. At the 20th session held in November 1993, the Supreme Council asked all Member States to develop a comprehensive social insurance law to ensure equal coverage for GCC nationals employed outside their countries, or alternatively to establish a GCC joint social insurance fund that would cover national labour working in Member States (GCC Secretariat General, 2009, p. 81). During subsequent meetings of the Council of Ministers of Labour and Social Affairs, a variety of proposals were adopted to ensure 'full and equal treatment' in terms of access to all social insurance for GCC nationals working outside their countries but within the region. In Manama in 2004, the Supreme Council adopted the mechanism for 'extending the insurance coverage of the GCC nationals in the public and private sectors working in the other GCC States' (ibid., pp. 81-82).

5.5.4 Engagement in all professions and crafts/engagement in economic, investment, and service activities

From 1981 to the present, through a series of successive protocols and the adoption of different resolutions, the GCC has expanded the opportunities for its nationals to engage in economic activities across different employment and trade sectors. Initial resolutions permitted Member States' citizens to take up employment across borders only in certain professions and crafts, while controls were created to ensure that some activities would be limited only to the nationals of a Member State. Over time the scope of permitted activities has grown to include almost all sectors and areas.

A year after the creation of the GCC, at the third session of the Supreme Council held in 1982, all nationals were given the right to work in a range of professions but were not permitted to do so without differentiation or in any sector of their choosing. In November 1983, at the fourth session of the GCC Supreme Council, a resolution was passed allowing all nationals to practice their profession in any Member State. At the same time, the GCC developed lists of 'negative activities' from which Member States' nationals were precluded from engaging in outside their home countries. Subsequently, through the efforts of the Supreme Council and the GCC Financial and Economic Cooperation Committee, a procedure was adopted whereby new 'permitted crafts and economic activities' were added on an annual basis. The list of proscribed economic activities gradually grew shorter, and accordingly, with the launch of the

GCC Common Market in 2008, there were only four areas of activity from which GCC Member States' citizenry are precluded[12].

Supranational mechanisms for collecting statistical data or tracking the movement of GCC nationals within the region have not been established. This proves to be a methodological constraint in determining both the causality, impetus for, and impact of intra-regional migration. Without comprehensive and accessible figures it is difficult to substantiate the extent to which citizens of the region are taking full advantage of the freeing up of restrictions and thus moving intra-regionally for residence, employment, or business purposes.

To date, a review of the existing GCC documentation demonstrates that agreements on several crucial components of popular movement have been pivotal to the steady consolidation of the GCC as a regional instrument of integration. The resolutions adopted by the Member States, indicate that the free movement of citizenry within the GCC states is actively facilitated and supported. Member states have successfully instituted full rights of transit for GCC citizenry, eased all previous restrictions on cross-border movements, and eliminated the need for advance-visas or passport checks. Member states have also reached an agreement on the mutual accreditation of professionals in a wide range of fields, which enables citizens of the six countries to practice their occupations in a context of reciprocal recognition. Adopted protocols and resolutions allow equal access and equal treatment to citizens of Member States in pursuing employment opportunities in both the private and public sectors across borders. GCC citizens can now legally own property and operate businesses without needing a host-state national as a co-owner. Procedures permitting students from the GCC to pursue higher education in institutions located outside their state of origin have also been simplified.

However, questions on the effectiveness of implementation remain outstanding and are difficult to address in the absence of corroborative data.

5.6 Challenge of unemployment in the GCC: Can freedom of mobility help?

High rates of unemployment are prevalent in all the GCC states and expectations are that with a burgeoning youth population these rates will continue to grow throughout the coming decades. All six states suffer from unemployment rates roughly between 10-15 per cent, except for Qatar, which has a healthier 3.2 per cent (Shediac and Samman, 2010, pp. 2-3). Two questions need to be critically examined: Why have the economically wealthy and stable Gulf States been unable to improve the employment opportunities of their nationals? Would improving intra-regional mobility assist the national governments in tackling their domestic unemployment issues?

12 Supreme Council Resolutions 3, 4, 7, 8, 21 and 23 among others.

Understanding the characteristics and structure of the Gulf economies and the regional labour market is crucial to determining why employment promotion continues to be a challenge for regional governments. Throughout the Gulf, skills and capacity levels amongst nationals are inadequate for the higher-skilled jobs available. The regional labour market is also highly segmented along public/private sectors, with limited participation of women and with a predominance of low-skill, low-wage jobs peopled by migrant workers from the developing world.

GCC nationals demonstrate a marked preference for employment in the public sector, where benefits, wage structures, and work hours are seen as more attractive. The public sector has historically been the largest employer for GCC nationals, and governments in the region face difficulty in encouraging their nationals to engage more actively in the private sector. Enhancing employment promotion entails the development of adequate skill levels and competencies in the hope that, eventually, nationals will replace the large skilled expatriate working class dominant in the private sector across the Gulf.

Removing legal and administrative barriers to intra-regional labour mobility and promoting the access of nationals to jobs across the region appears to have had a limited impact so far in terms of mitigating the unemployment problem. The intra-regional movement of Gulf nationals seeking jobs remains relatively low. In the policy debate surrounding low employment rates, increasing intra-GCC labour mobility is seldom offered as a possible solution in and of itself (Ibrahim, 2010, p. 110). Improving nationals' skills and capacity, and tackling the issue of regional labour market segmentation, are seen as preconditions for realizing successful mobility for nationals.

However, there is no doubt that in terms of facilitating the self-directed commercial and trade cooperation that is a feature of the region and of the Gulf society, the removal of barriers has been a welcomed change. Legrenzi (2008, p. 113) points out that the GCC aim of creating regional 'economic citizenship' has added both breadth and scope to the collaborative business ventures that have traditionally featured in the region. As other scholars have previously suggested, the institutional mechanisms of the GCC may be limited in terms of replicating patterns of economic integration that have been successful in other regional integration projects, but the general regionalization project of the GCC has fostered a dynamic allowing independent economic actors to flourish (Lawson, 2008, p.14). The GCC merchant, trading, and business community is very transnational in character, and many collaborative ventures that thrive across state borders have been strengthened through the freedom of mobility protocols.

Detailed annual statistics, or other forms of data on intra-regional labour mobility in the GCC, are not collected regularly by any central agency. As a result, the statistics that do exist are meagre at best, making it particularly difficult to assess the extent of, and purpose for, GCC citizens' travel and movement within the region. While understanding that the absence of a full accounting is problematic, it is possible to identify certain salient trends and developments related to intra-regional labour migration (Ibrahim, 2010, p.122).

The total population of the six states of the GCC is currently estimated at approximately 39 million, out of which approximately 15 million are non-nationals

who are residing and working in the region (Ibrahim, 2010)[13]. Statistics indicate that currently no more than 21,000 GCC nationals are employed within the region, outside their country of origin (ibid. pp.122-123). The overwhelming majority of these are believed to be Saudi citizens who are working in Kuwait and Qatar. Given the economic conditions of the region and the variations amongst the six states, as expected the nationals most likely to opt to take advantage of labour mobility within the region are primarily from Saudi Arabia, Bahrain and Oman. According to the available figures, Kuwaitis, Qataris, and Emiratis show a marked disinterest in leaving their countries to taking advantage of intra-regional employment opportunities (ibid.). The main receiving countries for intra-regional mobility of workers are Kuwait, Qatar, Saudi Arabia, and the UAE. Saudi Arabia is the only country that both sends its own nationals to work elsewhere within the region and also receives a sizeable number of workers from neighbouring countries for employment purposes. Qatar and the UAE are attractive destinations for nationals seeking intra-regional job opportunities, while Bahrain and Oman are the least likely to attract regional workers (ibid.)[14]. Given that Saudi Arabia, Oman, and Bahrain have been the three countries in the region most impacted by an increase in the number of young unemployed nationals (Fasano and Iqbal, 2003), and as a result face the greatest unemployment strain, it makes sense that their citizens are the most likely to take advantage of the freedom of mobility for employment purposes.

Whether through coordinated attempts, or directly through separate national planning agendas, GCC governments are attempting to address some of the current issues around unemployment in the region. The earlier policy of practically guaranteeing employment in the public sector to national university graduates has either been abolished or revised in most states. Attempts to lessen the difference in wage structure and benefits between the private and public sectors are also being

13 Note of the editors: In 2013, the GCC had a population of over 48.5 million people, of which only 38.5% was female. Especially the female population in Qatar is remarkably low. Females only account for 23.5% of the population, meaning that there are more than 3 times as many men as there are women in Qatar. The GCCC hosted over 22 million migrants in 2013, of which almost 6 million or, more exactly, 26.6% were female. Oman hosts the least female migrants, only 19% of their international migrant stock consists of women (UN, 2013).

14 Note of the editors: Still, in 2013, 77% of the total employment in Bahrain consisted of labour migrants. These migrants work mainly in the private sector, men often in large construction companies and women most often work as domestic workers. The majority of male migrant workers are from India, whereas the majority of female migrant workers are from the Philippines. These labour migrants come to Bahrain with hopes of finding opportunities to provide for their families, but in reality, they are often lured there by recruiting agencies with false promises of better wages and decent working conditions. They are then forced into overcrowded and unsanitary labour camps, lacking clean water or food. Often, young women are lured to Bahrain, Qatar or Saudi Arabia and get sold into sex slavery upon arrival. Women are among the most vulnerable migrant workers, since they are at greatest risk to be exposed to forced labour and/or sex trafficking. Also because women often work as domestic workers, they are particularly vulnerable to physical and sexual abuse, since they are extremely dependent on their employer and confined to their employer's houses. Qatar and Saudi Arabia deal with the same kind of issues (ADHRB, 2014).

attempted, so that private sector employment can be considered more attractive to nationals. Establishing employment promotion agencies to assist nationals with job-placement and improve access to information on opportunities in the private sector are being instituted (Shediac and Samman, 2010, pp. 2-3). Finally, and most crucial of all are the vigorous efforts within the region to bring about reforms to the educational system, and as a long-term strategy, commit state fiscal resources to human capacity development, education and training. Developing skill-sets which are in line with the needs of the regional labour market would be the most effective means by which to combat the unemployment challenge, and would allow the freedom of mobility protocols to become much more useful, as necessary components of regional economic integration.

5.7 Regional trends and the freedom of mobility

Determining the success of freedom of mobility within the GCC requires a broader examination of certain salient factors within the region.

5.7.1 Migrant labour

Determining who the recipients of free movement within a region are is often as important a question in both political and economic terms as the question concerning to what extent such protocols exist and whether there is the political will to ensure that they are implemented to their full extent. Without resorting to the trend towards exceptionalism that is often present in the literature on the Arabian Gulf, due mention must be made of the atypical labour demographic arrangements that are present in the region and how these impact the framing of freedom of mobility within the Gulf Cooperation Council's policy-making apparatus.

Along with all its sectoral segmentation, the Arabian Gulf labour market also reflects a peculiar demographic divide[15]. All six of the GCC states boast an extraordinarily high number of non-citizen workers in proportion to their own nationals; ranging from smaller proportions of the highly skilled, to a larger number of semi- and low-skilled workers, hailing primarily from developing countries in South and South-East Asia. On the heels of each consecutive oil boom that has taken place since the 1970s, waves of new migrant workers have come into the region. Increasing national oil- and gas-related cash flows have pushed forward large, labour-

15 Note of the editors: According to Naufal and Genc (2014), the labour market participation by local females has been increasing in the last few years, which has its implications on both the fertility rate and the marriage market in the Gulf. Local woman marry at a later age and, with the high levels of male migrants in the region, are marrying foreigners. Local men are also choosing foreign women as wives. In the future, the GCC countries will be faced with a generation of mixed locals, which might open a debate on national identity and a population with different ethnic and cultural influences. They point out that the UAE government has already campaigned to discourage locals from marrying foreigners.

intensive industrial and construction projects, producing a need for a steady supply of cheap, foreign labour. Despite strong statements by national leadership, development planners, and policy-makers in the GCC regarding the need to curb these in-flows, the dependency on foreign labour has certainly not decreased but rather consolidated over the past three decades

Much of the literature on human development identifies freedom of mobility with the enhancement of an individual's capacity towards greater economic and social advancement. Wealth and economic opportunity are not equally or equitably distributed across the globe. Many migrants who move across borders do so in order to improve their financial and social development; millions of people choose to do so each year (UNDP, 2009*a*, p. 9). For several decades, and as a consequence of its natural resource-derived wealth, the Arabian Peninsula has drawn scores of labour migrants from around the world seeking to improve their income-generating capacities and, as a consequence, their quality of life. An analysis of the existing free movement of people within the region cannot entirely neglect the subject of regional mobility as it impacts this significant non-national resident population.

The GCC documents reflect a prevailing regional sentiment when they make minimal mentions of the desire to expand the free movement regime to include other groups or subcategories of people present in the region. National governments express consternation at both the potential security implications of hosting such large populations of extraregional low-skill migrant workers, as well as the potential social and cultural impact upon citizens who rapidly face becoming, or in some cases already are, the minority within their own countries.

A range of overt and subtle measures of control over migrant labourers' mobility is a natural part of their existence in the GCC states. Entry and exit into each state is strictly monitored, and intra-regional movement of non-nationals is heavily controlled. Visa sponsorship arrangements, which require a worker's residency visa to be directly sponsored by an employer, are in place in all but one of the six states[16]. The visa sponsorship system is rife with potential for employers to engage in exploitative practices which limit the rights of their sponsored employees. One potential area of abuse is the curtailment of migrant workers' rights of mobility. It is regularly reported that employers within the region illegally retain their sponsored workers' passports, thus removing from them the ability to leave the country of their own volition. In addition, sponsored workers must obtain official and written permission from their sponsors before being allowed to exit the country. While in the case of high-skilled expatriate workers in the GCC this is largely a formality, for the majority of the migrant worker population this legal stipulation prevents them from leaving the country for any reason without their employers' authorization and approval. The employer sponsorship system also limits a foreign worker from seeking employment with any company or person other than their original sponsor.

16 Bahrain being the exception as it reformed the previously 'kafala' or worker-sponsorship system in May 2009. One of the critical changes under the new policy is that foreign workers are able to transfer their visa sponsorship to a new employer if they so choose.

It is not only that entry and exit at international points of transit within the region are rigorously guarded, but that the freedom of movement within a state itself for certain classes of migrant workers can be problematic. Large swathes of low-wage migrants are often restricted to their 'labour camps' or their housing facilities, which are typically located on the fringes of the cities that they work in. On their days off workers may be actively discouraged from entering certain residential or retail parts of the city. While there are no legal limitations or government-enforced curfews that prevent workers from moving about freely, there is a culture of spatial separation which can be overtly or subtly enforced through a variety of measures. Some of the larger shopping and recreational shopping complexes, for example, impose 'family' hours which last through the weekend, ensuring that male migrant workers cannot access these facilities during their days off.

Managing the delicate balance between the constraints to the population structure and the national development needs for the country continues to be one of the most testing policy issues for all of governments in this region. Moreover, as the states of the GCC continue to build their profiles on the global stage, presenting themselves to the international community as modernized and enlightened autocracies has become more of an imperative. Maintaining their domestic requirements, without drawing international censure, requires governments in the region to show dexterity and skill.

The GCC governments have come under exacting international scrutiny over the past few years with regards to prevailing human and civil rights questions surrounding the large migrant worker population. In response, most of the GCC states have taken active steps towards developing a more equitable environment for the migrant worker population. In 2008, the government of Bahrain reformed its regulatory system that governs the hiring and retention of expatriate labour, increasing the probability that other GCC governments will follow suit if the experiment succeeds in elevating the living standards of all workers in the country, citizens and non-citizens alike[17].

Despite recent attempts to improve living and working conditions for foreign migrant workers[18], the GCC governments are still reluctant to give up control in terms of monitoring and managing the flow of workers into their countries. Expanding the existing freedom of mobility within the GCC instruments to the large numbers of non-national workers would be anathema to national development planners, and would most likely invoke a negative reaction from the citizenry. In GCC instruments,

17 Note of the editors: International pressure is also being brought to bear to force reforms of the current system. Facing criticism in the run-up to its hosting of the 2022 World Cup, in 2014 the Qatari government decreed that expatriate workers' wages are to be paid by direct bank transfer, in an effort to combat the withholding of wages by employers. The government recently promised to replace the current sponsorship system with one based on employment contracts. The new system would see an end to the use of exit permits and harsher penalties for employers confiscating workers' passports (see *Al Jazeera*, 2014).

18 Note of the editors: In the past few years, increasing amounts of foreign migrant workers in the Gulf are accompanied by their spouse and/or children. Migration is therefore a social and cultural adjustment to both the migrant worker and his family, which the host country should also take into account (Naithani, 2010).

the mention of easing restrictions on the movement of non-member state nationals is strictly limited to the purpose of facilitating trade-related movement[19]. At the 23rd session of the Supreme Council, the resolutions adopted on the GCC Common Market include the following:

> The competent committees shall develop practical mechanisms, subject to appropriate controls, for the facilitation of the movement of certain non-GCC nationals, such as foreign investors, senior executives, marketing managers and truck drivers, provided that such facilitation shall be achieved by 2003, which is in line with the requirements of the Customs Union and facilitating the free movement of Intra-GCC trade (GCC Secretariat General, 2009, p. 79).

The mobility within the GCC of a non-national labour force is a critical component for regional construction. Each of the states is highly conscious of the large body of expatriate skilled and unskilled labourers present across member-states and strictly controls the entry and exit of this work force[20]. There has been some discussion amongst the GCC states concerning the possibility to centralize efforts to monitor the flow of labour throughout the region, but so far no concrete measures have been taken towards this aim.

5.7.2 Nationalisation

The participation rates of nationals in the GCC economies are dismal. In Qatar, nationals comprise 17% of the total labour force, in the UAE the figure is 12%, in Saudi Arabia 28%, and in Kuwait 18%. Bahrain with 45% and Oman with 46% represent marginally more heartening figures (Randeree, 2009)[21], which are no doubt a reflection of their slightly different economic situation. Faced with this dilemma of large, unemployed or under-employed national populations, each of the GCC states

19 GCC Supreme Council Session 23, Doha, December 2002.

20 Note of the editors: While freeing up the movement of expatriates has been deliberated by the states of the GCC, there are fears that the free movement of skilled workers in particular could negatively affect the progress of job nationalization programmes (see Thomson Reuters, 2014).

21 Note of the editors: In addition, only approximately 53% of the female working-age population engages in the labour market in Qatar. In Kuwait, the UAE and Bahrain, the labour force participation is somewhat lower, with respectively 45%, 44% and 40%. In Oman, only 29% of the women engage in the labour force and in Saudi Arabia only 18%. Unemployment rates are also often higher for women. In Qatar, only 3% of the female active population is unemployed, but none of the men in the male working force are. In Bahrain, 20% of the women are unemployed, whereas only 6% of the men are. In Saudi Arabia, this is 16%, compared to 4% (WEF, 2013). However, McKinsey & Company (2014) point out that the unemployment figures could be much higher, up to 50%, since unemployed women in the state welfare program are excluded from the statistics. This makes both female labour market participation and female unemployment rates significant issues in the Gulf region.

has, over the years, committed itself to a 'nationalization' project, entailing affirmative-action style schemes to increase the employment opportunities for their own citizens.

The structure of the national, as opposed to the non-national population active in the labour force of these states, frames the discussion and debate on the topic of nationalization. Since the 1970s, the non-national population present in the Gulf region has continued to increase and foreigners now outnumber nationals in many of the GCC country populations. Nationalization strategies have included the adoption of policies that increase participation rates amongst the GCC citizenry, alongside policies to restrict the number of non-nationals entering the country for work and residence purposes.

Since the early 1990s, the governments in the region have rigorously pursued these nationalization plans at the state level, with limited coordination between the various GCC Member states. The implementation of GCC-wide freedom of movement, and the subsequent opening up of national markets to all Member States' citizens may make such nationalization of each state's labour force even more of a challenge. Nationalization schemes directed to protect and give preference to a state's citizenry must be carefully managed against the GCC instruments of free mobility, which call for a region-wide system of preferential hiring for the nationals of all Member States.

International migration flows into the GCC region are dominated by workers from developing countries coming for purposes of employment in sectors such as domestic work, construction and other low-skill occupations. The existing assumption is that any intra-regional migration for employment by GCC nationals is dominated by those from the skilled, professional and business classes. Over the decades, it has been a challenge for national governments in the region to cope with meeting the increasing demands for cheap labour for large development programmes, while also contending with a low rate of employment amongst its own citizenry. Motivating a large number of nationals to work in lower wage, lower skilled occupations is not considered realistic within the current construct of Gulf society, especially in those GCC countries where per capita GDP levels are high. The result is a continued reliance on imported low-skill labour for the foreseeable future.

The GCC countries are also constrained by their dependence on a highly skilled expatriate labour force active in the private sector, and hindered by the limited domestic supply of adequate skills. Across the GCC there are a limited number of nationals who graduate with scientific or technical qualifications (UNDP, 2009*b*, pp. 115-123). There is an excess in supply of professionals/graduates with the same skills competing for the same jobs throughout the region, which curbs the effectiveness of regional labour mobility. Rather than focusing on awareness-raising programmes to destigmatize the local perception of lower skill occupations, most nationalization schemes focus instead on developing solutions for the replacement of the skilled expatriate class with nationals.

GCC governments have developed mechanisms such as initiating various quota-based employment schemes in the public sector; incentivizing the private sector to hire nationals on a preferential basis, and in some cases subsidizing the private sector employers' hiring of nationals and restricting or limiting work permits and visas for

foreign workers. All of these measures to nationalize the regional labour force have had limited success effecting real change in the situation of such an imbalanced labour market (Shediac and Samman, 2010, p. 17).

Increasing unemployment rates among nationals and high population growth have prompted the imposition of barriers for foreign workers in the GCC. Investment in human capital and institutional reforms across the region, to integrate capacity with the labour market needs, are critical. Focusing on improvements in the educational and skill levels of GCC nationals to match market demand will allow the regional governments to decrease their dependency on influxes of foreign labour and enable nationals to take advantage of the GCC's changing economic structure.

5.7.3 Rentier state arrangements

The political economy of the GCC states has developed around their unique hydrocarbon wealth. Together, they account for about 45 per cent of global oil reserves (BP, 2010, p.6). This immense wealth has had a socially and economically transformative impact on the states of the region, while helping to consolidate the traditional political structure of its leadership.

The political leadership in the GCC states comprises of a series of dynastic regimes, hierarchical, authoritarian, and non-democratic in structure. Wealth that accrues to these states through oil and gas revenues flows directly to the rulers. In order to ensure the continued support of their populace, to obtain their citizens' loyalty and trust, and to ensure state and regime stability, the ruling families in the region have developed extensive mechanisms for sharing their prosperity with their people. In return for forsaking their electoral rights and maintaining their continued support for the rigid structures of state governance, citizens are not required to pay any taxation to their governments, and accrue both direct and indirect forms of state beneficence. This bargain, between state and citizen, is a common phenomenon across states that operate under such rentier arrangements[22].

Although implemented to different extents, in each of the GCC states there are all-embracing state-funded systems of support. Social welfare is provided at various levels within each state. Government services in many GCC countries are provided free of charge, or else they are heavily subsidized. Electricity and water, for example, are usually provided at no cost to nationals. As a result of such state munificence, the GCC countries tend to accrue high levels of domestic spending (Fasano and Iqbal, 2003, pp. 3-4).

Among the six states of the Gulf there are differences in terms of each nation's capacity to meet the welfare needs of its citizens due to variations in rentier earnings, population size, and income distribution. For example, the per capita income of a Qatari national is more than three times that of an Omani national (ibid. Figure 3).

22 For more detailed information on rentierism, please refer to H. Beblawi and G. Luciani's 1987 edited volume on the topic: *The Rentier State*.

States which have a greater ability to distribute income and earnings amongst their people, who display more overt signs of state largesse as such, are considered to be more rentierized than others. Economists have often drawn the conclusion that affluence derived from oil and gas earnings has led to a largely economically inactive populace, dependent on the state for financial support.

The particular relationship between state and citizen in rentier economies is a dominant feature of the GCC region, a feature which may turn off nationals from leaving their home countries to reside and work elsewhere in the region. In general, in the absence of economic necessity people prefer to remain in their own country. In the GCC states with high per capita incomes and high per capita GDP, no doubt there exists a natural reluctance among people to forsake the particular status and benefits that citizenship confers.

5.7.4 Additional reasons for the limited impact of freedom of mobility within GCC

The significance of family, kinship and socio-cultural ties within Gulf society is also a reason why GCC nationals may be reluctant to move out of their home county. The heightened importance of kinship and social relations in the culture of the Gulf has to be considered an important reason contributing to the reluctance of nationals to relocate outside their home state. Practical obstacles, such as the dissimilar costs of living amongst the six states, may also make taking up residence or employment across borders unappealing. For example, rent and accommodation costs in Qatar and the UAE at present are significantly higher than in Oman, Saudi Arabia and Bahrain and have been cited as a potential impediment to attracting regional workers (Ibrahim, 2010, p. 125). In addition, existing supranational efforts to institute mechanisms for encouraging the cross-border employment of citizens are limited. The creation of jointly funded and operated employment promotion bureaus, or manpower departments with the effective mandate of assisting nationals in obtaining jobs intra-regionally, could provide a boost to the current numbers.

5.8 Conclusion

In reviewing the existing protocols on free movement of people within the GCC, it is clear that in stated policy terms and on paper, the six states have adopted the necessary language for allowing nationals of all the Member States to enjoy full mobility rights. Freedom of mobility within the regional instrument has facilitated GCC nationals' travel and transit, allowed them to avail themselves of the benefits of residence, and eased the process for students who wish to pursue educational ambitions across borders. In addition, the dynamic of autonomous transnational business cooperation that exists within the region has certainly been facilitated by the removal of barriers to travel and trade in the GCC. However, despite the supportive legislation to do so, citizen job seekers are not moving out of their home countries in large numbers to take advantage of the opportunities afforded to them in the regional labour market.

Efforts towards developing supranational institutional mechanisms to facilitate citizen workers seeking employment within the regional market are still nascent. This may be a reflection of the general institutional weaknesses for which the GCC is often criticized. As Matteo Legrenzi (2008) has pointed out, GCC efforts towards coordinating economic policies and practices across a range of sectors have seldom translated into substantial practical achievements.

There are several reasons why the impact of these adopted instruments has remained restricted, which move beyond a mere criticism of the GCC and its limited institutional capacity to introduce real change. The primary reason why there has not been a trend towards greater regional mobility amongst national job seekers is that the region-wide labour market reflects a similarity of structure and is segmented along the same lines in each state. In all six countries, nationals largely occupy jobs in the public sector, with minimal numbers in the private sector. Private sector employment is deemed unattractive by nationals, with the assumption that it provides lower wages and longer hours than the public sector. The existence of cheaper foreign labour in all of the Member States who are willing to work in the private sector also means that employers in the private sector are reluctant to hire nationals to fill a lot of their positions. Across the region, there is a demonstrably low rate of female labour participation and a marked mismatch between the existing education/skill set and demand[23]. In addition, despite ongoing efforts towards economic diversification, the six states of the GCC are still largely resource-based economies, and the employment opportunities across sectors are largely the same in each state. Given that the labour market regionally displays the same challenges and obstacles, it is not necessarily attractive, or even practical, for citizens to seek opportunities outside their own state of origin. Governments in the Gulf have grappled with the constraints of this skewed labour market by adopting a series of policies and measures aimed at creating greater opportunities for their own nationals, while trying to also meet the development needs of a booming economic arena. Measures to control the flow of foreign workers from outside the region have been largely ineffectual in terms of reducing the overall imbalance of numbers, and in most of the GCC states the largest percentage of the actively employed continues to comprise of low-skilled migrants from the developing world.

A secondary crucial factor preventing GCC nationals from taking advantage of the freedom of movement protocols is linked to the historical political economy of the Arabian Gulf and the system by which these states 'share' their resource wealth

23 Note of the editors: In every GCC country, women enroll more in tertiary education than men. For example, in Qatar, the female enrolment in tertiary education, expressed as a percentage of the number of girls who had left secondary school in the five previous years, was 31%. For men, this was only 5%. In Bahrain, this was 44% for women and 18% for men. However, labour force participation of women is remarkably low, as said before. There are especially low amounts of women in senior positions. In Kuwait, only 14% of the legislators, senior officials or managers are female. In Bahrain, the United Arab Emirates and Oman, this is 12%, 10%, and 9% respectively. In Qatar and Saudi Arabia, women only account for 7% of this employment category (WEF, 2013). Naithani (2010) points out that in the Arab world, women suffer from bias because of social attitude towards women in leadership positions.

with their citizenries. The unique construction of a 'special' state-citizen relationship within the rentier arrangements of the GCC states leads to an inherent economic dependency on part of the citizenry. This is ultimately a decisive factor precluding them from actively seeking employment opportunities elsewhere. Citizens feel that they can access higher status jobs and earn better incomes in their own countries. This is coupled with the fact that, despite an emerging '*khaleeji*' identity, citizens of the region identify closely with their own state, and feel that there is inherently greater protection and security derived from remaining in one's homeland.

Despite the fact that all six states often have their economies lumped together under the general assumption that they share identical features, it is obvious that there are differences amongst the states and citizens' behaviour from state to state, based on the nuances of the particular state-citizen economic relationship. Those states in the region which exhibit signs of a higher rentier relationship between citizen and state (Kuwait, Qatar and the UAE), tend to also show the lowest rates of labour mobility (Ibrahim, 2010, p. 131). The economies of Bahrain and Oman, which are far less able to accrue large sums of petroleum-derived income, and thus whose leaders are more limited in their capacity to meet their citizens' economic needs, are more likely to have citizens taking advantage of the freedom of mobility protocols. In essence, the more a state looks after its citizens through the rentier bargain, the more statistics will reflect a lack of citizens crossing borders for economic pursuits; despite the existence of all the legal and administrative channels to do so.

GCC policy-makers are aware that to enhance employment opportunities for their nationals they must institute comprehensive labour market reforms. Cooperative measures for diversifying the regional economies away from a hydrocarbon-based one, increasing opportunities in the private sector, and ensuring the development of educational and capacity building initiatives that are in-line with market needs, are the most sustainable means for achieving region-wide economic growth. Given the odd dichotomy of regional labour markets which reflect a very high rate of labour imported from developing countries, juxtaposed next to high rates of unemployment for nationals, as well as the near-absence of an active national female workforce, it is of central importance to long term economic stability and sustainability that the issue of employment-generation be given a central place in policy-making. Freedom of mobility, as a GCC-led tool aimed at building greater economic coordination within the region and addressing some of the challenges of unemployment, will be most effective once human capital, labour market, and educational reforms have been successfully carried out.

Finally, while freeing up the movement of nationals to engage in all professional arenas and reducing the barriers to property-holding and business activity represent notable aspects of the deepening of the GCC as a regionalist project, it must be pointed out that this stands out starkly against the other areas of popular movement which remain substantially more constrained. The right to enjoy liberty of movement is enshrined in international conventions on human rights and is conceptually distinct from the freedom of mobility of citizens in the context of a regional integration instrument aimed at economic needs. The broader economic construct of the Gulf,

which exerts such heavy and stringent mechanisms of control over the largest and non-citizen components of the labour force, clearly goes against the spirit of the freedom of mobility concept as it exists in the broader literature. The Member States of the GCC are all subject to migration pressures which require a response. Coordinated attempts aimed at balancing economic priorities with humanitarian considerations would be welcomed.

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Part III:

Perspectives from the Americas and the Caribbean

6

North American migration: Labour markets vs. political necessities

Isabel Studer[1] [2]

6.1 Introduction

Migration is a central feature of globalization as well as of the broader development debate. It is a key link through which countries can foster prosperity by taking advantage of the potential complementarities between the labour markets of developed and developing countries which can emerge from demographic trends, such as an ageing population. But migration can also be a source of polarization and contention when policies and attitudes against immigration come into conflict with the pull and push factors promoting migration, for example the demand for migrants in national labour markets that increases in times of economic growth.

In no other region is the dynamic between trade and migration so central to addressing the asymmetrical nature of integration schemes than in North America. The promise for development in Mexico through the North American Free Trade Agreement (NAFTA) actually presented trade and migration as mutually exclusive policy options. In retrospect, trade has grown exponentially since the entry into force of the agreement in 1994, as have migration flows, temporary and permanent, legal and illegal. Rather than free trade, the drivers of migration are a mosaic of diverse factors that consequently make the North American migration map quite heterogeneous and complex. Existing regional demographic dynamics dictate potential complementarities that could benefit the competitiveness of all three countries. However, these complementarities can only be realized if coordinated efforts are made to invest in human capital.

Migration flows between Canada and the United States are generally legal, largely respond to market demands, and have been barely altered by the post 9/11 security concerns in the United States. By contrast, US-Mexico migration flows are dominated by illegal crossings, US border security concerns, and the strong domestic politicization over undocumented migrant workers in the US, which creates additional tensions and suboptimal results given the need to respond to the demands of the US labour market

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2 I would like to thank Talia Contreras and Oscar Benitez who provided research assistance, gathered information and prepared the statistical annex. I am fully responsible for all factual errors or problems of interpretation that may appear in the present chapter.

dynamics. Asymmetries are as present in the migration context as in other aspects of the North American integration process. Even if US migration policies seem to be incapable of coping with the huge number of undocumented migrants, the United States is the single largest host-country for migrants in the world. And Mexico is the single most important source of migrant workers for the United States, as well as an increasingly important source of migrant workers to Canada. Both Canada and Mexico also provide the United States with a significant number of high-skilled workers. However, the integration of migrant workers to enhance national competitiveness has not been a driving goal of national policies in the three North American countries.

In contrast to the United States, where family reunification and security concerns dictate migration policies, in Canada labour market needs have increasingly shaped the openness of Canadian migration policies[3]. Although market considerations are barely considered in US migration policies, where they are at play, they tend to favour temporary workers, particularly the highly skilled[4]. Border security concerns were factored into existing traditional constraints on labour migrants in the post 9/11 context. A combination of factors, including the 2008 economic recession and demographic dynamics in Mexico, has somewhat altered migratory flows, increasing the number of deportations and decreasing the number of people trying to cross the US border. While a 'no migration policy' characterized Mexico's migration policies for decades, security/human rights considerations are becoming increasingly relevant aspects of the new Mexican migration policy. Even in Canada, where a positive predisposition towards foreign workers prevails, many barriers to integrating those workers into the labour markets exist.

The present North American institutional framework, created first with NAFTA and later embedded in the Security and Prosperity Partnership (SPP), does not provide the necessary rules to manage present or future flows of lower-skilled workers, even if these constitute the bulk of migration flows in North America. NAFTA was biased in favour of skilled labour migration, even if this was unauthorized. Mexico-US has never been the dominant migration issue in North America. There is no consensus, particularly in the largest national labour market in North America, on how governments should balance the needs of workers with the demand for different types of workers in a responsible fashion, or whether ultimately this is even possible.

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3 According to UN-INSTRAW (2007), migration streams have been feminizing over the past few years as more women are migrating independently in search of economic opportunities, rather than traveling as dependents. Indeed, according to Fry (2006), female migrants arriving in the US in 2004 were older, better educated and less likely to have children than their counterparts from the 1980s. He also points out that in 2006, women made up larger shares of legal immigrants to the US, but the stream of unauthorized male migrants had also increased, making the U.S. the only industrialized country where the percentage of illegal female migrants had declined in the past decades.

4 According to Boyd and Pikkov (2005), jobs held by migrant women in both Canada and the United States used to be in farming and manufacturing, however, in the past decades, they are more commonly being employed in the service sector. Main occupations range from seamstress and domestic worker to cleaner and nurse. Migrant women are also overrepresented in the marginal and the unregulated sector and/or in poorly paid jobs.

This paper addresses the existing tension between labour market demands and migration policies. The first section provides an overview of migration flows in North America and is followed by a section that briefly discusses how security concerns in the United States exacerbated the political obstacles which are hindering satisfaction of the needs of the labour market for migrant workers. The third section explains the opportunities that exist in North America to enhance competitiveness through labour mobility, as well as the contradictory dynamics that exist between migration policies and the labour market demand for migrant workers. Closely related, this section will also consider the difficulties faced when trying to effectively integrate such workers into the marketplace.

6.2 NAFTA and the undocumented conundrum

Historically, migration has been a key issue on the policy agenda of North American countries. In the late 1980s and early 1990s it became particularly contentious in the US-Mexico context, as the number of Mexicans migrating to the United States, mostly through illegal channels, soared. The North American Free Trade Agreement was enacted in 1994 and inaugurated a new era of optimism in the relations between Mexico and its two new trade partners. NAFTA generated the expectation that continental migration, particularly undocumented migration, would subside. The underlying assumption of the agreement[5] was that, by increasing trade opportunities, export industries would attract higher levels of investment, enabling them to modernize and access new technologies. Such processes would in turn boost productivity and increase employment, translating into higher-wage jobs and discouraging migration. This explains why migration was in fact not formally included in the agreement, and mobility across borders under NAFTA was largely restricted to skilled workers and business people (Scott, Salas and Campbell, 2006)[6].

A different perspective predicted that migration would increase with the implementation of NAFTA. Accordingly, it was expected that the liberalization of the Mexican economy would destabilize certain traditional economic sectors, releasing labour that would translate into potential migrant workers. Also known as a 'migration hump', this approach stated that, as labour markets adjust over time, new economic activities generated by free trade would absorb labour surpluses from traditional economic sectors (U.S. Commission for the Study of International Migration and Cooperative Economic Development, 1990)[7].

Despite the positive results in terms of increased trade flows (Lavenex, 2007, pp. 35-36), wage differentials and the economic asymmetries between Mexico and its two trade partners persisted in the period following the approval of NAFTA (Zepeda, Wise and Gallagher, 2009; Scott, Salas and Campbell, 2006). As such, Mexican

5 The very passage of the agreement through the U.S. Congress was 'motivated primarily by the promise that the agreement would reduce northward migration from Mexico' (Lowell, 2008, p. 141).

6 See also Blouin (2005) and Migration Policy Institute (2005).

7 See also Martin and Taylor (1996); Acevedo and Espenshade (1992).

immigration to the United States did not stop, and the agreement may have even contributed to an increase in the number of Mexicans migrating to the United States. This may be partly due to the displacement of workers as a result of unfavorable trade deals (at the individual level in terms of livelihood), such as in the case of Mexican farmers who were displaced by the import of cheap American corn into Mexico. By the late 1990s, net migration of Mexicans to the United States (i.e. both legal and illegal immigration) continued to grow, exceeding an average of 500,000 persons per year, compared with an average annual figure of 370,000 in the early 1990s (Lowell, 2008, p. 137; Hoefer, Rytina and Baker, 2010). Seen from this perspective, NAFTA was not a panacea either for stopping unauthorized immigration from Mexico or for checking its upward trend.

But NAFTA could not possibly stop migration, in particular because of the US context of both rapid economic growth and a lack of migration policies that responded more adequately to US labour market needs. 'Between 1990 and 2010, the number of foreign-born U.S. residents almost doubled from 20 million to 40 million[8], while the U.S. population rose from almost 250 million to 310 million. Thus, immigration directly contributed to one-third of U.S. population growth' (Martin and Midgley, 2010, p. 1). Indeed, in the time period spanning the 1990s and the first decade of the 21st century the US experienced the highest rate of immigration in its history (See Figures 6.1 and 6.2). During the 1990s, the US admitted approximately 825,000 legal immigrants each year, up from about 600,000 a year in the 1980s. Undocumented migration also increased notably, to an average of 500,000 per year in the 1990s (See Figures 6.3 and 6.4) (US Department of Homeland Security, 2009; Pew Hispanic Center, 2009)[9] [10].

Historically, US labour market conditions have been a powerful determinant of Mexican migration to the United States, with American rates of economic growth and employment correlating positively with Mexican migration flows. That said, data from the 2000-2010 period has led some analysts to contend that immigration flows

8 Note of the editors: The share of women in this population has however remained the same. Women accounted for 51% of total US migrants, both in 1990 as in 2010. In 2013, the total amount of migrants in the US rose to 45.8 million people, of which again 51% were female. The share of women in the total population however, has gone down slightly. While women accounted for 51.3% of the total US population in 1990, this was 50.8% in 2010. In 2013, the population rose to 320 million people, of which still 50.8% were female (UN, 2013).

9 See also Passel and Cohn (2008); Pew Hispanic Center (2009*a*); Pew Hispanic Center (2008).

10 In 2013, a conference was organized at Harvard University that had immigration and gender in the Americas as a general theme. At that conference, professor of psychology Carola Suárez-Orozco pointed out that undocumented immigrant status places specific burdens on women. They are vulnerable to violence while crossing the border, as well as, to exploitation once they arrive. On top of that, the threat of deportation, seeing their family separated, poverty, and domestic violence create constant psychological and physical stress. Migrant women who suffer from domestic violence are often afraid to contact the police since in some part of the US, it might lead to deportation. She added that female migrants are much more likely than male migrants to be widowed, separated or divorced, and more likely to take up financial responsibility, either in the home or the destination country (Blagg, 2013).

may continue even in the absence of a strong US market demand for jobs (Camarota, 2011). Conditions in Mexico, such as a large surplus of Mexican workers who are underemployed or who hold bad jobs, along with other existing asymmetries with its northern neighbour, have fueled Mexican migration flows to the United States. Economic factors can be powerful determinants of migration, but social networks developed through existing migrant communities have also been an important pull factor in the US-Mexico migration dynamic. According to the 2010 US Census, the number of persons of Mexican origin residing in the US was about 31.8 million (about 28 per cent of Mexico's total population[11] and about 63 per cent of the Hispanic population in the US), with about 200,000 legal permanent resident admissions each year (See Figure 6.5) (Ennis, Ríos-Vargas and Albert, 2010; US Department of Homeland Security, 2009)[12]. By contrast, the vast geographical and psychological/cultural barriers that exist between Canada and Mexico continue to inhibit larger flows of Mexican migrants to Canada. According to the 2006 Canadian Census, the population of Mexican origin amounted to 61,470, of which 50.8% was female (Statistics Canada, 2006), although Mexicans became the largest group of immigrants from Latin America.

The lack of appropriate legal channels in the United States to admit low-skilled workers is also a relevant variable when considering the nature of migration flows. As one study argues, 'illegal immigration, which broadly tracks economic performance, provides a flexible mechanism for responding to labour market conditions in ways the current legal immigration system cannot'. Nearly two-thirds of unauthorized immigrants to the US are Mexican. Legal flows of low-skilled workers to the United States are very small and relatively unresponsive to economic conditions, due to the fact that green cards are unavailable to low-skilled workers and that the two main low-skilled programmes in the United States (H2A and H2B) vary little over the economic cycle. 'Only roughly 150,000 workers are in the United States legally at any one time on temporary low-skilled visas, a fraction compared to the 8.3 million unauthorized immigrants working in the United States' (Hanson, 2009). Partly as a result of these policy constraints, between 1990 and 2000 the number of unauthorized residents in the United States doubled from 3.5 million to 7 million, reaching a peak of 11.8

11 Note of the editors: In 2010, Mexico had a population of 118 million people, of which 51.6% were female (UN, 2013).

12 Note of the editors: Mexicans are the largest Hispanic-origin population in the US, accounting for 64% of the U.S. Hispanic population in 2012. Compared with the 1990s, the number of male immigrants from Mexico has declined from 55% to 53% (Pew Hispanic Centre, 2013).

million in 2007 before dropping by 1 million by 2010[13]. In some years, annual levels of unauthorized immigration have even exceeded those of legal permanent immigration.

Although on a different scale, the situation in the United States contrasts with that of Canada, where unauthorized immigration is fairly minimal. Notwithstanding Canada's long tradition of facilitating the permanent settlement of immigrants, a tendency to rely on the Temporary Foreign Worker Program (TFWP) as a quick fix for domestic labour market needs has featured prominently since the late 1990s (see Figure 6.6). In December 2008, the total population of temporary foreign workers in Canada, entering through a number of general and occupation-specific programmes, was approximately 192,519, representing an 80 per cent increase over the past eighteen years. Of them, 64,718 or 33.6% were female. (Citizenship and Immigration Canada, 2008)[14]. In addition to the TFWP, Canada has a number of sector-specific programmes, including the Seasonal Agricultural Worker Program (SAWP), the Live-in Caregiver Program, and the Pilot Project for Occupations Requiring Lower Levels of Formal Training, which provide Canadian employers with legal recourse to foreign labour of a temporary nature[15]. Notably, through the Seasonal Agricultural Workers Program – a bilateral agreement with Mexico concluded in 1974 – Mexico has become the second most important source country of temporary foreign workers to Canada with 20,900 workers in 2008 and 18,403 in 2009, exceeded only by the United States with 31,399 in 2008 and 30,240 in 2009 (See Figure 6.7) (ibid.; Citizenship and Immigration Canada, 2010)[16].

13 The IRCA amnesty did not reduce undocumented immigration, as it had been expected. About 3 million unauthorized immigrants were legalized under IRCA. The remaining unauthorized population stood at 2 million in 1988. By 1996, that number increased to 5 million, in other words, the unauthorized population had replenished itself in less than a decade. In 2010, this grew to almost 10 million people, of which 43% were female. However, females accounted for only 3% of unauthorized immigrants older than 45. See US Immigration and Naturalization Service (2000); Hoefer, Rytina and Baker (2010).

14 The Citizen and Immigration Services of Canada (2013) take a certain gender perspective into account with Gender Based Analysis (GBA), a tool with which they assess the impact of policies, programmes, legislation and services on women, men and children. The CIC reports on the gender impact of the Canadian Immigration and Refugee Protection Act and incorporates gender analysis into policy and programme development. They do this in cooperation with Status of Women in Canada, a government agency that promotes equality for women as well as their economic, social and democratic advancement (Status of Women Canada, 2013).

15 Note of the editors: more information on the SAWP programme can be found in Box 6.1, where it is mentioned that the programme suffers from a gender bias. According to a prominent union, allowing Canadian farmers to request workers based on gender opens the door for gender discrimination. The union has therefore filed a complaint with Mexico's Human Rights Commission (Perkel, 2014).

16 Note of the editors: Statistics from 2012 paint a similar picture. Although not disaggregated into temporary and permanent foreign workers, it is clear that Mexico, with 23,683 foreign workers, is the second most significant source country for foreign labour in Canada, following the US with 39,886 workers (Citizenship and Immigration Canada, 2012).

6.3 The security agenda and immigration reform

The existence of a large population unauthorized to reside in the United States seems aberrant in light of the strong demand for labour in the US, especially for low-skilled workers that existed particularly in the 1990s and early 2000s. The sheer size of the unauthorised immigrant population and the security concerns that emerged in the aftermath of the 9/11 terrorist attacks have increased the ambivalence of US public opinion regarding immigration and have exacerbated existing tensions between labour market needs and security priorities.

As in many other countries, immigration is a contentious and polarizing issue in the United States. As one analyst recently stated, 'We live in a country that has – for more than 220 years – held the curious distinction of being a nation of immigrants that doesn't like immigrants' (Navarrette, 2011). Immigration has become a particularly divisive issue in the last two decades, as a large proportion of immigration flows became undocumented. Today many sectors of the US public opinion associate undocumented migration with crime, unemployment, depressed wages, and higher costs for health care and education services. According to (Meissner et al., 2006, p. 20):

> For a nation of immigrants that is also a nation of laws, the current level of unauthorized immigrant flows is indefensible and dangerous. Illegal immigration has fueled deep resentment of immigration more generally, and has led to widespread skepticism about the capacity of the government to secure the southern border and manage immigration, especially in ways that promote the nation´s security, economic success, and social and cultural well-being.

The terrorist attacks of 9/11, and their association with the abuses of migration laws by the perpetrators of those crimes, aggravated some of these concerns. Not surprisingly, since then national security priorities have prevailed in US policy regarding the admission of immigrants and temporary residents. The debate on migration in the United States has become emotionally charged, approaching a sense of hyper-nationalism, making it politically challenging to push an immigration reform that could address the long-pending issue of undocumented workers through the US Congress. For years, President George W. Bush sought to strike a balance between security and economic considerations that could deliver a solution to the US immigration problem. However, in July 2007 a bill that aimed at doing just that was defeated in the US Senate (Tichenor, 2009).

So far, the Obama administration's efforts on immigration have focused on a stepped-up campaign of deportation, with nearly 400,000 immigrants being removed each year in 2009 and in 2010 (see Figure 6.8)[17]. The administration has used this,

17 Note of the editors: This trend has remained fairly steady. Approximately 420,000 irregular migrants were deported in 2012. The total for 2013 has been estimated – on the basis of incomplete data – at around 340,000 (Vicens, 2014).

along with other efforts to secure the US-Mexico border[18], as a means of building pressure on Republicans to undertake a comprehensive immigration overhaul. In fact, the Obama administration has embraced many of the Bush administration's policies (Migration Policy Institute, 2010, 2010*a*, 2010*b*), including expanding a programme to verify worker immigration status; although it adopted a quieter enforcement strategy through audits of employee files at more than 2,900 companies (Preston, 2011; *The New York Times*, 2011). In the present political context, with a Congress dominated by a Republican majority, the strict enforcement of laws and of border security measures are a *sine qua non* condition to even start negotiations. However, Obama's call to work with Republicans to protect US borders, enforce US laws, and 'address the millions of undocumented workers who are now living in the shadows', has not succeed in changing the stalemate that has existed in Congress since the failure of Bush's immigration reform in 2007[19]. Among the reasons for the impasse is a fundamental disagreement about border control (Kerwin, Meissner and McHugh, 2011).

Paradoxically, border enforcement policies may have themselves contributed to the surge in the number of Mexican immigrants staying in the United States. Failing to deter Mexicans from emigrating to the United States, while making it more dangerous and difficult for them to cross the border, enforcement measures have altered the historical patterns of migration flows coming from Mexico that tended to be circular and temporary. The increase in the immigrant population in the late 1990s may have been a result not of 'new migration but, rather, more emigrants remaining in the United States on a permanent basis'[20].

The failure to pass a comprehensive immigration reform and forestall unauthorized immigration has prompted different states to introduce a wide array of actions, despite the fact that immigration falls under federal jurisdiction. Municipalities and towns are also undertaking many actions and many lawsuits have been filed. About 1,550 bills passed as of April 2010 (Archibold, 2010) target undocumented immigration, and many more have been debated, voted, praised, and protested in at least 15 States, including South Carolina, Texas, and Mississippi, fueling a fierce and heated national debate over migration. On several counts, Arizona's SB1070 is the most severe of all state

18 In 2011, the Border Patrol had around 21,000 agents (twice than in 2004) of which more than 85% were in the Southwest Border Sector (US Customs and Border Protection, n.d.). In 2010, the Obama administration deployed 1,200 National Guards in the four border states (California, Arizona, New Mexico and Texas) to assist with border security.

19 Note of the editors: President Obama has increasingly bypassed congress in this policy area, relying instead on Executive Orders to reform US immigration laws. In 2012, he issued a directive granting two-year deportation reprieves to undocumented immigrants younger than 30 who had been brought to the US as children and had graduated from high school or joined the military. In 2014, he expanded the directive by removing the age limit and extending it to anyone brought to the US as a child before 2010. The actions could affect up to 5 million undocumented migrants in the US – many more than previous presidential 'amnesties' – who will have the opportunity to attain a quasi-legal status in the country (Hirschfield Davis, 2014).

20 Although these changing patterns may also be reinforced 'increases in urban employment of migrants in year-round and permanent jobs as well as to the growth of Mexican communities in the United States. See Lowell (2008, pp. 139-140).

immigration laws. SB1070 contains a provision that allows police to arrest and drive out undocumented immigrants upon 'reasonable suspicion' that they are unauthorized to reside in the United States when they are detained on suspicion of committing a criminal offence, as well as high penalties for employers hiring unauthorized workers. Arizona's SB1070 was soon followed by similar laws in Georgia and Alabama, which also require all employers to use an e-verification system for hiring workers. While Utah passed an enforcement law that echoed Arizona's, a guest worker programme was simultaneously adopted (Brown, 2011; *The New York Times*, 2011*a*).

While being central to the North American dynamics, after 9/11 migration issues became subordinated to the US political need to strengthen border security. Indeed, this need became a prerequisite for its two neighbours to maintain their economic privileges under NAFTA. The challenge for governments has been how to devise ways to distinguish and separate valid flows of goods and people from those that pose security threats. Strengthened border security has required more sophisticated screening technologies and an intensification of information exchange between immigration officers in North American countries. Nevertheless, mechanisms at the trilateral level that could help facilitate broader labour mobility in North America are lacking. Labour mobility was notably excluded from the 2005 Security and Prosperity Partnership (SPP) framework, which otherwise called for trilateral cooperation in a fairly large number of areas, including competitiveness, food product safety, energy and the environment, smart borders, and emergency preparedness. The SPP emerged after the lukewarm reception in the United States and Canada to the ill-fated 'NAFTA-Plus' proposal. The latter, put forward by the then Mexican President Vicente Fox, included the creation of supranational institutions, mechanisms to facilitate labour mobility, the establishment of social funds to reduce regional disparities, and would have eventually involved the creation of a common currency.

In the face of high levels of unemployment after the 2008 economic recession, US domestic opposition to migration has increased while the impetus for a comprehensive migration reform has diminished. Immigration flows were reduced in the last couple of years, at a time where the precarious situation faced by the large population of undocumented immigrants residing in the United States was aggravated.

6.4 Labour mobility and competitiveness

The lack of comprehensive legislation in the United States makes evident the fundamental tension that exists between the call for border security and labour market needs. As already mentioned, immigration is a critical component for economic growth and prosperity. To start with, immigration can be critical in increasing the size of the population and labour force. Between 1994 and 2009, new immigrants accounted for about half of the growth in the US labour force (47.8 per cent) and for 60 per cent between 2000 and 2004. Although the growth of the foreign-born labour force slowed during the 2004–2009 period, representing only 37 per cent of the growth, it was still considerably faster than the growth of the native-born labour force (Meissner et al., 2006; Congress of the United States, 2010). Indeed, the immigrant share of US labour

force in 1990 was about 9 per cent, while during 2005 and 2007 it was 15.4 per cent (Fiscal Policy Institute, 2009)[21]. Immigration complements labour market gaps, both for skilled and non-skilled jobs.

Labour mobility also becomes particularly relevant in the present global context where human capital is increasingly central to the competitiveness of countries. The transition to a knowledge-based economy and the ageing of populations in developed economies, including the United States and Canada, translates into new labour market demand and competition for talent around the globe. The economic recession in the United States may have postponed the development of complementarities in the demographic and labour markets of the three North American economies (see Figures 6.9, 6.10 and 6.11). Nevertheless, it is clear that international migration will continue to be, in the foreseeable future, a key component in the competitive strategy of most national economies[22].

The situation faced by Canada before the US financial crisis of 2008 illustrates well some of the potential issues facing countries with an ageing population and labour force. The need for immigrant workers became evident in a labour market that exhibited, besides high age-dependent ratios, a 64 per cent employment rate, and low birth rates (See Figure 6.12). A knowledge-based economy with a high demand for highly specialized workers has also meant an even higher demand for low-skilled workers. For a number of years, Canadian employers have increasingly expressed their concerns regarding shortages of workers at all skill levels. According to official data, in November 2006, 49 per cent of Canadian businesses faced employee shortages in key occupations (health care, oil and gas, and construction industries). Other occupations that also experienced labour pressures include technical, professional, and management positions, as well as unskilled or lower skilled workers, such as temporary agricultural workers and domestic service providers. In 2009, about a quarter of permanent residents had a skill level of skilled or technical, 51 per cent were classified as professional, and 15.5 per cent as managerial. Of temporary workers, 18.2 per cent were classified as skilled or technical, 20.4 per cent professional, and 5 per cent managerial, while 7.2 per cent were classified as elemental or labourers in

21 Note of the editors: In 2013 the proportion of the US labour force made up by foreign-born workers was about 16.3%, about the same as in 2012 (US Department of Labor, 2014). Whereas between 1990 and 2007 the increase in the proportion of foreign-born workers in the US labour force averaged out at around 0.35 percentage points per annum, between 2007 and 2013 this slowed to an average increase of 0.15 percentage points per annum. As for labour force participation in the US by gender, the participation rate of foreign-born men was 78.8% in 2013, compared to 68.0% of their native-born counterparts. In contrast, 54.6% of foreign-born women were labour force participants, whereas 57.7% were native-born women (ibid.).

22 The future of female labour migrants, however, can be described as uncertain. Boyd and Pikkov (2005) pointed out that most immigrant groups have had success in the Americas over the past decades and that there is both gender awareness and gender sensitivity in certain fields. On the other hand, with growing labour market inequalities, deteriorating social provisions, increasing inequality in those provisions and a growing reliance on temporary categories of entry and residence, migrant women encounter significant struggles.

2009 (Citizenship and Immigration Canada, 2010*a*)[23]. In this context, the Canadian federal government promoted numerous initiatives to facilitate and expedite the hiring of foreign workers for certain sectors. The expedited Labour Market Opinions, the provincial Lists of Occupations Under Pressure, the Canadian Experience Class (2008), and Provincial Nominee Programs, which vary from province to province, are examples of such initiatives. The last two refer to efforts to facilitate the permanent residence of temporary foreign workers and international students who have received Canadian education or work experience in specific sectors of the labour market. During the 1990s and 2000s, a number of economic sectors in the United States, from agriculture to manufacturing and high-skilled IT, demanded more open migration policies to access foreign labour. The failure to pass a comprehensive immigration reform led to the adoption of a multifaceted strategy for improving the US migration system within the existing regulatory framework. The Bush administration consistently demonstrated a commitment to providing farmers, ranchers, and businesses of all sizes with a legal workforce to stay in business. Mechanisms seeking to satisfy the demand for skilled labour through trade agreements and non-trade visa programmes became a general feature of US policy. For example, the US Free Trade Agreements with Chile and Singapore (H1B1 visa category), as well as the US-Australia Free Trade Agreement (E3 visa category), all facilitate the admission of many high-skilled workers. High-skilled workers enter the United States through five other general visa categories that include: E (treaty trade or investor visa programme); H-1B (specialty occupation visa programme); L-1 intra-company transfer visa programme; TN or NAFTA visa; and O (extraordinary ability or achievement visa programme). The number of immigrants that entered the US through visa categories that permitted stays for a given period of time surged (See Figure 6.13). In 2009, alone, the United States admitted 1.7 million, of which 32.0% were female temporary foreign workers, of which 164,695 were from Canada and 301,558 from Mexico (see Figure 6.13) (US Department of Homeland Security, 2009*a*, 2009*b*). Most of these 'temporary' visas are geared towards skilled and high-skilled workers, although a few exist for low-skilled workers, as discussed in more detail below.

Skilled and high-skilled immigrant workers are seldom seen as a threat[24], but rather as a critical resource for competitiveness in a knowledge-based economy. Unfortunately, US migration policy is not responsive or flexible enough to cope with changes in labour market demand. As one report on migration and competitiveness states, 'employment-based immigration makes up too small a proportion of overall permanent immigration in the United States, even though it admits the country's

23 Note of the editors: In addition, 7.0% of all male temporary workers were classified as skilled or technical, 13.6% of them were classified as a professional, 2.2% as managerial and 5.9% as elemental or labourers. However, for 50.1% of them, the level had not been stated. These ratios were as follows for female temporary workers: 14.4% classified as skilled or technical, 18.0% as professional, 4.0% as managerial and 6.8% as labourer. For 32.7%, the level had not been stated (Citizenship and Immigration Canada, 2010a).

24 See, for instance, National Foundation for American Policy (2008).

most highly skilled foreign workers' (Papademetriou and Sumption, 2011, p. 1). One problem is the impossibility of attracting these workers on a permanent basis, as all those aspiring to become permanent migrants have to enter first through one of these temporary visas and then apply for a green card, the numbers of which are fairly limited[25]. As a result, the gap between the number of temporary and permanent migrant workers in the United States during the 1990s and 2000s progressively widened (See Figure 6.14). The numerical limits of some of the visa categories through which skilled immigrants enter the US represent another significant problem. For instance, throughout the long economic boom of the 1990s and 2000s, the demand for H1B visas was such that the annual quota, which has been limited to 65,000 since 1990, was filled within one day. Because of multi-year waits for green cards, the other mechanism through which these immigrants obtain permanent residence, H1Bs and other temporary visas have become crucial in attracting and retaining skilled talent in the United States (Papademetriou and Sumption, 2011, p. 10; Batalova, 2010). The fact that the visas are allocated on a first-come, first-served basis and by lottery in periods of high demand, rather than on the merit of applications, as well as the fact that the employers are required to apply for visas six months before the start of the fiscal year for the workers they will be needing that respective year, often leads to oversubscription, thus highlighting the lack of sufficient visas to meet labour market demand (Papademetriou and Sumption, 2011, p. 10). A number of surveys confirmed the extent to which maintaining a low level of temporary visas for the skilled and highly skilled foreign workers was becoming a factor in investment decisions, particularly for technological firms[26]. A well-publicized case was Microsoft's decision to expand into Canada as a way to access and retain highly skilled workers who could not be accepted into the United States (Bishop, 2007; *The New York Times*, 2007).

The NAFTA visas have become a key avenue to address some of these problems. Under Chapter 16 of NAFTA, skilled/professional workers in North America can apply for a 'TN visa', which has proven to be very flexible (its duration has been recently increased from one year to three years) and does not require a labour market opinion. Starting in the mid-1990s, each year approximately 70,000 Canadians enter the US through the labour mobility clauses in NAFTA. A cap of 5,000 NAFTA visas for Mexicans was initially imposed – likely the result of the Mexican government's concern for 'brain-drain' – but with the removal of this cap the number of Mexicans who applied for this visa rose to over 20,000 workers in 2009, compared to about 15,000 Mexican H1B visa applicants in the same year. Meanwhile, the number of Canadians

25 According to Papademetriou and Sumption (2011, pp. 6-7; 11-12 and notes 15 and 40), 'about 15% of visas of Green cards are issued to economic-stream immigrants in the United States'; about 90% of employment-based Green-card recipients arrive on temporary visas and later adjust to permanent residence form within the country; and immigrant workers can receive temporary visas for up to six years, but the waiting time for getting permanent residence is about 4.4 years.

26 Sixty-five per cent of technology companies responding to an NFAP survey said in response to the lack of H1B visas they had hired more people (or outsourced work outside the United States)'. See National Foundation for American Policy (2008).

that entered the US with a NAFTA visa was 77,793, out of a total of 164,695 Canadians of temporary status in the United States (Citizenship and Immigration Canada, 2009; US Department of Homeland Security, 2009*a*). Even with the economic recession, the TN visa was the only category that registered an increase, reaching over 99,000 in 2009 (US Department of Homeland Security, 2009*a*). Another 20,000 or so high-skilled Canadian workers enter the US each year to work temporarily through the H1B visa category. The relatively high number of these workers who migrate to the United States has been an issue of concern for some Canadian policy-makers.

As a number of studies have demonstrated, the international competitiveness of the US economy will continue to depend heavily on the contributions of skilled and high-skilled professionals from abroad for many decades to come (Bray, 2010; Beauchesne, 2010; Immigration Policy Center, 2009). The debate around whether or not US skill levels have stagnated *vis-à-vis* the rest of the world is far from settled, although it is clear that a liberalization of US immigration laws is needed to permit the entry and retention of talented people from around the world. According to one view:

> America in the 21st Century is no longer a skill-abundant country relative to an increasing share of the rest of the world. […] and will feel the full impact of the 30-year stagnation in skill levels in the US workforce when many baby boomers begin retiring (National Foundation for American Policy, 2008).

In contrast with the United States, where immigrant workers are concentrated at the extremes of the education ladder, immigrants in Canada tend to have skill levels which enable them to contribute quickly to labour market development and thus tend to be as educated as the Canadian-born population[27]. In fact, Canada's point system was designed to attract immigrants who were very likely to succeed in the Canadian labour market. Skill has been the key component considered in Canada's immigration policies since the 1990s. The new cohorts of immigrants have a higher level of education than those accepted earlier and the occupations declared by immigrants at entry have also shifted towards jobs with a greater skill requirement. According to official data, in 2005 over 80 per cent of all immigrants (192,000) between the age of 24 and 65 had post-secondary (tertiary) schooling, such as college, a trade education or advanced degrees. While in the United States, the US-born tend to be more educated and skilled than

27 According to Martin, 2004 about 40% of the foreign-born US residents have less than 12 years of education, and many are having a hard time closing the gap between their US incomes and the incomes of similar Americans.

immigrants[28], the score distributions in Canada are the opposite. Indeed, immigrants with tertiary education in Canada increased by 5 percentage points from 1987 to 2002, while those numbers decreased in the US (Boeri, 2006). Since the Canadian system favours skills through its point system, immigrants are at least as skilled as natives (accounting for quality). Hence, the score distribution of immigrants almost perfectly overlaps with the distribution among natives (See Figures 6.15 and 6.16).

Growing global competition for these high-skilled workers further adds to their value and costs to employers. Whereas US and Canadian businesses could once assume that they would be able to recruit high-skilled or well-educated immigrants to fill critical occupations, either from the ranks of US and Canadian colleges and universities or directly from overseas, circumstances are changing. The economies of China, Korea, and India are booming and are retaining or attracting back many of their nationals. This may explain why Canada, Australia and New Zealand, and others have been improving higher education opportunities for students from emerging or maturing economies. Starting in 2005, Canada introduced a number of measures to facilitate the immigration of foreign students and to allow them to gain some Canadian off-campus work experience. Foreign students have become an important source of skilled workers for Canada, representing about one-quarter of all temporary residents coming to the country over the period 1996–2005. The amount of foreign students, around 78,000 in the late 1990s, rose to almost 136,664 in 2001 and to 196,138 in 2009 (Citizenship and Immigration Canada, 2010)[29]. About half of those foreign students were enrolled in Canadian universities. Foreign students are viewed as high-potential permanent immigrants since many issues related to social integration that are faced by other immigrants are solved through the Canadian education process. In addition, the flexibility of Canadian migration policies allows for the introduction of mechanisms to respond to labour market conditions, as shown by the Canadian Experience Class, introduced in the Harper government's 2007 budget, to facilitate the application of international students and foreign workers residing in Canada for permanent status. In 2009, Canada had 1,775 permanent residents in the Canadian Experience Class category (Citizenship and Immigration Canada, 2010*a*).

By contrast, although being 'the largest destination of international students,' receiving about a fifth of the world market share in 2006[30], and with the largest proportion of tertiary level international students enrolled in advanced research programmes of the OECD countries (OECD, 2010, quoted in Papademetriou and

28 In fact, only 28% of immigrants as compared to 30% of natives have at least a college degree (OECD, 2006). Of Mexicans, the largest group to immigrate to the United States, only 5.3% of them have college degrees, whereas 61.9% have less than high school. Despite high participation in the workforce, US immigrant workers are over-represented in the highest risk, lowest paid jobs. Low-wage immigrant workers are concentrated in these jobs due to a number of factors, including educational background, work history and skills, limited English proficiency, and immigration status.

29 Note of the editors: in 2009, there were 85,140 foreign students registered as temporary residents, of which 44.0% were female. In 2012, this grew to 104,810, of which 44.9% were female (Citizenship and Immigration Canada, 2012).

30 See Papademetriou and Sumption (2011, p. 13) and National Foundation for American Policy, (2008).

Sumption, 2011), the United States imposes restrictions for skilled foreign nationals graduating from US universities to enter the US labour market. That said, graduates on student visas can stay in the United States to gain work experience for one year after graduation or longer if they work in certain fields of knowledge. In addition, there are 20,000 visas reserved from the H1B programme for foreign students with a master's degree (Papademetriou and Sumption, 2011, p. 14).

In spite of the demographic dynamics that are complementary in North America, current overall skills and education levels in Mexico suggest that this country does not have sufficient numbers of competent workers to either capture the potential offshore investments that would ensue from the labour situation in Canada and the United States, or see its workers move into US or Canadian jobs. Mexico does not fare well as a country of origin for many of the foreign students in Canada. However, the two countries signed a youth mobility agreement through which young people can travel and work for a year in the other country. The agreement may be opening a door for a 'brain drain' of Mexican talent. Anecdotal evidence shows that Mexican permanent immigrants to Canada tend to be high-skilled, although they are still a fairly small group compared to the absolute number of immigrants coming from other countries. As already mentioned, Mexican immigrants in the United States have the lowest levels of educational attainment (Passel and Cohn, 2009).

Although Mexico has been increasing its investment in education and is undertaking a variety of reforms to improve the quality of education, educational opportunities remain poorly distributed, with many obstacles to continuing beyond primary education for poor and rural students. The slow progress in education has placed Mexico in the unfortunate situation among manufacturing countries of having relatively high production costs and a workforce with relatively low-level skills. Indeed, human capital in Mexico, 'measured by average years of schooling amongst the working-age population, is the lowest in the OECD' (Guichard, 2005, p. 4).

These trends, combined with increased global competition for skilled workers, have pushed US and Canadian businesses to look for new sources of competent workers. New global attention to the effects of migration on the economic and social prospects of sending countries will also force Canada and the United States to be sensitive to the needs of developing economies to retain the best and the brightest for their own future and to find innovative ways to ensure 'brain circularity' and avoid 'brain waste.' In the context of the combined Canada -US - Mexico labour market, the three North American countries have strong interests in developing a large pool of skilled workers, many of whom may work in all three countries over the course of their lifetime. In many meaningful ways, such an approach would mirror the labour market relationship that exists already between the United States and Canada.

In the United States, it is generally accepted that low-skilled immigrants can help fill the labour market gaps that emerge as the native population achieves higher levels of education. The proportion of native-born workers with high school and college degrees increased substantially and the quality of the domestic labour force rose dramatically between 1980 and 2000. Should this pattern continue into the future, compounded by the ageing of the US labour force, there will be fewer native workers

available for low-skilled jobs (Ellwood, 2002, quoted in Meissner et al., 2006, p. 5). That said, the US difficulty reducing unemployment rates after 2008 may be altering this situation now and in the near future (Papademetriou and Terrazas, 2009). In spite of the apparent economic benefits, the overall effect of low-skilled workers in the domestic economies tends to be quite controversial. A predominant view in public opinion is that immigrants, especially unauthorized residents, cost more to states and localities, although they pay more taxes at the federal level. Another common perception is that these workers depress the wages of low-skilled native workers. However, by taking low-paying jobs, immigrants create the incentives for native workers to pursue more education, which in turn, generates more human capital and productivity growth (Borjas, 2003, quoted in Lowell, 2008). Furthermore, at least one study has shown that the lower cost of services offered by these workers means a higher real level of income for native high-skilled workers (Peri, 2010).

A large proportion of low-skilled workers enter the United States illegally and the political complexity of regularizing these workers has obstructed other reforms that could favour a migration policy that is more responsive to the labour needs of the US economy. Temporary programmes for low-skilled workers in the United States, basically the H2A temporary agricultural worker programme and the H2B temporary non-agricultural work programme, are small compared to those existing for high-skilled workers (See Figure 6.13). H2B visas are limited to 33,000 for each six months, whereas H2A visas are not restricted to numerical quotas.

As is the case for the highly skilled, economic motives expedited visas for lower-skilled workers during the 1990s and 2000s. The political pressure from the business community in a wide variety of sectors was strong enough to expand temporary programmes for low-skilled labour. In contrast to many other developed countries, including Canada, Australia and others in Europe, who have designed and implemented unilateral and bilateral agreements to gain broader access to lower-skilled workers, the United States has yet to sign an agreement targeting broader access for lower-skilled workers. In 1966 Canada signed the Seasonal Agricultural Workers Program (SAW) with Jamaica, Trinidad and Tobago, and Barbados; Mexico followed joining in 1974, and other Caribbean nations in 1976 (Service Canada, 2010). Regular US immigration channels have been insufficient to absorb the large undocumented migrant population. The multifaceted strategy introduced by the US federal government in the mid-2000s was targeted at sectors with a strong need for workers and included the streamlining of the H2A and H2B programmes. Interestingly, while the H2A programme was under-used, the agricultural sector estimates that between 600,000 and 800,000

undocumented agricultural workers are present in the United States (Nguyen, 2008)[31]. As a consequence, a number of reforms were developed in order to make these programmes more efficient. In 2005, the Save Our Small and Seasonal Business Act passed by the US Congress provided an exemption for returning H2B workers so that they would not count towards the annual 66,000 cap on H2B visas. The programme became very popular, with the number of visas passing from a little over 15,000 in 1997 to 130,000 in 2007 (Seminara, 2010, p.1). However, the programme was not renewed in 2008. Even at the outset of the 2008 financial crisis, the demand for H2B guest workers remained strong with requests for H2B workers in that year reaching 300,000 (ibid.).

The growing interest in temporary migration at the global level poses complicated challenges because there is concern that programmes based on this type of migration may imply a trade-off between numbers and rights. That is, more workers going abroad, but with diminished rights, a compromise that some governments and migrants might be willing to accept. One particular challenge with temporary workers, particularly the low-skilled, is designing appropriate mechanisms to ensure the enforcement of rights. Temporary Workers Programmes in Europe, for instance, have become smaller, more narrowly focused on specific sectors or occupations, and increasingly more seasonal, with employers having more power to select and recruit migrants. Meanwhile, Canada's introduction of the Temporary Foreign Workers Program for low-skilled workers has placed the SAWP participating countries and workers at an unfair competitive disadvantage *vis-à-vis* other non-participating countries because the rights contained in the broader federal programme are less strict than those negotiated under SAWP (see Box 6.1). The Canadian case is aggravated by the fact that immigration policy is a shared responsibility between provinces and the federal government, but labour policies are fully in the hands of provincial governments. This adds to the economic and labour market dynamic that varies from region to region and therefore different labour market needs. The language and cultural barriers faced by foreign workers, the fact that labour regulations vary from province to province, that provincial standards tend to change with changes in government, that sometimes provincial standards are not modified to accommodate the needs of temporary workers, and the difficulty Consular officers have in effectively monitoring the enforcement of such regulations, etc. have prompted civil society organizations to express public concerns about the protection of workers' rights under SAWP.

31 Note of the editors: Women make up 22% of the agricultural workforce in the US, however, female farm workers are prone to exploitation. Women are typically given the least desired and lowest-paying jobs without health insurance, little job security, and few opportunities to advance in a reigning culture of discrimination and machismo. There are also issues of gender discrimination and sexual harassment. Many women identify sexual harassment as a major problem since they are coerced into having sexual relations with their supervisors to keep their jobs. Undocumented women are particularly unlikely to report this, out of fear of being reported to immigration authorities (NFWM, 2014).

Box 6.1 The potential for wider cooperation Canada-Mexico

Mexico and Canada share a long tradition of labour mobility cooperation. Through the Seasonal Agricultural Workers Program (SAWP), Canada has imported foreign workers for up to eight months a year to work in Canadian farms since 1966 from the Caribbean and since 1974 from Mexico. In 2009, Canada brought in 15,352 Mexican workers through the SAWP. About 80 per cent of those workers are employed on the horticultural and tobacco farms in Ontario and their stay in Canada averages 5 months.

This bilateral agreement, which was established in 1974 through a Memorandum of Understanding between the Mexican and the Canadian Governments, has become internationally recognized as a best-practice model for a number of reasons. Some of the SAWP aspects that are considered best practice include the active participation of the Mexican Government in both recruiting workers and negotiating wages and other labour conditions, the involvement of farm employers in the programme design and administration, as well as exceptions made by the Canadian Government which allow the provision of health insurance in Canada for temporary foreign workers.

The Mexican Ministry of Labour is responsible for recruiting workers, negotiating their wages with Human Resources Development Canada, and generally monitoring that workers' rights are respected during their stay in Canada. Canadian farmers also have to respect minimum conditions; for instance, they have to offer a minimum of 240 hours of work during a period of six weeks, free approved housing and meals or cooking facilities, and the higher of the minimum wage, prevailing wage, or piece-rate wage paid to Canadians doing the same job. A grower organization funded by user fees, Foreign Agricultural Resource Management Services (FARMS) arranges to transport workers to Canada and deducts 4 per cent of workers' wages to cover transport costs, up to $C575; farmers also deduct payroll taxes and insurance costs from workers' pay. Workers have a 14-day probation period after arrival, and farmers prepare a written evaluation of each worker, place it in a sealed envelope, and returning migrants give it to Mexican authorities.

The fact that over 70 per cent of the time farmers specify the names of the workers they want year after year has been presented as an element of this programme's success. The average worker interviewed has between five and seven years experience in Canada.

But despite the view that the SAWP "is a real model for how migration can work in an ordered and legal way" to the benefit of both Mexican workers and Canadian farmers, since 2001 worker organizations, in particular the United Food and Commercial Workers Union – which has established several Migrant Worker Centers in Ontario, Quebec and British Columbia – have raised concerns and complaints about some problems with the design and the administration of the programme. They have complained about the legal restrictions that apply to all farm workers, including guest workers, regarding their right to strike, particularly in Ontario; about the inability of workers to move from one job to another; and about the fact that a guest worker who loses his job also loses the right to be in Canada. The UFCW filed suit against provincial authorities in Ontario for excluding farm workers from the Occupational Health and Safety Act, a suit they won in June 2006. Since that time, farm workers have been covered by the Act. The UFCW also filed suit against the practice of charging migrants C$11 million a year in employment insurance premiums but not allowing them to obtain the benefits from this programme. While in all other provinces migrants are eligible for health insurance coverage upon arrival in Canada, in British Columbia they have to face the usual three-month wait for coverage under provincial health care programmes.

Other issues of concern regarding the SAWP include its gender bias and the significant costs incurred by migrants to get into the programme, largely due to their need to move from their sometimes-remote-rural communities to Mexico City to undertake medical examinations, a requirement put in place by Canadian authorities. This trip generally means that most workers begin their foreign job assignments in debt.

Temporary workers in the United States, particularly those who enter the US through visas for low-skilled workers, H2A and H2B, face similar problems. Some argue that the majority of the H2B programme's current users 'are neither small nor seasonal employers, but rather mid- to large-sized companies and recruiters that petition for H2Bs to work for 10 months out of the year, year after year' (Seminara, 2010) making them cheap permanent workers. There is evidence that their hourly compensation has stagnated since the H2B programme began to expand in 2002 (Seminara, 2010)[32], and there exists potential for abuses as their 'legal status in the United States is tied to their employment'. Labour brokers and unscrupulous recruiters are often a problem faced particularly by H2A and H2B visa seekers[33]. US H2B employers and US recruiters often partner with foreign recruiters, who commit frauds and abuses against H2B visa holders, but 'US courts have not shown a willingness to try cases of abuse when the violations occur outside the United States' (Seminara, 2010, p. 2). Similarly, according to one study, 'neither the Department of Labor (DOL) nor the Department of Homeland Security (DHS) has ever barred a U.S. company from filing H2B petitions. Some repeat offenders continue to have their petitions approved to this day' (ibid.). That is why the SAWP practice of keeping recruitment a government monopoly was recognized as a best practice.

However, there is some skepticism regarding, for example, the possibility of using the SAWP model in the United States, given the small number of workers involved in the programme compared to the numbers that it could entail in the US context. The Philippines' labour migration programme, which manages about a million workers a year, can hardly be a model; its size was largely the result of the participation of private recruiters. How could any US agency process applications from 12 million undocumented workers?

Addressing all social challenges concerning foreign temporary workers is complex because many of them are also faced by low-income workers in general; and temporary worker programmes could not possibly consider all of these very complex social issues[34]. There is also a concern that the trend to increase the number of temporary worker programmes might result in an unacceptable dissolution of the traditional link between migration and eventual citizenship. Increasing the number of temporary workers in programmes like the SAWP would most likely face strong political opposition, particularly from unions. Legislating the right to unionization for temporary foreign workers, as well as the setting up of research and monitoring programmes, are actions often proposed in the case of the Mexican workers under SAWP, to little avail (See Box 6.1) (Long, 2010; Velma and Batalova, 2007; Gilbert, 2009; *Rural Migration News*, 2010).

32 See also Griffith (2006).

33 For a comprehensive study of the problems facing these workers see Griffith (2006).

34 The ILO Multilateral Framework offers principles, guidelines and best practices for effective Management of labor migration, which can enhance its development benefits. See Organization for Security and Cooperation in Europe (2006).

Some progress has been made on government monitoring of labour standards, both in Canada with the SAWP (See Box 6.1) and in the United States. On 15 March 2010, the US Department of Labor implemented the H2A Final Rule, which improved worker protection and wages and enabled employers to receive workers in a timely manner (US Department of Labor, Employment and Training Administration, 2010). Similarly, the Department of Labor modernized the application process and enhanced worker protection under the H2-B programme. In 2004, a joint declaration was signed through the Consular network between the US Department of Labor and the Mexican Ministry of Foreign Affairs, in which they committed to improving compliance with, and awareness of, workplace laws and regulations which protect Mexican workers in the United States. Under this declaration, 45 Mexican Consulates have so far signed letters of agreement with the US Department of Labor's Wage and Hour Division and/or the Occupational Safety and Health Administration (OSHA)[35]. These letters of agreement include a multi-pronged approach to improve safety and health conditions in the workplace and provide outreach and assistance in Spanish for both Spanish-speaking workers and employers[36]. For instance, one of the priorities of the Wage and Hour Division in these letters is to increase worker protections in low-wage industries; OSHA offers a toll-free help line that provides assistance in English and Spanish, a Spanish web page that is continually updated, and many documents and publications available in Spanish.

Lastly, undocumented migrants are particularly vulnerable, given their low education levels and differences in industrial sector and occupational distributions which explain their lower median incomes and higher poverty rates than native-born workers[37].

6.5 Conclusion

In sum, the United States and Canada face similar challenges in their need to attract and/or develop talent to maintain their national and regional competitiveness vis-à-vis the rest of the world and at the same time cope with the difficulties faced trying to integrate international workers into their economies and societies to ensure future competitiveness. Being the largest labour market in North America, the United States faces significant challenges but also opportunities to fully exploit human capital in the region. The United States needs to grapple with a large undocumented migrant

35 Note of the editors: These agreements have recently been renewed. See Occupational Health and Safety (2014).

36 According to Leite et al. (2013), only 15% of Mexican immigrant women in the U.S. were enrolled in public health programmes in 2012. Mexican immigrant women had the lowest level of formal labour market participation, compared to other immigrants or native-born workers. This reduced labour market access entails reduced access to decent salaries and benefits, and reduced access to employer-based health insurance. Immigrant women also often face different challenges that may contribute to health issues such as poverty and food insecurity, limited English proficiency, lower skill levels and enduring a continuous state of stress.

37 See Kandel (2011).

population that requires improvements in educational attainment. The political inability of US Congress to pass a comprehensive immigration reform has now resulted in high levels of unemployment that affect the immigrant population disproportionately, especially those who are undocumented and tend to be in poverty. Concerns for border security on the one hand, and unemployment and economic insecurity on the other, limit the development of migration policies that better respond to structural trends favourable to international labour mobility, particularly in North America.

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7

'We are all MERCOSUR': Discourses and practices about free movement in the current regional integration of South-America

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7.1 Introduction

In June 2005, during the XXVIII MERCOSUR Presidential Summit, a document issued to the participating delegations affirmed the need to incorporate the 'social question' into the integration process[3]. On that occasion, the programme 'We are MERCOSUR', a project that aims to promote the construction of local identities, was officially launched after the speech of the then-Uruguayan President Tabaré Vázquez, who called for 'integration at the grass roots level'. The presidential speeches which followed, further emphasized the importance of creating regional identities, as well as prioritizing regional decision-making processes. Vazquez argued that 'there is no integration without citizenship' and argued for the need 'to develop institutions and a civil integration system'[4]. This political process was started by the heads of government present at the meeting and was developed further the following year when the so-called Social MERCOSUR Summit took place. In that context, the creation of the block's Parliament (PARLASUR) was announced, supported by representatives of social movements, grass-roots activists, and NGOs. As part of this general effort to take into account the 'social question', MERCOSUR summits since 2005 have reinforced the idea that the success of political pacts within South America depends on the involvement of people and raising awareness about their common future.

These events imply a shift away from the directions taken previously within the regional integration process in South America. By the end of the 1990s, the Latin American scenario was one of economic crisis and, as a result, of deepening social inequalities. In some quarters this was attributed to the failure of neoliberal policies applied within the region. While a number of such policies remain intact,

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3 XXVIII Encuentro de Presidentes del MERCOSUR, Asunción, Paraguay, junio 2005. Full speech can be found on: http://www.mercosur.int.
4 Full speech can be found on: http://www.mercosur.int.

the dominance of the neoliberal approach was challenged by visible attempts to develop alternative political thinking. One of the clearest indications of this shift is the election of new leaders and governments that have placed the fight against poverty and social inequalities and the creation of a common strategy to foster regional political alignment at the top of their agendas. In this context, MERCOSUR received a new impulse that was on the one hand fostered by the resistance to signing a Free Trade Agreement with North America (NAFTA) and on the other was – and still is – driven by the reorientation of regional politics and the articulation of new political priorities.

One of these new priorities is to promote channels for social participation as a key way of strengthening regional integration. At the national level, this means reaffirming the commitments made to those social movements and actors which helped bring these new governments to power. At the regional level, it implies the emergence of the social question onto the regional agenda, which until recently focused exclusively on economic issues. In order to achieve its newly defined social aims, MERCOSUR started to develop a new concept of regional integration. This concept is based on the strengthening of the citizenship dimension alongside existing democratic institutional structures. Thus, this legal and symbolic phase of integration has been trying to reach all of the citizens in MERCOSUR, including migrant populations[5].

Indeed, by constantly crossing national borders regional migrants are simultaneously testing the possibilities and limitations of regional integration and modifying demographic structures, labour markets, social relations, and cultural patterns, both in their countries of origin and in their destinations. This makes migrants one of the main vehicles for bonding nations within the South-American region. The free movement of people – not only of commodities – appears to be necessary if the dream of true regional integration is to materialize. Currently, bilateral agreements between certain MERCOSUR Member States facilitate the attainment of residency status by eliminating administrative requirements, like a work contract, and by reducing application fees. This movement of people brings new elements to the debate about citizenship and belonging.

Taking this into account, the present chapter proposes an analysis focused on discourses and practices, both contemporary and from the recent past, concerning free movement among the countries involved in the regional integration organization known as MERCOSUR. The presidential discourses selected for analysis have been taken from public events held between the years 2000 and 2010. This period of time

5 Note of the editors: The international migrant stock in MERCOSUR countries in 2013 was over 3.9 million people, of which almost 54% was female. Remarkable is that Venezuela attracts mainly female migrants. Of the almost 1.2 million international migrants that it hosted, 58.5% were female. Uruguay and Argentina also attracted more female than male migrants, with 54.8% and 54.1% female migrants respectively. Paraguay and Brazil, however, attract less female than male migrants, with 47.5% and 46% female migrants respectively (UN, 2013). Data on South American migration flows from 2000 show that, of all the MERCOSUR countries, Uruguay hosted proportionally the most female migrants: 56.6% of its South American migration stock was female. This ratio was 54.2%, 52.1%, 48.3% and 45.8% for Argentina, Venezuela, Paraguay and Brazil respectively (Cerrutti, 2009).

coincided with the emergence of a new model of regional integration in the bloc[6]. These discourses are directed towards their audiences – both national and regional populations and the Presidents from the other countries involved. They were delivered by those Presidents during particularly relevant moments of political life in these countries (such as an inaugural speech, or during national civic commemorations) as well as the region (including during diplomatic summits and MERCOSUR institutional meetings). Because of these features, we consider that these events are, in practical and symbolic terms, important spaces for the affirmation and strengthening of the political commitments adopted in the region from the perspective of the main representatives of the nations involved: the Presidents. From our perspective, such discourses comprise a meaningful corpus for the analysis of the current approaches to Latin American integration, emphasizing certain conceptions of regional citizenship central to the proper interpretation of the free movement of people debate in the context of MERCOSUR.

This chapter will devote special attention to the process of building a common idea of citizenship and an image of 'the citizen of MERCOSUR' through the examination of laws, public policies, and available statistics on intra-regional migrations to confront those discourses and practices with the reality of migratory flows in South America. In addition, the analysis will pay special attention to the logics underlying attitudes to the role of free movement in the regional integration process. By questioning inherited ideas of regions, nations, people, identity, and membership, discourses and practices promoting a common citizenship are bringing new ideas concerning development, human rights, and multiculturalism into the debate. In sum, all of these discourses and practices will be put within the context of existing debates and disagreements that new economic, social and political integration has fostered as regards intra-regional migration.

7.2 The past and present of regional integration in South America

The Southern Common Market (MERCOSUR) is one of the Latin American commercial treaties signed in Montevideo during the 1960s and 1980s. The first such treaty established the Latin American Free Trade Association (LAFTA) which was reorganized in 1980 into the Latin American Integration Association (ALADI)[7]. The Association includes Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico,

6 An exception is the discourse of the former Argentine President Raúl Alfonsín (1983-1989), who was one of the main promoters of the regional treaty in its origins. He has fostered some of the ideas of the development of the bloc in its cultural and social aspects that are currently reincorporated to the regional project by the new Latin American Presidents and representatives.

7 More information about the history of the Association is available on the official website: http://www.aladi.org/nsfweb/sitio/index.htm.

Paraguay, Peru, Uruguay, Venezuela, and, since 1999, Cuba[8]. Its main objective is to establish and regulate a common market. In order to achieve this, Member States have committed themselves to cooperate and provide mutual economic aid for steadying customs duty rates in order to promote trade between them[9].

In 1969, following ALADI's example of cooperation, the Andean countries (Bolivia, Chile, Colombia, Ecuador and Peru) established the Andean Pact[10]. Brazil and Uruguay concluded the Trade Expansion Protocol (PEC) in the 1970s, and during the same period Uruguay signed the Argentine-Uruguayan Economic Cooperation Agreement (CAUCE). During the 1980s, Brazil and Argentina agreed to twenty-four bilateral protocols, and in 1985 the High-level Joint Commission was set up by the Declaration of Foz de Iguazú. Nevertheless, real economic cooperation between the countries of the Southern Cone did not begin until the 1990s. Brazil and Argentina signed the Economic Complementarity Agreement in the ALADI in 1990, the year in which representatives of Uruguay and Paraguay expressed their interest to join the group. In this context, the Treaty of Asunción was signed in 1991 establishing the Southern Common Market or MERCOSUR between the four participating countries: Argentina, Brazil, Uruguay and Paraguay. In 1996, Chile joined the group as an 'Associated Country'[11] and one year later Bolivia entered with the same status. A series of other countries then joined the association: Peru in 2003, and Colombia, Ecuador, and Venezuela in 2004, the latter becoming a 'Full Member' in 2006[12].

The historical agreements between South American countries are reflected in the discourses of their respective Presidents during the 29 year integration process that resulted in MERCOSUR. The Argentine Raúl Alfonsín, the Brazilian José Sarney, and the Uruguayan Julio Maria Sanguinetti, as co-creators of the regional integration initiatives of the 1980s, saw their discourses crystallize into further agreements[13]. Many years later, in a Conference given within the 2000 Second National Meeting on Integration, Alfonsín (2000) recalled:

> In the case of MERCOSUR, as its name indicates, has lent preference to those (commercial) aspects of integration, limiting in some way the

8 Note of the editors: Venezuela became a member in 1973 (until 2006), whereas Chile withdrew in 1976.

9 Always within an economic logic, the tariff relief includes products of the cultural sphere such as books, art works and music.

10 The Andean Pact was renamed the Andean Community (CAN) in 1996. More information about the history of the Andean Community can be found at http://www.comunidadandina.org/.

11 Associated states do not have full voting rights with the decisions of the organization, nor do they have full access to the benefits of the common market. They are allowed to lower customs duty, but they do not have to apply the same customs to importing goods, as do other members.

12 More information about the history of MERCOSUR is available at http://www.mercosur.int/msweb/Portal%20Intermediario.

13 There, they signed a Declaration that was supposed to give birth to the Programme of Integration and Economic Cooperation (PICE) between two big states that, from the very moment of independence, had been divided by mutual suspicions and open rivalry.

> original idea that we fostered with Presidents Sarney and Sanguinetti. For that reason, we have to be careful. As we said, initially economic supranational decisions may have a huge relevance in the field of social, scientific and cultural problems, redefining the development of our country.

Despite these problems, in Alfonsín's opinion: 'The Mercosur is a successful integration process' which has fostered the emergence of 'a wide market, harmonized legislation, (and) internalized common norms' and which 'is now projected as a core center of South American integration.'

In accordance with this optimistic outlook on the future of integration, some parts of Brazilian President Lula da Silva's speech during the Heads of State Summit also underlined these ideas: There are four governments strongly involved in strengthening the pact and there is a regional environment highly promoting integration'. He also said that 'We live in a time of extraordinary convergence of values and aspirations in our region' and that 'If we agree to share the inevitable (process of) regional integration, the strengthening of the coalition's institutional structure must be perceived as natural'. Finally, Lula confessed that 'I strongly believe that there is no room for individual solutions for our countries. Furthermore, to achieve this it is not enough just to follow the same path. We have to walk together and with the same aim'[14].

A more recent example of such discourses is provided by the statements issued by some Latin American presidents during the Argentina Bicentennial celebrations in Buenos Aires on 25 May 2010. On this occasion, the leaders expressed optimism about economic growth in the region and reaffirmed their commitment to the unity of the MERCOSUR. The current president of Uruguay, José (Pepe) Mujica encouraged his peers to 'restore the greatness of Latin American countries', while the Bolivian president Evo Morales pushed for more comprehensive integration and growth through the strengthening of The Union of South American Nations (UNASUR)[15]. The current President of Ecuador and the then-President of Venezuela, Rafael Correa and Hugo Chávez respectively, showed their strong support for the regional project, arguing for greater regional autonomy vis-à-vis the rest of the world. Rafael Correa underlined that the Bicentennial, which in 2010 was celebrated in many Latin American Countries, 'brought political independence' and 'now economic and cultural independence is to be achieved too'. The Venezuelan President Hugo Chávez said that the jubilant celebrations in Buenos Aires show that 'in Latin America there is a passionate revolution for the "patria grande".

The 'patria grande' or 'greater fatherland' is frequently referenced by South American presidents and is closely linked to the historical liberation struggles on the

14 Reunión de Cúpula del MERCOSUR, Montevideo, Uruguay, 09 de diciembre de 2005.

15 The UNASUR is a more recent organization which aspires to contribute to the cultural, political and economic integration between South American people. The following countries are involved in it: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela.

continent. The concept is indicative of a cultural common ground shared by all South American nations, and is to some extent embodied by MERCOSUR. It has facilitated the reconfiguration of the shared imagery and representations which are directly linked to both legislation and institutions, as we will explore in the next section. Changes to migration laws and the policies of South American countries, establishing incentives for the free movement of people within the region and paying special consideration to human rights protection, have been driven by this founding conception of MERCOSUR as a potential 'patria grande'. Developments in migration policy show a new harmonization of discourses and practices. Indeed, regional migration policies have a direct impact on South American migrants. As will be shown, we believe that these new discourses on free movement are being translated into concrete policies with a positive impact on the life of migrants.

7.3 Free movement: from development policies to human rights

7.3.1 Historical migratory flows in the region: its importance and features

According to IMILA[16], one of the dominant patterns of the 20th century is the intra-regional flows of migrants, due to growing inequalities in the social and economic development of different countries[17]. Indeed, the number of immigrants in these countries doubled during the 1970s (although it stabilized afterwards). During this period, Argentina and Venezuela were the main recipient countries in the region and both enjoyed strong economic growth. While Argentina is the traditional destination of Paraguayans, Chileans, Bolivians, and Uruguayans attracted to the possibilities of working in agriculture, manufacturing, construction, and services (Pizarro y Villa 2001), the Venezuelan oil boom also proved to be a significant pull factor. At the same time, massive Colombian migration, followed by people fleeing the Southern

16 The Project called IMILA (Investigación de la Migración Internacional en Latinoamérica) from the Population Division from CEPAL-CELADE (Centro Latinoamericano y Caribeño de Demografía), gather the national census data that make possible to quantify migration and characterize migrants. Nevertheless, its usefulness, this information have many restrictions as the data are referred just to the accumulated migrants stocks and not to the flows; in additions they cannot clearly identify the undocumented migrants and those who migrate temporarily. See Martinez Pizarro and Villa, 2001, '– Notas de Población Nº 73 – CEPAL - Santiago, Chile.

17 The other two migratory patterns referred to by IMILA for Latin America are: (a) the transoceanic immigration to the region, the intensity of which has decreased during the last decades as a result of a subsidence of historical flows, return and mortality; and (b) the emigration of Latin Americans and Caribbeans – especially to the United States – that increased sharply in the 1980s and 1990s.

Cone, transformed Venezuela into a destination of so-called forced migration and/or political exiles[18].

The origins and destinations of continental migratory flows did not change significantly in the following periods. However, due to both the economic crisis and the resulting structural reform programmes, as well as the return of democracy in many countries during the 1980s, the growth of migration within Latin America was fairly modest[19]. In this context, the intensity of migrations to Argentina and Venezuela experienced a visible fall, and at the same time there was significant return migration towards traditionally sending countries, such as Paraguay. In the 1980s, the main migrant sending countries were Colombia (with 560 000 emigrants, of whom approximately 52.8 per cent were female)[20] followed by Chile and Paraguay (both with a population of 280 000 emigrants, of whom respectively approximately 47.8 per cent and 53.7% were female)[21]. During the 1990s these figures stayed largely the same, both in terms of numbers and destinations[22.]

At present, intra-regional migratory flows make up an important and complex revenue-generating system for the economies of the MERCOSUR countries, both for receiving and sending countries[23]. As a result, Latin American Heads of State have acknowledged the importance of such flows in their rhetoric as well as through political action. Their speeches have repeatedly focused on the need to channel the benefits of migration, drawing on a combined labour force, natural resources, and regional

18 In the context of intra-regional migration in the 1990s, it is possible to highlight the mobility of Colombians. 600 000 Colombians have been counted in the national census of other Latin American countries (90% in Venezuela). By that time, the Chilean and Paraguayan emigrades, with an estimated total of 280.000 people (more than three fourths counted in Argentina), shared the second place within the intra-regional emigrades population. Despite their absolute quantity, these figures represented - with the exception of Paraguay - less than 3% of the total population in their countries of origin. A special case is Uruguayan emigration - largely in the direction of Argentina - that by the early 1970s reached a similar intensity to the mortality in the country of origin (Fortuna and Niedworok, 1985).

19 Although information in the 1990s census suggests a stabilization in the absolute number of intra-regional migrants, some patterns indicate that in the previous years the partial substitution of traditional migration by new forms of mobility might be accentuated. Those new forms present reversibility features (partly because they include variable-tem displacements that sometimes do not involve the abandonment of the place of residence) that appear to reveal an extension of the life spaces of a big part of the population. This phenomenon coincides with a new model of the territorial structuration implied in the regional economies.

20 Note of the editor: Many Colombian migrants have Venezuela as destination country. Male migrants mostly end up in trade, construction, manufacturing or agricultural work. Female migrants have trading, tourism, manufacturing and domestic work as their main employments. More female than male migrants work in the Venezuelan trading sector, the opposite goes for the manufacturing sector (OECD, 2009).

21 In the 1970s, the respective emigrant populations were: Colombians (197,000), Chileans (160,000) and Paraguayans (253,000), For the 1990s the figures were: Colombians (596,000) Chileans (283,000) and Paraguayans (275,000) (Villa and Pizarro, 2001; Cerrutti 2009).

22 For updated census information, see https://unstats.un.org/unsd/demographic/sources/census/censusdates.htm.

23 For more details about remittances, see Canales, 2006a and 2006b.

capitals in order to tackle future economic challenges. Alfonsín (2000) mentioned in a speech:

> "The crisis of the State demands changes and alterations in the role of the State itself to achieve its essential goals. It is the time of the big regional spaces, where economic development depends less on an individual country and more and more on regional integration, avoiding, at the same time, the negative effects of financial speculation brought about by globalization".

At the UNASUR conference held in Buenos Aires on 5 April 2010, and with view to the bicentenary, the recently elected Chilean Head of State, Piñera, evaluated the integration process, concluding that 'we are still underdeveloped' but that

> …we should not get caught in this assessment but set ourselves goals: consolidate and legitimate democracy, defeat underdevelopment, overcome the poverty that still remains on a large scale, reduce inequality, in order to achieve a real integration of the continent, unified enough and in peace to set example to the World, to jointly face our dreams with concrete proposals and projects[24].

What these discourses imply is that migrations have been a central element in the development of South American countries. In that sense, it is logical that 'an exploration of the relationships between migration and development tendencies enables us to emphasize the potentialities associated with the efforts in favor of a scheme of open regionalism and integration within the broader limits of globalization' (Pizarro and Villa, 2001, p. 73). As we will see, the migratory policies of the Nation-States involved in the MERCOSUR project are in no way unrelated to this tendency.

7.3.2 Migrants as productive factors: a shift in free movement policies

There is no doubt that the 'free circulation of productive factors', as it was declared in the founding agreements of MERCOSUR, established a certain notion of free movement in the agenda of the integration process. The central aim of the agreement at the time was to incentivize intra-regional capital investment, facilitating the movement of the labour necessary for that purpose. In this way, it is possible to state that the regulation and direction of the historic Latin American flows of migrant workers was a key concern of the MERCOSUR countries.

24 Words spoken by the Chilean President Miguel Juan Sebastián Piñera Echenique in the UNASUR meeting, Cardales, Argentina, April 2010.

In the meetings of the Ministers of Domestic Affairs of MERCOSUR (RMIM), the main directions, strategies, attitudes, and public policies of the region are generated, discussed, and promoted. Despite the fact that many of the commitments formulated and assumed during these meetings face obstacles related to their incompatibility with the legislation and constitutions of each country, it is instructive to acknowledge the efforts of national delegations to promote legislative harmonization within MERCOSUR. For that purpose, the RMIM has been held periodically, since 1997, through Commissions and Sub-commissions within which Specialized Working Groups function, addressing various topics in the process. In accordance with the aims of this chapter, the work of the Commission of Migratory Affairs shall be observed. The available institutional memory of the Commission covers the ten years between 1998 and 2008. This memory shows both the aforementioned tensions and the rising importance of migration as a regional issue. It also allows us to understand how each country has been dealing with those migration issues in their own territories and how they managed to push their national policies onto the bloc's agenda.

For example, during the first three years of its creation (1997 to 1999), the Commission of Migratory Affairs was dominated by ideologies of control and national security, as the name of the Sub-commission indicates: Subcomisión de Seguimiento y Control, Grupo Delictual y Migratorio[25]. Among its main policies was the creation of an integrated information system related to the extra-MERCOSUR migrants and denied visa applicants at the Triple Border (between Brazil, Argentina and Paraguay). The delegations in those three countries pointed to the need to create a security plan for the border area and to digitalize the information shared between them. They also affirmed the need to conduct a census of the foreigners settled in the Triple Border area and establish magnetic cards as a document to cross from one country to another. During those years, border control was the main aim of the bloc and by 1999 the Argentinian delegation presented the project Transito Vecinal de Fronteras (TVF)[26] to deal with the circulation of the local border population.

In 2000 the Sub-commission was renamed the Specialized Group of Migratory Work. The agenda referred to the commitment to deepen the harmonization of migratory legislation, including the attainment of residence status and visas. However, in the meetings which followed between Argentina, Brazil and Chile, the contradictions with national migration legislation were evident. More positively, the TVF negotiations initiated in 1999 were finally confirmed by the MERCOSUR Ministers of Domestic Affairs. That same year, three important issues on the agenda materialized in regional agreements directly influencing the circulation of people in the bloc: the exemption of visa costs for stays of less than 90 days for MERCOSUR citizens; the instalment of privileged channels for their attention in airports (proposed by the Argentine delegation); and the exemption of the need to translate diplomas and

25 Editor's translation: Monitoring and Control Subcommittee: Migration and Offences Group.
26 Editor's translation: Neighbourhood Border Traffic.

other administrative documents for residence proceedings for virtually permanent migrants.

By 2001, another important proposal from the Argentine delegation was incorporated into the agenda: the establishment of MERCOSUR citizenship for citizens of the countries in the bloc. In addition, the delegations reaffirmed their commitment to work towards the harmonization of their migration legislation. For that purpose, they asked the International Organization for Migration (IOM) to do some research. They also created a strategic plan to combat human trafficking – a topic that would be kept in the agenda for many years – and produced a document that differentiated the economic migrant from the refugee[27]. Additionally, they created a project for the 'implementation of citizenship security measures' which was designed to improve the quality of life in the region. From 2001 therefore, the need to be acquainted with the migratory problems of the region, their causes, and consequences, had become evident. The Commission deepened its knowledge of migratory flows in the region, combining studies from Argentina and Chile and the contribution of the national census. Therefore, in 2002, it started a phase of further harmonization characterized by more effective proposals on integration. In this context, the Argentinian delegation played an important role as the main promoter of regional migratory studies[28] and projects directly promoting the free movement of people. An example of this are the important proposals concerning the differentiated treatment of MERCOSUR citizens in instances where they do not need to return to their home countries to arrange their migratory status in the country of residence. Another example could be to change the term 'amnesty' for 'regularization' as the latter has no time limit, something that could be observed in the Permanent Residence Agreement for the Nationals of the MERCOSUR.

By 2003, the transposition of regional agreements into national legislation appeared to be the main agenda topic. Again, Argentina was the first country to send to the National Congress such an agreement of residence, while other countries, such as Brazil and Chile, continued to consider the idea. Another activity, oriented towards the deepening of knowledge, was a project to exchange regional information about

27 Note of the editors: UNODC data on suspected trafficking cases and investigations in South America showed that cases of trafficking increased in Brazil, Bolivia and Peru but decreased in Venezuela between 2003 and 2007. In Argentina, Brazil, Chile and Paraguay, adult women made up the largest group of trafficking victims, while in Bolivia and Peru young girls were the main victims. However, in Venezuela, adult men made up a significant number of victims. Further, in Brazil, most victims of slave labour were men and in Argentina, increasing numbers of males are recorded as victims of trafficking. In many countries, such as Brazil and Paraguay but also Bolivia, Chile and Peru, the primary reason for trafficking was sexual exploitation. However, forced labour also constituted a major form of trafficking in Argentina and Colombia, and a significant amount of victims of trafficking for slave labour were also identified in Brazil and Bolivia. Remarkable is that when it comes to the gender of the offenders, women appear to be just as involved as men (UNODC, 2014).

28 Studies were also proposed in cooperation with the IOM about the return movement of foreigners, which involved the exchange of information between countries of the region. *The first of these studies was carried out by Argentina and Chile.*

how each country is dealing with their citizens abroad and also about their respective attitudes towards EU policies in this area. This could be conceived of as the third phase of the Commission. The bloc started to unify its position regarding the main migratory issues. This is evidenced by the restructuring of the Commission's work through the creation of the Permanent Forum of Migrations. In 2004 it was written in the Declaration of Principles about Migratory Policy in MERCOSUR, later signed by the Ministers and called the Declaration of Santiago, that it is a

> joint policy declaration that fixes a common position about migrations that aims to give a strong sign of integration, of respect for the human rights of migrants and of positive knowledge of their contribution to the past and present economic, social and cultural development (Memoria Institucional, n.d., p. 35).

That same year, another shift in the treatment of migration issues was evident during the discussion about the Naturalisation Agreements among the bloc countries' nationals and about the Agreements regarding the Re-Admission of Nationals of MERCOSUR. Also illustrative of this third phase is the elaboration of another declaration about the acquisition and acceptance of the double nationality for the regional population, which was signed as the Declaration of Brasilia. This was also the first of a series of bi-regional agreements between MERCOSUR and the European Union. The need for a joint position was acknowledged in the years that followed when the Group decided to have a common base in the International Conference on Migration. Another example of this shift is the formalization of the IOM as an official consultant organization of the bloc and also the implementation of the Patria Grande Programme by the Argentine delegation.

2005 was marked by various initiatives with the aim of ensuring effective harmonization. For that purpose, the Brazilian delegation proposed that a MERCOSUR passport be introduced. They also added to the agenda of regional studies about migration some new topics, including tourism, development and remittances. In 2007 Paraguay started the process of transposing the Residence Agreement of MERCOSUR while Chile embarked on a more advanced phase that initiated the regularization of the migratory status of MERCOSUR and other Latin American and Caribbean migrants. As another joint initiative, the bloc created the Latin American Programme of Technique Cooperation on Migrations (PLACMI). Finally, in 2008, alongside the deepening of the aforementioned transformations, it should be highlighted that the creation of the 'We are MERCOSUR' programme had the aim of 'approximating the citizen to the benefits that have been accomplished by the regional integration process' (Memoria Institucional, n.d., p. 60). The creation of a common MERCOSUR position at the Global Forum on Migration and Development in The Philippines in 2008 and the creation of the Seminar on Asylum, Refugees, Human Rights and Security are some relatively recent advances.

Having described the shift in the free movement policies in the region we should also highlight that the notion of *development* is underpinned by a number

of theoretical and practical assumptions. These assumptions are shared not only by states but also by various social actors (including organized migrants and international organizations) who used some of the development ideas to inform their strategies for political action. 'Development' therefore became a framework for the thoughts and actions currently valid in various areas of the social lives of those different actors. However, as a consequence of the criticisms made of the theories of dependency and unequal interaction, the development paradigm has been questioned since the 1970s. Eminent Latin American intellectuals have challenged the notion of 'development' and the term 'underdevelopment' and have developed theoretical understandings and forms of political action to channel the continental demands for a new world order, in opposition to the 'old colonialisms' dominant in previous centuries.

Changes introduced by globalization created an opportunity to question the cultural traits of beneficiary communities who used to be considered relatively isolated. It also moved the focus of attention onto the transnational cultures that go beyond national frontiers. Taking this into account, the socio-cultural analysis has focused on the issue of power to show that minorities are not listened to when they demand an improvement in their quality of life. Equally affected and benefited by the development-paradigm oriented policies, these social groups have taken a leading role. They have forcefully asserted the need for social participation as an essential part in the design, execution, and assessment of current public policies.

When these models of development were created, social sciences played an important role, making it possible to analyse 'the concrete reasons for the failure of developmental projects' and consider 'the ways in which the proposed targets could be attained.' (Monreal and Gimeno, 1999, p. 11) Stemming from this, a criticism was made of programmes' design and application by states and agencies on the grounds that they were mostly drawn up with a 'top down' approach (imposed on people) instead of 'from below' (centred on people). As a solution, the need to promote local participation was emphasized along with the need to incorporate the social knowledge of beneficiaries into plans[29]. 'Social participation' and 'human capital' are two concepts that have begun to appear regularly both in speeches and in practice.

Therefore, according to UNASUR's first Secretary General, Nestor Kirchner, the main aims of regional integration should be the 'recognition', 'respect', and 'inclusion' of the majority of people who have so far not been the prime beneficiaries of integration processes. Combined with the reconciliation of ideological and political disagreements among countries in the region, this inclusion is one of the aims supporting reflection

29 Since then, the anthropologists have become privileged interlocutors of the beneficiaries, playing the role of intermediaries with the *aid agencies* and the *state* (Gavazzo, 2004). In this sense, they have been trying to improve the 'cultural contact' occurred among the different actors involved in the projects. In spite of their good intentions, this anthropology has not questioned the development itself. Instead it has simply searched for an improvement of the methods with which it is being taking place. This is what could be called *anthropology of the colonial encounter*, first anthropology of development that was widely criticized, being currently abandoned because of some changes both of the development paradigm itself and of the social sciences as well.

on the migration issue. Accordingly, migrants also knew how to make the best of the favourable conditions, not only including the argument of development in their vindications but mobilizing and pressing governments to enclose their demands in the migratory agenda of the bloc as well.

7.3.3 From workers to citizens: migrants and the 'social question'

The current European and American trend of tightening immigration laws, particularly following the attacks of 11 September 2001 and the 2007/8 economic crisis, is absent in MERCOSUR. Regional agreements have promoted and supported migrant policies based on human and civil rights rather than on control and security issues. Additionally, the organization has created a political regional network against discrimination and xenophobia (Montero, Paikin y Damian, 2009; INADI, 2007) and has consolidated the institutional structure to implement it and to strengthen peace treaties between democratic governments. These directions have guided MERCOSUR towards a perspective of 'integration from below'. Using that same term, Nestor Kirchner proposed to initiate a campaign to improve the visibility of South American integration and highlight the benefits thereof for the every-day life of its citizens. In June 2010, during a meeting between the presidents of the UNASUR, the Union of South American Nations, and the Latin American Group of Ambassadors (GRULA)[30], Kirchner summarized: 'We talk about the UNASUR agenda and about the key issues. The Haiti issue was discussed in depth, in addition to the integration of the pension systems, university degrees and free movement of people'[31].

Over two decades after the signature of the MERCOSUR agreement, and in harmony with the changes in development models, discourses maintained that the issue of people's free movement in the region should be considered more in terms of the 'free movement of citizens' than the 'free circulation of productive factors'. This is a big step away from the previous terms in the original agreement, where the movement of people was determined by the needs, oscillations, and instabilities of the labour markets in the region. This shift, much more than semantic, has shifted focus towards the area of civil rights, and installed migratory flows, previously subordinate to the needs of the common market, as a major item on the MERCOSUR agenda.

There is no doubt that the 'free circulation of productive factors', one of the founding principles of the MERCOSUR bloc, aimed to encourage business investments within the region. This latter goal necessitated the easier movement of skilled workers. From this point of view, the treaty considered the migration in the area as related to production and work needs. In other words, migrants were not recognized other than as 'migrant workers'. In spite of its narrowness, it is important to underline that this

30 The GRULA plans a monthly dinner party in different Latin American embassies where having 'special guests' is a common habit. This latter one was held in the Colombian embassy in Buenos Aires and the special guest was Néstor Kirchner.

31 Encuentro de Embajadores Latinoamericanos (GRULA), Buenos Aires, 24 June 2010. For more information see http://www.pagina12.com.ar/diario/elpais/1-148275-2010-06-25.html.

was the first space in which migrants had their basic rights recognized in the bloc (Longhi, 2003; Ermida Uriarte, 2000).

Even if migrant populations were supported by social-occupational bilateral and regional agreements which respected the conventions and declarations of the International Labour Organization for the protection of the rights of migrant workers[32], the immigration laws of single member countries did not consider the idea of 'open borders' for the movement of people (as in the case of goods) despite recommendations by the agreements of the regional bloc. Indeed, as we saw in the previous part, national laws and immigration policies were, and in some respects still are, incompatible with the above rights. National laws are rigid and restrict the entry and stay of foreigners in some of the member countries (Santillo, 2001). As a consequence, one of the major problems for South America is still far from being resolved: the irregular situation faced by many immigrants affected by restrictive national policies. As Santillo highlights, the impossibility of reuniting with their families[33] and the fear of living with an illegal status confines migrants to ghettos and disrupts family relationships in their country of origin. This contributes to an increase in the exploitation and abuse of migrants' basic rights.

Fortunately, this harsh reality is changing in some national contexts. Argentina, one of the main host countries of South American migrants in the region, instituted in 2003 law No. 25 871, one of the most progressive immigration laws in the world. This was a big step forward from the previous law (called the Videla Law after the authoritarian head of state), which had been framed in the context of a dictatorship that restricted residency for migrants, particularly those from other Latin American countries. Law No. 25 871 is considered a model to be followed by other countries in the region. A result of 20 years of parliamentary debate between legislators and civil society organizations, the law recognizes migration as an inalienable human right and goes as far as to acknowledge the attribution of human rights to Latin American citizens over and above single country nationalities (Giustiniani, 2004). To achieve this, Law 25 871 establishes MERCOSUR citizenship as a criterion to allow the admission, stay and residence (temporary or permanent) of foreigners in the country. As such, MERCOSUR citizenship extends rights to non-Argentine MERCOSUR citizens (though not to extra-MERCOSUR migrants). Far from being only a legal status, MERCOSUR citizenship is transforming the perception of national identities (Gallinati, 2009). Finally, the practical possibility of establishing legal residence in the country in which they live, the feasibility of starting a business or trade, gaining access to national health services, education and pension systems are needed interventions

32 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990: www.un.org/documents/ga/res/45/a45r158.htm.

33 Note of the editors: Male migrant workers migrate alone far more often than female migrant workers. According to a study by the IOM (2009) on Brazilian migration, most migrant women have children living in the destination country and most migrant men have children living in the home country. This indicates that strong mother-child relationships, traditional families and traditional marriages are embedded in the case of Brazilian migration.

that a nation can implement in order to improve migrants' quality of life. This contributes towards the establishment of a regional social network as the foundation of a regional community.

Increasing attempts to define a 'MERCOSUR citizen' indicate an important change, both in legal and symbolic terms. Nonetheless, making this definition real and applicable to everyday life is a difficult task. Differences between national legislations and the weaknesses of institutional mechanisms that are (in theory) designed to protect human rights are obstacles that have yet to be overcome[34]. In addition, failures within national borders occur where workers' rights are not respected, whether they are migrants or not. It is also important to consider that many native workers, whether they can emigrate or not, are often ignored within their own countries and, as a consequence, go undocumented like their migrant counterparts.

In all cases, including the Argentine one, there are different contributing factors in the creation of a network supporting migrants' rights. These factors include the current ideological restructuration of South American regional integration, the definitive acceptance of human rights as priority guidelines within MERCOSUR, and the efforts to place migration issues together with the fight against poverty and inequality into the social agenda (Domenech, 2008).

7.3.4 The 'people' of MERCOSUR: democracy and social movements

Today, in the context of the fight for 'inclusion' – defined as access to basic rights as framed by the MERCOSUR agreements – South American civil society organizations in general, and migrants in particular, play an important role in monitoring the commitments and achievements of current and recent governments. In turn, these governments have tried to listen to social movements and civil society organizations and bring them to the discussion table. This is because 'civil society organizations face many of the migrants' problems every day: human rights violations, abuses, human trafficking, lack of legal and humanitarian assistance, work problems, border conflicts, deportation, etc.' (Santillo, 2001).

It is important to highlight that human rights organizations rise with greater force in times characterized by restrictive policies and controls and broadening of xenophobia in public and official speeches, especially when it involves migrants. In Argentina, this happened in the second half of the 1990s, in the context of the economic, social and political crisis. The urgency of ensuring basic rights (employment, educational, health, housing, etc.) for vulnerable members of society prompted the development of social organizations (OIM-CEMLA, 2004; Gavazzo, 2006). Migrant organizations grew in a favourable environment because of the coordination between different human rights organizations (as in Argentina and other countries of the region with military

34 See CEDLA / Comisión Chilena de Derechos Humanos / CEDAL / CELS (2000, pp. 114-218); (CELS) (1997, 1998, 2000, 2001, 2002, 2005); CERD (2004); Courtis et al. (2001, p. 61); Gavazzo (2010); Grimson (2006); INADI (2001, 2005, 2007); Kaliman and Rivero Sierra (2007); Margulis and Urresti (1999).

regimes), which were greatly committed to restoration of democracy (O'Donnell, 1999; Stepan, 1988).

Vital for restoring democracy is the recognition of rights and the construction of an institutional system and a set of policies that guarantees them – in national and local contexts – with the participation of society in all countries of MERCOSUR. These devices in turn draw the interest of civil society in political participation (Jelin, 2000, 2003). The rise of social movements in the region has been intrinsically linked to the ending of military dictatorships. Present-day South American presidents often mention those times; as did, for example, Cristina Kirchner during Argentina's recent bicentennial celebrations at the opening of the Gallery of Latin American Patriots in Buenos Aires in June 2010:

> In the Argentinean Republic, we have had democracy continuously for only 27 years. All Argentineans can express their ideas freely, and I would like to thank them for the happiness which they expressed and are expressing during the celebrations for the bicentenary of Argentina[35].

Presidential speeches have emphasized the importance of returning to democracy and welcomed the rise and consolidation of social movements in the shared history of Latin America. An example of this is the inaugural speech by Fernando Lugo in 2008, when he spoke about the importance of human rights claims in the name of the Paraguayan dictatorship victims, including 'many Paraguayan who live in political and economic exile in other places of our America or of Europe'[36]. The regional statistics, as discussed in previous sections, show a greater mobility of people up until the 1970s, which corresponds to the period of military dictatorships in most of the South American countries. 'Operation Condor', a strategy of 'integration' undertaken by the regimes of the Southern Cone and aimed at 'eliminating Marxist subversion' in the context of the Cold War, forced a significant part of these countries' societies to emigrate. This resulted in a large number of exiles secretly fighting in their host countries for the restoration of democracy in their home countries.

An interesting case is that of the Uruguayan President José 'Pepe' Mujica, who was a prominent figure in the struggle for the restoration of democracy in his country. Mujica, on the day he won the presidential election of 2009 in Uruguay, urged:

35 Speech given by President Cristina Fernandez de Kirchner during the opening of the Gallery of Latin American Patriots, Buenos Aires, Argentina, 25 May 2010. https://www.argentina.gob.ar/.

36 Speech given by Fernando Lugo when he was elected President of Paraguay in Asunción, on 15 August 2008.

> Do you know, 'pueblo'[37] ? You should be standing here on the stage and we should be down there clapping! Because it is you who have fought this battle, and who have kept it going, dear comrades (…). Tomorrow our homeland will still be here, and our commitments stand. An old fighter is telling you that he needs you. We need you!

Furthermore, Mujica exhorted:

> Now it's time that we stand by our promises and commit ourselves! All this is transient, you are a permanent, anonymous being, omnipotent, and there are those who believe that power is at the top, but we have realized that the power is in the heart of people. And I only want to say one thing: we're going to make mistakes but we won't be blind and turn our backs on the problems. We will be together in the most difficult times[38].

To measure the degree of social participation in macropolitical and economic processes in the regional blocs is not an easy task. One way to do this might be through the analysis of social movement participation across national borders. Among these cases, we could highlight the Movement of Landless Workers[39] (MST) from Brazil, which is affiliated with other Latin American organizations through the Peasant Path[40], the Madres de Plaza de Mayo from Argentina, which is linked internationally with other human rights organizations, and many indigenous peoples on the continent. As we have been trying to show through the discourses of the presidents, social movements are repeatedly invited to participate in the integration process, to sustain the democratic principles that justify the bloc to its popular base, and to get involved in crucial moments in the history of the continent. The Venezuelan then-Chancellor Nicolás Maduro pointed this out when he referred to the Colombian situation in 2010 during a meeting between the delegation of the Social Summit of MERCOSUR and civil society in San Juan, Argentina:

> For the consolidation of peace, which is in the declarations and treaties of the UNASUR and MERCOSUR, it is important that the social movements, articulated and activated, assume this issue of peace in a special way, and we dare to put it in this scenario, the topic of peace in Colombia as a historical need of all South America[41].

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37 'Pueblo' as a reference to the masses or 'the people', meaning society in general, is a very common South American way to appeal to the popular adhesion.

38 Discurso de Asunción presidente Uruguayo José (pepe) Mujica Cordano, 29 de noviembre de 2009.

39 *Movimento dos Trabalhadores sem Terra*.

40 *Vía Campesina*

41 For more information, see http://www.avn.info.ve/node/8734?guicktabs_5=11

Besides peace and democracy, the issue of work has also constituted one of the main axes of regional integration, and is likewise promoted by the social movements and the labour unions of the continent. In this context, under the slogan 'strengthening integration with redistribution of wealth with more rights and employment', the IX Labour Union Summit was held in December 2009 in Montevideo, Uruguay. During the meeting, organized by the Coordinator of Labour Union Centrals of the Southern Cone[42] (CCSC), union leaders and workers resolved to move towards Latin American unity, agreeing on an agenda and a working plan for 2010 that included the promotion of 'agreements between countries for the recognition of the rights to social security for migrant workers'[43]. According to the CCSC, 'it is fundamental to deepen the regional integration processes such as MERCOSUR and UNASUR, and everyone who materializes the unity of action and construction of our people in the way to concretize the Patria Grande' (ibid.). From Argentina, Fito Aguirre, International Relations Secretary of the Central of Argentine Workers (CTA) reinforced the idea: 'we do know the importance of integration, the advances that have been made in our different countries, such as Bolivia, which is the most paradigmatic and that we all wish we could emulate as a plurinational state'[44].

Finally, we could mention the Global Social Forum (FSM) as another space for mobilization and the manifestation of regional citizenship that, although not restricted to regional discussions and actions, is similarly critical of the neoliberal economic model and committed to the general defence of human rights. In its Letter of Principles, the FSM established:

> it (the Forum) is an open meeting place for reflective thinking, democratic debate of ideas, formulation of proposals, free exchange of experiences and interlinking for effective action, by groups and movements of civil society that are opposed to neoliberalism and to domination of the world by capital and any form of imperialism; (it is) a space for organizations involved in the construction of a global society working towards a fruitful relationship between human beings and between them and the earth.'[45]

Because of these principles and of its geographical localization on the continent, those meetings – held from 2001 onwards – functioned as channels for the articulation of the views of different social movements at a regional level.

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42 Coordinadora de Centrales Sindicales del Cono Sur. The CCSC coordinates the major labour organizations of Argentina, Brazil, Chile, Paraguay and Uruguay.

43 For more information, see https://www.coordinadoraconosur.org/

44 Information material from the Agrupación German Abdala. These Group is composed of a set of militant, activists, delegades and Readers from the labour unions, and by social, territorial, and cultural organizations that integrate the Confederation of Argentine Workers or Central de Trabajadores de la Argentina (CTA). For more information see: http://resistenciagermanabdala.org/.

45 To see the full Letter of Principles consult: http://www.forumsocialmundial.org.br/index.php.

Aware of their role, leaders and immigrant organizations have exercised constant pressure to force their claims onto the presidents' political agenda (Jelin, 2001; Korzeniewicz and Smith, 2004). It is interesting to see how this relationship between 'control and responsibility' involving organizations and governments is projected and extended to all members of nations and the region when they recognize themselves as a 'pueblo'. The emotional opening speech of the Bolivian president Evo Morales in January 2006 is the most telling example:

> This victory is the result of the support of all of you. I want to make a serious and responsible commitment, not for Evo Morales, but for all the Bolivians, for all the Latin Americans. We need the people's strength in order to bend the Empire's hand ... I will continuously correct myself, I can be wrong sometimes, you can be wrong, however we will never betray the fight of the Bolivian people and the liberation fight of all Latin American people[46].

In summary, the restoration of democracy involves the re-politicization of civil society which until relatively recently was targeted by repressive systems across the region. The vote given to recent and present governments in South America was overwhelmingly massive. It is no coincidence that many members of these governments have a history of activism during the decade of political exiles. Equality before the law, the basic principle of any democratic government, is proclaimed by the governments of the region as an ideal and an achievement that must be defended and preserved. As Fernando Lugo said when he was elected president of Paraguay: equality must be sought 'to recover the vision of a shared destiny, because we want everyone, everyone without exception, to grow'[47]. Social justice and redistribution of wealth are the solutions to resolve the historic inequality that exists within the countries of the region. 'We are changing history'. And this 'we' includes not only governors and high-level functionaries of the State, but also those who migrated and continue to migrate in the region.

In any case, these arguments – and current practices such as policies and agreements – legitimate the inalienable and basic rights of citizens of the region. This allows social movements to build a locally and internationally active network which encourages social and political participation of immigrants in both countries of origin and destination. We believe that such practice is playing a key role in the debate about freedom of movement within the framework of regional integration in South America. It is a central factor in development policies and strategies as well as, from the past two decades on, a human right as stated in the 1948 UN Declaration on Human Rights.

46 Speech given by Evo Morales when he assumed the Presidency, La Paz, Bolivia, 21 January 2006.

47 Speech given by Fernando Lugo, when he assumed the Presidency, Asunción, Paraguay, 15 August 2008.

7.4 Integration as an idea: equality or diversity?

7.4.1 Integration as moral harmony: the 'hermandad latinoamericana'[48]

Academically speaking, it is important to underline that the notion of 'integration' is both a theoretical concept and a social category and, as such, it is defined in many ways. Therefore, the complexity of the concept of 'integration' is due partially to the agents' influence (both governments and social movements) and partially to researchers 'facing any social situation where an otherness rises, any different group is as *lively* as any *other*' (Grimson, 2002, p. 202). Countries and nations become 'integrated', a process that can involve societies, communities, movements, peoples and governments. In this way, the notion of 'integration' – as any idea – has different meanings. Grimson (2002) raises two of them: *totalidad* (wholeness), which assumes interdependence with parts of a culture, and *preservation* (conservation), which assumes dialogue with foreigner influences, where 'integration' means 'absence of conflict'. National societies, for instance, since their creation aspire to be 'integrated societies', formed by their single parts, their groups, in harmony as a whole.

In reference to migrant groups, 'integration' describes a social policy which must be applied to reality, while *integrated* is a foreign group which settles without being detrimental to native populations (ibid., p. 209). This has been one of the concerns of the Latin American ruling elite, especially in the South American countries. The 'disintegration' of Latin American migrants in many target and host countries of the region is 'functional' because, by keeping them illegal, they become cheap labourers, as well as 'scapegoats'.

Despite this, the necessity to correlate 'governments' integration' and 'people's integration' has been considered a priority. The broadening of the two ideas of integration (the social-anthropological process which involves people and societies, and the international process undertaken via treaties between sovereign states), has meant that integration policies for cultural minorities are complementary to the activities undertaken by different social movements[49]. On the one hand, national policies towards immigrants aim to strengthen the cohesion between the different agents who form national societies and to integrate them in this sense. On the other hand, the actions of social movements and migrant associations focus on strengthening the ties between migrants from the same country, on the unification of the community within and outside the country of origin, which represents another meaning of integration.

This is demonstrated in the speech of President Cristina Fernandez during the celebrations of the Argentine bicentenary on 25 May 2010:

48 Latin American brotherhood.

49 Between the latter ones, Grimson (2002) underlines that there are attempts to change the meaning of 'integration' to separate it from 'assimilation' and combine it with 'cultural differences'.

> Since Friday, millions of people have been in the streets altogether, celebrating, laughing, sharing (…) Despite all our differences, our shapes, our identities, we know that we share the same path, the same followed by San Martín, Bolívar, O´Higgins, Artigas, José Martí, and the same that the indigenous people bravely chose[50].

In these speeches, the initial claims made in times of independence are re-interpreted to support the contemporary integration process. Continental liberation struggles from the nineteenth and twentieth centuries find their aims echoed in the renewed unification of the region. From this point of view, discourses are a means of interpreting the region's economic, political, and cultural challenges: as a way to overcome the international financial crisis and to achieve greater economic autonomy; as a guarantee of unstable democratic governments and their weak institutional structures; and as symbolic support for the building of agreements to establish new borders and divisions between 'us' and 'them', between Latin Americans and the 'other' outside the bloc. In other words, MERCOSUR suggests an interpretation of the Latin American that is highly emotional and linked with what is perceived as 'our own history'. The inaugural speech by newly-elected Bolivian president Evo Morales in 2006 is a clear example of these ideas:

> The triumph on 18 December is not my personal triumph: it is the triumph of all the Bolivians. It is the triumph of the democracy. It is the triumph of a revolution. All the American people, social movements, want to continue in pushing for the liberation of our Bolivia and our America. This fight was passed on to us by Túpac Katari, sisters and brothers, and we will persist until we make this land our land. This fight was passed on to us by Che Guevara and we are going to finish it, sisters and brothers[51].

The purpose of creating a united regional identity on a shared basis 'must' overcome national differences. Fernando Lugo, during a UNASUR meeting in Buenos Aires on 4 May 2010, said:

> We have the historical obligation to build the South of this Continent in solidarity. South America was founded as a union, however we have been separated. We do not have to be together only from the financial point of view, but also, as governments and people we must connect each other in solidarity. UNASUR must be a symbol of unification[52].

50 Speech given by Argentine President Cristina Fernandez de Kirchner during the opening of the Gallery of Latin American Patriots, Buenos Aires, Argentina, 25 May 2010.

51 Speech given by Evo Morales when he assumed the Presidency, La Paz, Bolivia, 21 January 2006.

52 UNASUR meeting, Buenos Aires, Argentina, 4 May 2010.

Thus, if we take Durkheim's conceptualization, there is an idea of integration which 'refers more to exchanges and social bounds than to a single collective consciousness' (Grimson, 2002, p. 205). In this case, *integration* derives from individuals being less selfish and more interested in the social sphere. From this perspective, its opposite is *individualism*. According to Durkheim, this is an obvious consequence because *the social* is linked with *the moral*, and as a result, social cohesion has frequently been characterized by this collective feature. Therefore, integration always has a moral aspect which can also be ideological. Applied to political interventions aimed at minorities, its opposite is segregation, which becomes a problem to be addressed by governments in multi-ethnic societies.

Consequently, policies of 'integration' are implemented when a 'lack of integration' is acknowledged. To address this problem, it is necessary that governments both represent their nations and guarantee basic rights. This is what the presidents of the region have named the 'historical obligation' of their governments towards the 'American people'. At the UNASUR meeting during which Nestor Kirchner was elected General Secretary, the Ecuadorian president Rafael Correa stated that 'We are now re-writing our history, gaining the unity of the 'patria grande' as our liberators wished', stressing that 'our and future generations will demand it because Latin America doesn't have time to waste'. Meanwhile Kirchner swore 'in the name of the Latin American unification'[53].

During the 2006 MERCOSUR summit, cultural and social meetings were held in parallel to the presidential meetings; public attendance was allowed as part of an effort to promote different spaces of integration for a wide range of social forces. In addition to these meetings, electoral campaigns, the introduction of regional projects (such as the MERCOSUR Parliament and UNASUR)[54], the opening of regional infrastructural projects, and the development of bilateral agreements have been important steps towards establishing the dreamt-of Latin American union.

7.4.2 Integration with changes and conflict: nation vs. region

The need to reinforce institutionalisation was always at the core of the bloc's agenda, and may therefore be considered a fundamental element of regional integration (Gallinati, 2009). In October 2010 Marco Aurélio Garcia, the Brazilian president's top adviser for foreign affairs, enumerated five unresolved issues for MERCOSUR, one of which is the intensification of political integration based on the promotion of supranational

53 UNASUR meeting, Buenos Aires, Argentina, 4 May 2010.

54 The PARLASUR was founded in 2004 during the 27th Heads of State and Government Summit of the MERCOSUR. However, the Parliament assembled for the first time in May 2007. PARLASUR originally consisted of eighteen representatives of the Regional Congress. Each of the five member countries was represented. The second step towards the establishment of the PARLASUR is planned to take place in 2010. All the members of the Parliament will be chosen in each country of the bloc through both secret and direct elections. In keeping with the aims of other pacts, associations and intra-regional treaties, one of the goals targeted by the PARLASUR is to frame integration within legislation. The Union of South American Nations, UNASUR, was founded in May 2008.

institutionalization: 'I think that we have a low level of institutionalization. If we see the political structure of the MERCOSUR, with its Montevidean base, we conclude that it is ridiculous. Not because it is bad, but because it is small'[55]. According to this high-level Brazilian civil servant, the countries of the region present resistance to supranational institutions because accepting them implies renouncing a part of their sovereignty. Nevertheless, Garcia argues that it is less problematic to implement this in Latin American than in Europe because 'the South American nationalism was always oriented towards integration. Peronism and Chavism, among others, are clear examples of Latin American nationalisms that defended the idea of the Patria Grande'[56]. In this sense, we can observe two different logics that, although not incompatible according to the perspective described, are in constant tension: the integrationist regional project and the respective national projects[57].

This is also important for the academic discussion on 'integration' as a concept and as a meaningful term. In contrast with the idea of 'wholeness' in 'balance' and 'harmony' expressed in Durkheim's ideas, Gino Germani defined the notion of integration as strongly intertwined with conflicts and changes. He put the state at the centre of the study of society which should be understood through the examination of its 'partial structures'. Immigrant groups make up one of these partialities. According to this author, such groups (or 'partial structures') build relationships between them. Sometimes they are more 'integrated' with the wholeness, other times they are completely 'un-integrated'. As a consequence, there are different degrees of integration which can be measured or at least acknowledged.

Applying this theory to the migrant flows, integration, unlike assimilation which involves a progressive adjustment of one group to another one, allows for a 'cultural melting' or 'hybridization' resulting in the rise of a third integrated system[58]. The changing processes usually result in 'acceptance', 'adaptation', or 'reaction' by the involved groups. Therefore, integration seems to refer to the 'preservation of some level of autonomy and organization of the group more affected by the cultural change' (Grimson, 2002, p. 206). A relevant example can be found in the speech that the

55 The other unresolved issues are: physical integration (railways, tunnels and other transportation channels in the region), energetic, productive (agriculture and industrial) and financial (especially through the creation of the Banco del Sur - Southern Bank - and the realization of the regional exchanges of local money).

56 Because of the high relevance of the topic, the bloc proposed a reform called 'The new institutional phase'. It consists of the 'restructuration of the decision-making organisms of the MERCOSUR and its subordinated forums; the improvement of the solution system for the incorporation and application of the bloc's legislation; establishment of the MERCOSUR Budget that incorporates the funding requirements for the recently created Secretary of the bloc with its Permanent Tribunal of Revision. For more details, see www.mercosur.org.uy.

57 This tension could also be observed if we analyse the aforementioned institutional memory of the RMIM.

58 Various studies on migrants establish that 'integration had also a predominant and inevitable role in the processes of intercultural contact distinguished by an evident asymmetry of power and a relation of domination' (Grimson, 2002, p. 214).

Venezuelan president Hugo Chávez held during the signing of an agreement between Venezuela and Cuba in 2007:

> The future of our countries is the union! When are we going to emerge from hibernation? For how long are we going to be divided and subjected to powerful exploitation? If the cooperation of our people has been successful, why should not the union of our nations be fruitful as well? Only through that union we can be free!'[59]

Thus, the idea of integration becomes central in analysing the changes that are related both to migration and to global development. From this point of view, the rise of cultural contacts can be both creative and destructive; and in both cases a loss of cultural autonomy emerges whereby the whole socio-cultural system may seem to be crumbling or disintegrating. For example, Cristina Fernandez in her Bicentennial speech said that: 'because of the ways of nature, because of the idea of always pretending to be like Europeans instead of just being ourselves: Americans, Latin Americans'. She also talked about colonialism and nationalism: 'If we were to be observed, that person would see many different people from different backgrounds but he would see a single dream: more freedom, more equality, a fairer distribution of wealth, more education, more health for all the people and the whole of society'[60].

There have been attempts to overcome this condition of inequality and integrate those who feel un-integrated through the recognition of an idea of citizenship which – without overlooking differences – allows equality to be recognized. According to Castles and Miller, there are four ideal types of citizenship, one of which is the multicultural model that defines the nation in terms of laws but accepts cultural differences and the formation of ethnic communities. This is the favourite of current governments in South America, which appear to welcome national differences. A celebration of national belonging in the current process of regional integration within the MERCOSUR bloc seems to prevail in a multicultural tendency in both international pacts and public policies at a national level. For example, during the UNASUR summit in Buenos Aires, held on 5 April 2010, the newly elected president of Chile, Piñera, said: 'this continent is blessed by God, with homogeneous working people, a great and fruitful land … There are differences, long live the differences. However, we will overcome the differences and will achieve that which is asked by people'[61].

From this point of view, conflicts over the trajectories of the various integration processes must be analysed in the context of the global system as it is nowadays, divided into nation states with geographical borders and specific criteria for inclusion and exclusion. As Jelin (2006, p. 51) points out, despite attempts to unify the region,

59 Speech by Hugo Chávez Frías during the signature of the agreements between Venezuela and Cuba in Caracas, Venezuela on 24 January 2007.

60 Speech by Argentine President Cristina Fernandez during the opening of the Gallery of Latin American Patriots, Buenos Aires, Argentina, 25 May 2010.

61 Reunión de la UNASUR, Buenos Aires, Argentina, 04 de mayo de 2010.

'Nationality is an important aspect to define belonging' since it 'also denotes (even if it does not define) the access to citizenship rights'. Because of this, international migration highlights the contradictions of citizenship as a means of inclusion/exclusion. There are societies that are open to absorb and assimilate foreigners, while others built strong structures and systems to create classes and to marginalize parts of them. According to Jelin, changes in the community or society where we live lead to questioning the idea of belonging[62].

From one point of view, nationalisms based on the idea of 'people' or 'pueblo' as discussed in the previous paragraphs, which is supported both by South American presidents and by the social movements who voted for them, counters the ideal of 'Latin American unity' promoted by MERCOSUR leaders. People are different, but equal. This implies the inclusion of the citizens of these countries as agents, accepting that there are both cultural differences and social inequalities within single groups and between nations. This all happens in a world characterized by power struggles and change and transformation. As a consequence, in the speech of 14 December 2005 by the former Argentine president Néstor Kirchner, during the presentation of the National Plan for the Regularization of Migrants known as 'Greater Fatherland', it is possible to observe that regional unity is not disassociated from the affirmation of 'the national':

> Therefore, equal responsibilities, equal rights, equal possibilities and a 'patria grande' which – at the early stages – welcome everyone who comes from the MERCOSUR countries, but also from all the world. Argentina is a land of good will, but we want those who come to be willing to join us in working to build our homeland and to build this region, which we want to have a joint direction and common aims[63].

National imagined communities have survived the process of regional integration based on Latin American brotherhood and continue to define feelings of belonging as basic rights and guarantees. For this reason, if we consider Grimson's approach, 'ideological or political homogeneity in a nation is highly unlikely, but in a given country there can be discerned limits to what is possible, a logic linking the parts of a whole, a common social language, and certain specific "shared" cultural elements'. And last but not least, given that the sedimentation process is ongoing, as Grimson says, the above factors are historical by definition[64]. National identification then could be seen as 'the outcome of historical-political processes, and consequently contingent',

62 'La pertenencia a un colectivo implica compartir ciertos patrones culturales y sentidos de lealtad; también derechos y responsabilidades' (Jelin, 2006, p. 50).

63 Speech given by Néstor Kirchner during the act of presentation of the National Plan of Migratory Normalisation, Buenos Aires, Argentina, 14 December 2005.

64 This distinguishes the experientialist conceptualization from that of the essentialists, who believe that a nation prevails over internal divisions, and from that of certain constructivists who use the idea of the fictional character of a nation, like all false consciousness, to mask conflict.

while simultaneously 'indicating sedimentation as the means for configuring relevant cultural and political mechanisms'.

These cultural differences, historical and changing, may be observed in a comparison between Brazil and Argentina. Using this example, Grimson (2007) highlights how national differences are relevant to understanding the MERCOSUR and UNASUR project and its difficulties, not only derived from its specific geopolitics, but also from sedimented ways of perception, meanings and social imagination:

> Cultural configurations' are not obstacles to integration project. Nevertheless, they claim to be understood in its historicity to be effective in the policy making of the regional block. Political discourses on Latin American brotherhood naturalize MERCOSUR and do not help to comprehend contemporary challenges.

7.5 Conclusion

When approaching the issue of the free movement of people within MERCOSUR, we are faced with a complex network of practices, laws, speeches and theoretical works about this subject. Studying the material gathered and the different points of view helps us to understand the main dilemmas in this area: how is this material being deployed in the discussion about the free movement of people within the bloc and which practices – discourses, policies, agreements and social actions – are taking place? As we have tried to demonstrate, the answer is not simple.

Firstly, it is a phenomenon of legal and ideological fields generated by the political, economic and cultural sphere that currently drives the South American integration project – a project based on sovereignty and independence. In this context, MERCOSUR has played an important role in facilitating meetings and dialogues among member countries, as well as making laws out of these ideas of unity and common needs. As we have seen, on the one hand, the regulation of population movement is part of new regional guidelines. It is only in this favourable context that migrants can aspire to the recognition of mobility as a right. On the other hand, despite the regional promotion of the 'Latin American brotherhood', the difficulties faced by changing social practices in the short and/or medium-term are many, including racism, discrimination, and xenophobia towards certain migratory flows that have been classified as 'undesirable' until a few decades ago, as in of the case of Argentina analysed in this chapter.

Secondly, the shift in recent and current discourses and practices is linked to changes in development models; 'modernity' and 'globalization' through which governments and societies express themselves and build their strategies are consistent or inconsistent between them[65]. Currently, those discourses and practices described for

65 Which in turn are connected to the ideas, perspectives and parameters of International agencies (Domenech, 2008; Annual report UNFPA 2008 and 2009).

the MERCOSUR region in this chapter show a tendency to approximate expectations of both the governments and the populations involved. This has been possible largely because of the recognition of common experiences that the countries in the bloc face, such as the long-standing 'north-south' confrontation and the oscillations between democratic and dictatorial regimes that long shook the region. In this context, the terms 'historic debt' and 'Latin American brotherhood' have acquired significance and contributed to narratives about a 'common destiny'. Shared fate and continental union make up the narrative that calls for the 'Latin American people' to assume ownership of the process of integration and its future.

Theoretical concepts and strategic models of inclusion/exclusion are based on multi-ethnicity, diversity, homogeneity, incorporation and assimilation, and are used by both nation-states and migrants' organizations. Such theoretical concepts and strategic models redefine patterns of regional and national citizenships. In this new and unstable universe of possibilities, MERCOSUR represents both political and economic uniformity and cultural diversity. Nevertheless, following the economic crisis, some Latin American analysts such as Emir Sader warn about the lack of common objectives beyond all the rhetoric[66].

The relaunch in 2010 of free trade negotiations between the European Union (EU) and MERCOSUR could impact the labour and human rights of populations as well as migration in the subcontinent[67]. The region-wide pivot leftwards of South American governments may also affect these rights, and could equally prompt a shift in the modes of dialogue and negotiation in the construction of a common area. In this sense, the reconfiguration of the memberships of regional organizations – themselves key to the process of 'legalisation' of migration flows – could profoundly affect the trends reported here. Any analysis of these contexts would exceed the scope of this chapter but should be considered as important emerging elements in the redefinition of the ideologies underpinning the ongoing regional integration process, and also concerning the legitimized ways of negotiating between government loyalties and their respective citizens.

Finally, we point out that the meanings assigned to the notion of 'integration' must be observed at the beginning of the process of building a bloc of countries

66 Emir Sader, CLACSO CEO, made the following statement: South America reacted to the crisis in a diversified way, rather than proposing cohesion. (...) South America not yet ready to offer collective solutions. (...) The line should be between those in favour of free trade and those who are in favour of regional integration. The UNASUR, for instance, includes some countries that are for free trade, hence cannot be integrated economically since they are in other political line. Chile has 70%of its exports to the United States overturned. Retrieved 5 April 2009 from http://www.pagina12.com.ar/diario/economia/2-124302-2009-05-04.html.
Even that has not been possible to develop the participation of Latin American intellectuals in the integration processes (be they part of a broader trade agreement) is a subject of vast and interesting literature together. For further information, see Bergel, 2008.

67 Note of the editors: Negotiations between the EU and Mercosur began in 2000 but fell apart in 2004. Relaunched in 2010, the negotiations have recently shown signs of progress thanks to pressure from Brazil. See Meacham (2014).

which has a common history but diverse paths in terms of growth and development. The notion of 'integration' is charged with diverse meanings and as such must be understood as a dialogue between theoretical concepts and the categories of actors involved in the processes being considered. In this sense, the actions of heads of states should be observed in conjunction with the responses of different social subjects, be they migrants, intellectuals, or social movements, in the continuing bid for a shared definition, narrative, and acquisition of benefits for the 'people'. Indeed, regulating free movement within MERCOSUR represents an effort to stabilize the regional order, something which requires delicate balancing in a world order that is ever more unstable. However, if the recognition of the right to free mobility means restoring the voice of the people through the construction of discursive alternatives, then this creates the possibility of inclusion 'from below' in the regional integration process, and, in time, in conceptual academic reflection too.

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8

Regional migratory policies within the Andean Community of Nations: crisis vs. reinforcement of freedom of movement within the region

Mercedes Eguiguren[1]

8.1 Introduction

At the present time migratory movements all around the globe involve millions of people. In October 2013 it was estimated that around the world there were 231.5 million persons living outside of their country of origin, a number which equates to 3.2 per cent of the global population[2].

Regarding Latin America and the Caribbean, estimates reveal that around the world there were almost 26 million émigrés from the region in 2013, a figure which represents 11% of the global migrant population. Half of them were female. The main destination for the majority of these migrants is one of the world's most developed countries – the United States – in line with the global trend of South-to-North migration, itself a function of the unequal power relations and wealth distribution in the world today (Castles and Miller, 2003; Portes and DeWind, 2004; Martínez, 2008; Massal, 2009).

The Andean region follows this trend with over 3 million migrants for the year 2000, of which the majority were residing in Europe[3] and the US: in the year 2000 there were 1,246,993 migrants from the Andean region registered in the US, and 296,299

1 Researcher, FLACSO (Ecuador).

2 World Migration in Figures: A joint contribution by UN-DESA and the OECD to the United Nations High-Level Dialogue on Migration and Development, 3-4 October 2013, http://www.un.org/esa/population/migration/documents/World_Migration_Figures_UNDESA_OECD.pdf

3 Note of the editors: A study by Mcllwaine (2008) on Latin American migrants in London shows that some significant changes have occurred in the lives of both men and women and that power relations have shifted in favour of women. However, these improvements in female migrants' lives were already in motion before they migrated to the UK. Daily gender practices, especially the gender divisions of domestic labour, had changed significantly. Both male and female migrants worked as cleaners and in the catering business, which are usually considered as feminized jobs. This had important implications for gender relations. Women were able to get jobs more easily and earned the same as men. Coming from countries where they were accustomed to earning less than men, this was both a revelation as a source of pride for migrant women. However, gender ideologies such as machismo, having the male as breadwinner and as household representative (Kang, 2010), were not as easily changed.

migrants from the region registered in the Official Census (Spanish Civil Registry), a number which had increased to 1,319,448 people in the same registry by 2008 (Ramírez, 2008)[4].

This does not mean, however, that interregional fluxes are irrelevant in the migration map. Within the region Argentina, Venezuela, Brazil and Chile are important destinations for the Andean population (Ramírez, 2008; Martínez, 2008), to which we can add Ecuador, a country which during the last fifteen years has received bigger numbers of transborder immigration from Colombia and Peru (FLACSO-UNFPA, 2008; Coalición por las Migraciones y el Refugio, 2008) (See Annex 8.2). In the South American region, these trends correspond mostly to labour reasons, but it is important to point out that the immigrant population also comprises thousands of people in need of international protection, most of them coming from Colombia (Ortega, 2010).

Facing this situation, it is relevant to ask ourselves which are the most important political and institutional mechanisms in place to deal with these trends on a regional level. The answer to this question points most obviously to national governments and the actions that are being carried out in order to preserve rights and even advantages for their own emigrant citizens. Nevertheless, the answer also points to the Andean Community of Nations (CAN), as a regional integration organization that encompasses Bolivia, Colombia, Ecuador and Peru.

This chapter argues that these two levels of political decision-making – national and regional – are under a situation of pressure. On the one hand, the two levels share the same point of view on dealing with migration. On the other hand, there are difficulties developing a common normative approach to migration given the different priorities regarding migration policy at the regional and national levels, and internal and bilateral political dynamics that are hindering the deepening of Andean regional integration. We should therefore ask ourselves about the role of the CAN on the subject of regional free movement governance, its possibilities and its limitations, taking into account both national and regional views of integration, migration, and the general situation in the Andean subregion.

4 The numbers of both destination countries include Venezuela inside the calculations for the Andean region.

8.2 The CAN: a brief historical review and present context

The CAN has its origins in 1969, when the agreement on regional integration was signed[5]. This agreement is widely known as Andean Pact, Andean Group or the Cartagena Agreement between Bolivia, Chile, Colombia, Ecuador and Peru. During the 1970s, Venezuela became part of the Andean Group (1973) and Chile left it (1976)[6]. In 1997, the organization adopted the name of the Andean Community and in 2006 it was reduced to four Member States when Venezuela formally withdrew from the organization. Today, there are still four Member States, not including the following associated states: Argentina, Brazil, Chile, Paraguay and Uruguay.

Since 1997, the institutional structure of the CAN has been consolidated[7]. The institutional set-up of the Andean Community is articulated in the Andean Integration System (AIS). The internal CAN decision-making process is in the hands of the Andean Council of Ministers of Foreign Affairs, although the rest of the AIS institutions have a certain degree of participation and intervention in the Council's activities. The CAN's foreign policy is articulated through two instruments: decisions and declarations. The former are legally binding for the Member States. The AIS is ruled through Andean Community law[8] (CAN, n.d.).

During its 45 years of existence, the Andean Community has expanded its range of action and domains of activity considerably. It has gone from being focused on commercial issues to taking action on environmental issues, ethnic diversity and regional migration. In this respect, we can see the CAN's lifetime as involving the progressive creation of regional integration mechanisms. Nevertheless, during the last few years we have witnessed the weakening of this model of regional integration. In effect, there are various signs of this crisis which are becoming more evident by events such as the withdrawal of Venezuela as a Member State in 2006, the diplomatic confrontations of the latter with Colombia, and between Colombia and Ecuador

5 Note of the editors: More recently, the Andean Community made an agreement towards working on gender equality. CAN is aware of the fact that living in societies where women make up more than half of the society but are not treated equally as their male counterparts, creates disadvantages for human development. Where women suffer from exclusion and discrimination, there cannot be an equitable society. Therefore, CAN has adopted equal opportunity plans to promote the incorporation of a gender-based approach in their participatory budgets. Therefore, the Andean Advisory Council of High-Level Authorities on Women and Equal Opportunity (CAAAMI) was created in August 2009. The Council is made up of representatives from each Andean Community Member Country, who are responsible for promoting public policy on gender equality, equal opportunity and women's rights. Their aim is to support the regional integration of human rights and gender. They want to further equal opportunities for men and women, eliminate gender-based violence and build a more equitable society. The strengthening of women's participation in the Andean integration process is one of their main points (CAN, 2012).

6 This separation was due to a conflict between Decision 24 from the Andean Pact that tried to limit foreign investment and the open economic policy that was taking over Chile in those years. For a more detailed explanation see Godoy and González (2009).

7 This structure is created with the Trujillo Protocol, in force since 1997.

8 For more information on CAN, see www.comunidadandina.org.

between 2008 and 2010, and the divergence of positions of national governments regarding economic policy and security policy that has polarized the region, pitting Peru and Colombia on the one side against Ecuador with Bolivia on the other. In this regard Godoy and González (2009, p. 352) point out the following:

> These and other problems among members of the Andean Community like the signature of treaties on free trade with the USA or very diverse positions towards institutions like the International Monetary Fund have produced differences besides Venezuela's withdrawal from the CAN in 2006, threatening the survival of institutions for regional integration. Nowadays, Ecuador also threatens a withdrawal from the CAN. This is a critical moment[9].

These episodes of crisis, according to certain authors, have been present throughout CAN's history (ibid.); together with the general state of decay of the regional integration initiatives in the Americas, such as OAS or MERCOSUR (Bonilla and Long, 2010), they have contributed to the questioning of the effectiveness of the Andean Community. At the same time, we have witnessed the emergence of alternative regional organizations such as the Bolivarian Alliance for the Americas (ALBA) in 2004 and the Union of South American Nations (UNASUR) in 2008[10]. This evidence seems to prove how weak the CAN is as a regional organization in the current context, despite its numerous efforts, particularly in the last decade, to deepen the process of Andean integration. This is the dilemma faced by the CAN and which consequently affects regional migration policy.

This chapter considers why the Andean Community, despite having made palpable efforts to improve and broaden its free-movement policy, remains unable to apply its Andean migration policy. In the following paragraphs the instruments encompassed by this policy will be analysed in detail. Later it will be argued that the current situation of free movement in the region is determined by two opposed processes. One of these processes is the evolution of regional norms regarding migration. In this respect, we can state that the CAN's instruments (decisions) regarding free movement of people in the region are currently wider than 10 or 15 years ago, and it could be said that they have taken into account the increasing complexity of regional migration. On the other hand, the effective implementation of regional instruments by the CAN and the observation of these at a national level appear to be the two main obstacles to the application of the CAN's free movement policy.

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9 Ecuador's intention to withdraw from the CAN was never implemented.

10 These organizations are considered ‹alternative› for two reasons. Firstly, their creation is recent and was produced following what has been called the 'multilateralism crisis', which has attained a global extent during the last decade but which has had an acute incidence in the 'inter-American system' of organizations such as the CAN, OAE and MERCOSUR (Bonilla and Long, 2010, p. 23). Secondly, we find a possible restructuring of political order in the Southern hemisphere by the establishment of some distance with the USA or 'a moment of search for more self-determination' (ibid., p. 24).

8.3 The CAN and its migration policy: brief historical revision

Five years have passed since the Andean Community started to think about its common policy on temporal or permanent migration (Moncayo, 2009). According to the CAN, common Andean migration policy originates in a decision taken by Member States to make 'every effort to allow its inhabitants to travel freely through the subregion, regardless of the reasons for travelling: tourism, work or change of permanent residence' (CAN, n.d.). Right now, there are at least 12 decisions that structure the free movement policy in the region (see Table 8.1).

Table 8.1 CAN decisions related to migration according to area or action theme and kind of migration (1996-2004)[1]

Area or action theme	Decision nº and description	Kind of migration[2]: • Short-term Intra-community (T.I.) • Permanent Intra-community (P.I.) • Extra-community (E.)		
		T.I.	P.I.	E.
Control and registry of migration fluxes	397* – Creation of the Andean Migration Card (1996) The Andean Migration Card is created: this document is used for migration control and statistical registry as well as for entering and leaving the territory of Member States. *The Andean Migration Card was modified in 2001 through Resolution 527.			
	502 – Binational Centres for Border Control (CEBAF) in the Andean Community Aims at promoting the establishment of Binational Centres for Border Control (CEBAF) and approving the general legal framework for its development and functioning. Calls for: • A control and management system of bidirectional transit on border crossing points. • Less duplication of procedures and registries when entering or leaving Member States for people, luggage, goods and vehicles. • The registering and collection of information in the CEBAF on the flow of migrants, luggage, goods, and vehicles. • The direct international transport of passengers and goods by road to make the transit of people swifter.			

Area or action theme	Decision nº and description	Kind of migration[2]: • Short-term Intra-community (T.I.) • Permanent Intra-community (P.I.) • Extra-community (E.)		
		T.I.	P.I.	E.
Control and registry of migration fluxes	503 – Recognition of national migration documents (2001) • Nationals from Member States can be admitted as tourists in any Member State presenting one national ID. • Rights of community tourists will be guaranteed in the Member States. • The states will recognise this document as valid together with the Andean Migration Card. • Entry into force: 1 January 2002.			
	504 *– Creation of the Andean Passport (2001) • Creates the travelling document Andean Passport with a unified model for all Member States. • Gives guidelines and features for this passport. • Establishes deadline of 31 December 2005 for entry into force. *Technical characteristics and features of this passport are specified through Decision 525. The deadline for the implementation of decision 504 was extended successively by decision 625, 655, 678, and 709; this last one extended the period for the entry into force of the Andean Passport until 31 December 2009.			
	526 – Airport box offices for nationals and foreigner residents in Member States (2002) • Establishes Special Entry airport box offices for nationals and foreign residents of Member States of the Andean Community in order to expedite intra-regional travel. • Entry into force: 1 January 2003.			
	398 – International transport of passengers by road (1996) • Establishes conditions for international transport of passengers by road within the Member States. • Replaces decision 289 (International transport of passengers by road).			

Area or action theme	Decision nº and description	Kind of migration[2]: • Short-term Intra-community (T.I.) • Permanent Intra-community (P.I.) • Extra-community (E.)		
		T.I.	P.I.	E.
Cooperation and regional integration	**501 – Areas of border integration (ABI) in the Andean Community (2001)** • Defines ABI as areas on the border of two Member States for which policies, plans, programmes, and projects implementing sustainable development and border integration will be undertaken. • Gives states the freedom to establish areas of border integration and neighbouring areas of priority. • Among the objectives regarding migration we find a loosening and dynamisation of transit of people, goods, services etc., as well as establishing effective mechanisms for the creation and management of border labour markets and for the administration of migration trends, bilateral and international, that take place in the ABI.			
	548 – Andean mechanism for cooperation in consular assistance, consular protection and migration issues (2003) • Establishes a mechanism for cooperation in consular assistance, consular protection and migration issues, in the interest of citizens coming from any of the Member States of the Andean Community who is outside of his country of origin. • Promotes coordination actions for the protection of fundamental rights. • Promotes exchange of information on migration issues. • Lists actions that allow Andean citizens to receive diplomatic protection from the Andean region if his state of origin does not have any official representation in the third state. • Enumerates procedures to be implemented by Member States in order to fulfil these actions. • Entry into force: 1 January 2004.			

Area or action theme	Decision nº and description	Kind of migration[2]: • Short-term Intra-community (T.I.) • Permanent Intra-community (P.I.) • Extra-community (E.)		
		T.I.	P.I.	E.
Cooperation and regional integration	**550 – Creation of the Andean Identification and Marital Status Committee (AIMSC) (2003).** • Creates AIMSC as a technical institution responsible for advising the Andean Council of Ministers of Foreign Affairs and the General Secretariat of the Andean Community on various issues related to the identification and registry of marital status processes.3 • Among its functions: to give out opinions before the Andean Council of Ministers of Foreign Affairs on programmes or Andean integration, create projects and actions for regional integration, strengthen inter-institutional cooperation, and promote legislative harmonisation regarding identification and registration processes within the Member States			
Labour rights	**545 – Andean labour migration instrument (2003)** • Establishes regulations that allow a progressive and gradual free movement and the stay of Andean nationals in the subregion with labour aims and dependency relations. • Defines labour categories. • Establishes a labour registry for Andean migration workers in the Labour Offices of each Member State. • Allocates equality rights, union rights, family protection, individual freedoms and labour rights to community workers • Gives a framework to labour migration offices. • Gives a framework to the liberalisation programme so that the signing states will respect the agreement. • Revokes decision 116 from the Commission of the Cartagena Agreement through which the Andean labour migration instrument was approved.			

Area or action theme	Decision nº and description	Kind of migration[2]: • Short-term Intra-community (T.I.) • Permanent Intra-community (P.I.) • Extra-community (E.)		
		T.I.	P.I.	E.
Labour rights	583 – Andean instrument for Social Security (2004) • Establishes regulations that will try to guarantee equality among labour migrants. • Gives general regulations about social security for migrant workers. • Recognises that each Member State has its own labour laws that should determine the proper procedures. • Stipulates that the labour migrant will have to respect the social security regulations of the Member State where he or she works regarding disability allowances, health, retirement benefits, and life insurance. • Delegates to the Andean Committee of Social Security Authorities (ACSSA) responsibility for issues related to social security in the communitarian sphere.			

1. This table includes CAN decisions listed as migration regulations within the section 'Migrations' in the website of the Andean Community; and is not presented separately from the modifications to certain decisions.
2. In this chapter we will take into account the definitions of short-term and long-term migration given by the CAN. The first one concerns the stay of a foreigner in a CAN Member State for less than 90 days. The second one concerns any migration that lasts longer than that time. Intra-community migration is a change of residence on the short or the long-term in another Member State while extra-community migration is a migration of Andean citizens to third countries (CAN, 2008). These definitions will be used throughout this document.
3. Note of the editors: In the Andes, it has been extensively observed that the absence of a male head of the family, by either death, divorce, migration or abandonment, significantly changes the women's status within the household and her daily responsibilities. There is a strong cooperation between households in the Andes, and women are likely to participate in community management tasks through among others their male family member's mediation. Therefore, not having a male head of the family could lead to significant changes for women's interaction with the community (Kang, 2010).

Source: CAN (http://www.comunidadandina.org/Seccion.aspx?id=84&tipo=TE&title=migracion)
Compiled by the author

As shown in Table 8.1, since 1996 CAN Member States have established instruments in order to gradually open their borders, facilitate migration within the Andean area, and establish regional mechanisms of citizen identification. This means that CAN decisions regarding migration concern not just migration within the community, be it temporary or permanent, but also migration from outside the community.

Nevertheless, it is evident that regulations on temporary intra-community migration (i.e. free transit) have enjoyed a greater level of implementation and compliance than the instruments aimed at establishing regional parameters for permanent intra-community migration or for extra-community migration (See Table 8.2). In order to evaluate the implementation of the CAN's decisions, and

the effective reach of integration regarding free movement of Andean citizens, it is necessary to take into account the important obstacles in this field that have until now prevented such decisions from being completely implemented (Aguilar and Mendiola, 2008; Moncayo, 2008; Araujo and Eguiguren, 2009a).

These obstacles stem from two sets of factors, one political and another socio-cultural. The first has to do with the conflict that exists between national regulations and political dynamics relating to migration issues, and the regional frameworks established by the CAN in this field. The second reason relates to the limited extent to which both the CAN and the notion of 'community' have penetrated societies in the region. The next section will deal with these two factors.

Table 8.2 CAN decisions according to type of migration and entry into force[1]

Type of migration	Decision	Entry into force
Temporary intra-community migration or short-term	Decision 503	In force
	Decision 397 and Resolution 527	In force
Permanent intra-community migration or long-term	Decision 545	Non-regulated[2]
	Decision 583	Non-regulated
Extra-community migration	Decisions 504 and 525	In force
	Decision 548	In force[3]

1 The decisions included in this table correspond to those presented by the CAN for every type of migration. See http://www.comunidadandina.org/Seccion.aspx?id=84&tipo=TE&title=migracion

2 When quoting a 'non-regulated' Decision, we are referring to the fact that the Regulation has not been passed yet and therefore the decision is not an effective instrument. The approval of a regulation from an CAN Decision lies in the hand of the General Secretariat.

3 by resolution 1546 of 20th of February 2013
See: http://www.comunidadandina.org/Normativa.aspx?GruDoc=08

Source: CAN (http://www.comunidadandina.org/). Compiled by the author

8.3.1 Regional regulations on migration and national migration policies from the CAN: a story of ups and downs

The trajectory of regional migration policies has developed differently from the ones in the CAN Member States. Regional and national policies have been shaped by different political dynamics. This means that, in addition to taking into account the main

trends on Andean international or intra-regional migration[11], it becomes necessary to consider the political processes that have affected on a national and international level all Member States and thus the whole regional integration process.

Regarding the CAN, its birth under the Cartagena Agreement responded mainly to the interest in creating a space of commercial exchange advantageous for the Andean territory. According to Torales, González and Pérez (2003), during the 1990s migration within the Andean Community was still tackled under 'the conceptual framework of labour migration and not under the theoretical framework of free movement' (Torales, González and Pérez, 2003: 94). Until the 2000s, the transit of people in the region was primarily understood as a condition favourable to increased regional liberalisation.

The 'theoretical framework of free movement', on the other hand, implies a change in perspective concerning human mobility in the regional organization, towards a conception of migration as a social phenomenon with relevant implications for Andean societies in fields such as citizenship, human rights, or human development. From the 2000s, migration within the Andean Community began to be understood in this way. This change, suggested by Torales, González and Pérez (ibid.), can be explained as a product of 'cycles and structural transformations in the international economy and as a result of the reaction of Member States to these changes', as well as 'the political changes in Andean States and Andean democracies' to quote Fuentes Hernández (2008, pp. 155-156).

These factors stemmed mainly from globalization and the democratic processes that took place in Latin America during the 1990s after a period characterised by various forms of authoritarian rule. The restoration of democratic order in Latin America brought about a great debate on the relationship between the State and civil society in terms of rights. As the years passed, issues and disagreements about these rights proliferated (issues not related to social class, which had occupied the public political discourse for years); among other topics, we can mention gender[12], ethnicity, childhood and adolescence, environment, and political participation. Globalization is also a factor that explains the emergence of new categories that have gained currency within the international system, categories promoted by international organizations, international development and civil society.

11 Note of the editors: Cerrutti (2009) points out that, as in other regions of the world, South American women have increased their share as international intra-regional migrants. They mainly migrate due to economic reasons, because there are limited social and economic opportunities in their home countries. There is also a demand in service and caring sectors by host countries, contributing to the female labour migration. Other reasons for female migration are poverty, domestic violence, civil armed conflicts and in Latin America often also to escape crime and insecurity. The choice to migrate is not easy, because it often involves leaving families and children behind and because opportunities for legal migration are restricted, migrant women are frequently abused for being undocumented. Migrant women often face more obstacles than man, since for women types of jobs can be limited, and female migrants are often lower skilled than male migrants.

12 Note of the editors: Within the Andean Community there is a strict division of gender roles. This encompasses not only a strict division of labour but also different gender ideologies (Kang, 2010)

As regards regional integration, the European experience was considered a successful model during those years, a model in which the implementation of normative frameworks was developed in wider areas than just economic liberalization (Godoy and González, 2009).

As a result, the CAN, since the new millennium, has tried to consolidate integration through an agenda that takes care of social issues, cultural issues and political issues; apart from the objectives concerning economic liberalisation already exposed. The official position of the CAN offers a similar perspective on this retrospective analysis:

> During the current decade, limitations on our open model of integration became more evident. Even though this model allowed us to grow commercially it also left other issues such as poverty, social exclusion or inequality untouched. This is how in 2003 a social dimension is added to the process of integration and through presidential mandate (Quirama, 2003) the establishment of an integrated plan for Social Development is set in motion. Little by little we start to get back a development dimension (...). In the Working Plan for 2007 of the General Secretariat of the CAN it is very clearly reflected that this change will have incidence in the Social Agenda, Environmental Agenda, Political Cooperation, External Relations and Commercial Productive Development[13].

In the field of regional mobility, this broadening of the topics and lines of action of the CAN reflects not only the regulations presented in the prior section but also new initiatives like the establishment of a space for political dialogue called the Andean Migration Forum, which up to now has had four summits, carried out in Quito (2008), Lima (2009), La Paz (2012), and Bogotá (2013). This forum follows the line of other intergovernmental initiatives for dialogue such as the South American Migration Conference and has the objective of looking for approaches to actions for the protection of Andean migrants through non-binding declarations (CAN, 2008). As a result, discussions took place on the Andean Plan for Human Development of Migrations, the same that has been promoted by the government of Ecuador since the first edition of this Forum. Although the plan was discussed – and indeed endorsed – during the III and IV Andean Migration Fora in La Paz and Bogotá, the Member States of the CAN have not yet signed up[14].

According to the CAN, this programme 'has as its precedents a series of activities that have been developed in Andean states, including the dense regulation from the community that exists in the field of intra- and extra-community migration' (CAN,

13 http://www.comunidadandina.org/Seccion.aspx?id=195&tipo=QU&title=resena-historica

14 This document has been promoted by the Ecuadorian state in the framework of migration policy objectives proposed since the beginning of Rafael Correa's government in 2007. With the creation of the National Secretariat for Migrants (SENAMI) that year, as the ministry in charge of migration policy in Ecuador, the government started an international campaign in order to promote the principles directing its migration policy.

n.d.). It is necessary to consider that not all actions carried out by states in the region concerning migration will contribute to creating common migration frameworks focused on rights and human development as fundamental criteria as set out by the programme (ibid.).

In effect, the consolidation of Andean integration through the protection of free regional movement has not necessarily been a priority in the agendas of the four Member State governments, and thus the normative framework for migration in these countries has not progressed evenly enough to allow for the creation of common regional regulation.

All this can be explained by the fact that the Andean states have faced increasingly complex migration dynamics that not only include interregional transit but also, and mainly, extra-community migration. Furthermore, fluctuating political relations between these countries can sometimes be an obstacle to the fulfilment of legal duties concerning migration, even though these have been formally adopted by the four countries in the region[15].

This way, a rapprochement between the political and legislative migration ambits of the Andean states reveals a dynamic that is increasing in speed very quickly. The politicisation of migration on a global scale, the growth in migratory flows, and the diversification of profiles and destinations for migration in the Andean region explain how regulating migration has become in the last few years one of the most important objectives for governmental agendas nationally, regionally and globally (Domenech, 2008; Araujo and Eguiguren, 2009b).

This is how in the last few years important changes for migration policy have taken place in the states of this region. In these four countries, regulations on migration were put into action mostly through relatively old legislation (from the 1970s or earlier), according to the principle of restriction and control of migration flows (Domenech, 2009). Nevertheless, the turn of the century brought a new perspective to this issue.

Firstly, political debate on how to face new features in migration takes place within the state. This produces four different kinds of migration policy:

- Policies treating migration as a security problem.
- Policies prioritising the rights of migrants.
- Policies linking migration and development.
- Policies that consolidate links between migrants and the nation-state (Araujo and Eguiguren, 2009).

Even though the last three kinds of migration policies originate in the last fifteen years and represent a dramatic change (considered by Domenech as constituting a

15 A fact that exemplifies this is the requirement imposed by Ecuador in 2004 that Colombian immigrants present a criminal record when entering the country. The criminal record is an official document issued by the Colombian state. This requirement was eliminated during the second half of 2008 but re-established at the end of that year with the additional condition that it should be sealed with an 'apostille'. This measure was implemented for security and transborder migration flow control reasons. Nevertheless, the regional and national regulations on this topic allow Andean citizens to enter Ecuador without the need of anything other than a document of identification.

'citizenship-ation of migration policy' (2008, p. 54)[16], they have not overtaken the traditional security and flow control perspective that has existed for decades. On the contrary, sometimes contradictory perspectives on migration policy present themselves in different moments, at different political junctures, and according to different types of migration (Eguiguren, 2010). In this regard we can mention roughly the schism between the treatment given to emigration and the one given to immigration. In effect, the perspective on migration as a security issue is applied mostly to immigrant populations, to the detriment of policies aimed at social integration, human rights, or human development (Araujo and Eguiguren, 2009; Ortega, 2010). In contrast, the other three types of policies are aimed at national emigrants and are articulated in different migration planning programmes created by the four Andean countries during the last few years (See Annex 8.1).

As shown in the Annex, the Andean countries' action plans are aimed at protecting and maintaining the connection with national emigrants living abroad. The Ecuadorian case includes some immigrants residing in Ecuador through the National Human Development Plan for Migration. However, given the fact that most of the emigrants from these countries are not located in other countries of the Andean Region, the most relevant efforts concerning migration policy are aimed mainly at extra-community emigration. Consequently, actions intended for intra-regional migration lose importance in national agendas.

Yet migration policies made at a national level have not necessarily included intra-community migration. This is one of the reasons why up to now there are still flaws in the implementation of regional migratory regulations, as pointed out in a recent CAN Working Paper (CAN, 2008*a*). With reference to short-term migration, this document states that:

- In Peru, some commercial premises require citizens from Member States of the Andean Community to show their passport as the only means of proving their identity when paying with a credit card, violating Decision 503. This requirement is based on Legislative Decree Nº 703- Immigration Law and in the regulations on Consumer Protection from the National Institute for Defence of Competition and Protection of Intellectual Property (INDECOPI).
- In Colombia, certain banks and bureaux de change (except those banks that have premises in customs of an international airport) require citizens from Member States of the Andean Community to show a passport as the only valid means of proving their identity for currency exchange, violating Decision 503.
- In Peru, in violation of Decision 503, hotels require citizens from Member States of the Andean Community to present a passport as proof of identity

16 Domenech (2008, p. 54) defines 'citizenship-ation' of migration policy as a 'socio-political process that comes as a result of different ways of intervention and legitimisation developed by international organizations and national states on the subject of public policies and the different strategies of participation used by certain institutions from civil society (...)'.

> if they wish to avoid the 19% General Sale Tax (GST, IGV) applicable to foreigners (Supreme Decree 12-2001 EF, modified by Supreme Decree 063-2003 EF) (CAN, 2008a, p. 3).

To all this we could add that Ecuador still requires Colombian citizens to present their criminal record before entering the country, in spite of the appeal of unconstitutionality lodged by civil society organizations in the beginning of 2009[17]. Likewise, on the topic of permanent migration, the CAN identifies as a 'problem' the fact that some regulations from decisions 545 and 583 have still not been approved (CAN, 2008*a*), which prevents the entry into force of both the Andean Instrument for Labour Migration and the Andean Instrument for Social Security (See Table 8.1). We can therefore see a certain disconnect between regional and national migration policy. We will examine the three main reasons for this situation.

Firstly, there is a divergence in priorities on the topic of migration policy between states and the CAN. At a national level, the priority of free movement is aimed at emigrants and their main destinations, which are still the USA and Europe. At the same time, on the regional level, measures concerning migration policy are only aimed at intra-community flows. Because of this there are a large number of Decisions on migration, the most effective of which are the ones concerning short-term intra-community migration[18]. In contrast, CAN's actions towards tackling extra-community migration are extremely weak as compared to other regional blocs such as the European

17 The following institution presented this appeal: Jesuit service for Refugees and Migrants, INREDH (NGOs defenders of human rights); Association Umiñahui 9th of January and Association of Colombian Entrepreneurs in Ecuador (ACEREX) (Associations of relatives of Ecuadorian migrants and Colombians in Ecuador).

18 Note of the editors: The study by Kang (2010) on gender roles in Peru points out that rural-urban movement within the country usually consists of married adult men migrating temporarily as a survival strategy. Rural-urban migration among women mostly takes place, either as a single young woman, or along with family members (most likely their husband) once they get married. Temporary labour migration is important for young women, as it is an important channel through which they get exposed to the cash economy and can participate in the salaried labour force, often in the form of a housemaid or a restaurant helper. However, women often have lower mobility compared to their male partners because of their responsibilities, such as animal care, storing of agricultural products and reproductive labour. The study shows that most women actively participate in productive activities, whether it is in a rural or an urban setting. Indeed, the World Economic Forum (2013) confirms that in Peru, there are about 80% as many women participating in the labour force as there are men. However, the intensity of their participation depends on many factors, such as their responsibilities towards the family, their education or their age. Despite the extensive engagement of women in productive activities, their access to economic resources is highly determined by their marital status. The idea of the male as the breadwinner is still very widespread in Peruvian Andean societies.

Union[19]. That said, we can accept that countries from the region would prefer to take action themselves regarding migration outside the Andean Community; even though intra-regional migration has increased during the last two decades (CELADE-CEPAL, 1999; Ramírez, 2008), with the exception of Ecuador, the Andean countries do not present significant flows of Andean immigration and their main destinations are not located in the subregion. Indeed, while Colombia and Peru do have considerable expatriate populations in Ecuador, the majority of migrants from both countries are in the USA and Europe. Furthermore, the main destinations within Latin America are Venezuela, Argentina and Chile[20] (See Annex 8.2).

Secondly, migration flows in this region have by definition a very controversial social nature. In countries where social conditions such as poverty, exclusion and marginalization affect a large percentage of the population, the arrival of regional migrants is frequently seen as 'competition' for the scarce sources of employment and social welfare. Thus, the greater political, social and economic costs of long-term migration account for why short-term migration under conditions of free movement has been established more easily.

Thirdly, we should bear in mind that a strong social imaginary and sense of belonging to the Andean Community has not been achieved yet. In fact, nearly all proposals by the CAN for overcoming all the obstacles faced when applying free migration within the Andean Community include campaigns, diffusion and awareness-raising acts about community regulations meant for civil society and authorities (AC, 2008, pp. 3-4, p. 7). In other words, CAN recognizes from the inside that there is a lack of knowledge regarding the rights and privileges of citizens that derive from their membership in the Community. This would explain why a citizen from a Member State is considered a 'foreigner' in another Member State; that is, not identified under the same conditions. This socio-cultural element plays an important role when creating effective legal frameworks given that this kind of implicit agreement within a society

19 Even though the CAN has officially expressed its will to look at international migration from the point of view of human rights in the context of the free trade negotiations between the CAN and the European Union, there have been no visible results. On the contrary, the negotiations themselves show how weak the CAN is regarding internal consensus. This has aggravated the CAN's difficulties as it negotiates in a deeply asymmetric situation with a European Union determined to maintain the commercial clauses and exclude migration from any future agreement. In 2012 the EU signed a free trade agreement with Colombia and Peru. On 17 July 2014 the EU concluded similar negotiations with Ecuador, which will also become a party to the agreement. Only Art. 276 of the agreement makes reference to migrants, specifically migrant workers: 'The Parties recognize the importance of promoting equality of treatment in respect of working conditions, with a view to eliminating any discrimination in respect thereof to any worker, including migrant workers legally employed in their territories'.

20 The determination of figures of immigration and emigration flows in the region is quite problematic. The sources are heterogeneous, mechanisms of information gathering are not unified and the information is outdated given that primary sources come from the civil census that was made over a decade ago. Other difficulties are the sub-registry given the amount of undocumented migration that makes it difficult for any research or analysis to be accurate. The data presented in the annex comes therefore from a series of sources and is only approximately accurate and varies from source to source.

is the kind that gives legitimacy to regulations established by the authorities. From the point of view of international relations, we observe regional integration as a process linked with the formation of a sense of belonging and collective identities, constructed with common values (Moncayo, 2009). In the following section we will analyse how all this relates to a regional structure, either 'strong' or 'weak', according to the capacity to generate a regional response to the issue at hand.

8.3.2 Regional Integration and the CAN crisis

Jorge Martínez (2008, p. 89) points out that:

> Intra-regional migration in Latin America and the Caribbean has a long history and is deeply intertwined with the identity of the region. In fact, it is a phenomenon that starts before the constitution of Nation-states, as a result of a common history of social, political, economic and cultural linkages between all the different territories.

However, as explained above, only during the last 20 years have these historical linkages manifested themselves as migratory flows supported at the regional level by regulations seeking to reinforce them and turn them into elements of integration. That said, such progress should be clarified given that these regulations have often been implemented only partially or left to national authorities altogether.

On the other hand, it is necessary to take into account a broader set of limitations and possibilities that determine the capacity of the CAN to effectively assure free movement in the region. In this sense we will examine the achievements of the Andean Community regarding migration, taking into account the context of the crisis that is currently affecting the organization according to a variety of analysts (Guarnizo, 2008; Bonilla and Long, 2010).

According to Guarnizo (2008), the CAN crisis started in 1998 in the commercial sphere. The response was the introduction during the first years of the new millennium of a 'Multidimensional Agenda of Integration', involving *inter alia* social issues, external foreign policy, and sustainable development objectives. Nonetheless, Guarnizo argues that the crisis continued into the 2000s, manifested in part by the decision of Colombia and Peru to individually negotiate commercial agreements with the USA (ibid.)[21]. The situation reached a peak when Venezuela, a significant economy within the Andean Community, decided to formally withdraw from the organization in 2006 (ibid.). Guarnizo's analysis of a CAN in crisis is supported by Bonilla and Long (2010, p. 23), who state:

> The case of the Andean Community of Nations (...) is dramatic. Since nearly two decades, it has been unable to act in the relevant political events

21 With the conclusion in 2012 of a free trade agreement between the EU on the one side, and Colombia and Peru on the other, history appears to have repeated itself.

that took place in the region: Ecuadorian-Peruvian conflict; Venezuelan polarisation; Colombian violent conflict; political instability in Ecuador and Bolivia; Fujimori's authoritarianism in Peru; and the tensions on the borders with Colombia and its neighbours.

The origin of the CAN's weaknesses as a political actor, unable to influence the international sphere, is linked to the instability of the political relations between its members, with neo-liberal policies entrenched in Latin America during the last decades (ibid., pp. 24-26), together with the absence of common 'loyalty, expectations and activities' that belong to the CAN as delegated by its members according to the concept of integration suggested by Haas (ibid., p. 23).

Bonilla and Long, however, consider that the current situation of the Andean Community can be situated within a broader framework of regional restructuring on a global level. In this sense, they believe that the construction of UNASUR and ALBA, as well as the accession of Venezuela to Mercosur, represent attempts to find alternative ways of integration linked to new political-ideological and commercial alliances (ibid., pp. 25-26).

Nevertheless, though bedeviled on many fronts, from the point of view of international migration the CAN may offer more solutions. Every day, supranational dialogue and political decision-making processes are becoming more open to dealing with international migration and transnational dilemmas. In fact, Domenech (2008) observes how during recent years a new trend that tries to deal with the challenges presented by migration has been consolidated through bilateral and multilateral agreements either in organizations or in consultative regional fora. This author points out certain relevant elements for the creation of supranational frameworks of migration policy:

- Firstly, these global debates have given rise to certain categories on how to regulate migration according to a cost/benefit logic: migration has changed from being evaluated in terms of 'advantage and disadvantage', which at the same time has opened the doors for a notion of migration as an 'opportunity' (from a development perspective), which would imply treating migration no longer (or not exclusively) as a security problem.
- Secondly, these debates do not necessarily present unilateral (government) perspectives; they involve various players, among which we can find organised civil society, consultancies, and international bodies as supporters and promoters of these processes.

Even though Domenech maintains a critical analysis of the construction of regional and global agendas in the topic of migration, it should be pointed out that this perspective leaves open the possibility of interaction between different sectors present in these debates making it possible for civil society to manifest its positions (Domenech, 2008, p. 61).

The meetings of the Andean Forum for Migrations can be read under this perspective, as well as the initiative of the Andean Plan for Human Development of Migrations. We must bear in mind that this Plan was an initiative of Ecuador,

which at the same time has shaped its own migration policy according to concepts of human development. This is a good example of how different notions of migration are converging and being transmitted to regional agendas.

At the same time, recent initiatives have attempted to open channels of participation for civil society in the discussions on the Social Agenda of the CAN. In the case of migration, we can mention the project 'Migration and citizenship – Andean Migration network', funded through SOCICAN[22], a project supported by the European Union in order to strengthen the participation of citizens within the CAN. As part of the project several studies took place, along with meetings with representatives from regional civil society organizations. In 2008 a declaration was released proposing among its relevant points the creation of a Consultative Council for Migration in the CAN (Andean Migration Network, 2009)[23].

This could point at a multiplication of sectors involved actively in the field of migrations in the region, such as non-governmental organizations, new state institutions, International and Cooperation Development Organizations, and academic institutions. Ultimately, this could produce a convergence of interests between the CAN and civil society with local political dynamics, supporting the legal framework of regional free movement created by the CAN through awareness-raising activities in the Andean countries.

However, it is necessary to cross-check this with the CAN's weaknesses as a structure for regional integration in a context where the map of South American multilateralism is being restructured. Moreover, we should also ask ourselves if in that kind of context we can find any political will on the side of states to promote integration and to take into account intra-community migration by committing themselves to policies regulated by the CAN instruments.

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22 In the framework of International Cooperation between the European Union and the CAN, the General Secretariat of the CAN created a series of projects among which we find one called Civil Society Project for Andean Integration (SOCICAN), aimed at the reinforcement of participation of civil society in the process of regional integration. With funding from the European Union, there was a call for projects related to SOCICAN during the period of 2008-2010 (www.comunidadandina.org). One of the chosen projects was Migration and Citizenship - Andean Network for Migrations, presented by a group of NGOs from the four Andean countries. The main objective of this project was defined as follows: 'Contribute to the creation of common and effective public migration policies that will protect rights of migrants in Member States of the Andean Community CAN'.

23 The members of the Andean Network for Migrations involve the following NGOS and academic institutions from the four countries in the region: Capítulo Boliviano de Derechos Humanos, Democracia y Desarrollo; in Colombia: Consultoría para los Derechos Humanos y el Desplazamiento (CODHES); Plataforma Social Migratoria HERMES; Red de Universidades Públicas del Eje Cafetalero ALMA MATER; Instituto Sindical de Cooperación al Desarrollo (ISCOD-UGT); in Ecuador: Foro Urbano; Coalición para las Migraciones y el Refugio; FLACSO Ecuador Office; Acción Humanista; in Peru: Instituto de Estudios para la Infancia y la Familia (IDEIF), Instituto Laboral Andino (ILA), Observatorio Andino de Migraciones Tukuymigra, CHS Alternativo, Observatorio Andino de Migraciones, Interculturalidad y Codesarrollo; and the following bi-national institutions in Colombia and Ecuador: Fundación Esperanza y Observatorio Colombo-Ecuatoriano de Migraciones (OCEMI).

8.4 Conclusion

This chapter has briefly revised the legal framework of migration developed by the CAN in addition to the context in which this organization has dealt with new challenges. The main aspiration was to evaluate the progress and limits of the free movement of persons under the regional integration organization. From this analysis we could extract conclusions about two features: firstly, about the relationship between the CAN and the Member States on migration; and secondly, about the crisis of this kind of regional integration and its impact on human mobility in the Andean region.

In reference to the first point, there are coincidences between the notion of migration used by every Member State and those adopted by the CAN during the last years. Nevertheless, some notions are not applicable to the national level and there are contradictions between priorities in migration policy at the national and regional levels.

This can be explained by several factors. The first one is not directly related to the topic of human mobility but rather to the development of regional institutionalism in Latin America. According to some academics from international relations, the history of relations between Latin American states has hindered the consolidation of regional blocs (Hirst, 1996; Godoy and González, 2009). According to Hirst's analysis, even though democratic processes in Latina America created the right context for development in regional integration during the 1990s, it was not achieved completely:

> In order to explain why expectancies were not fulfilled on this point regarding inter-American and intra-Latin-American scenarios, it is important to consider present and past elements that have configured inter-state relations in this hemisphere. The most relevant aspect is the asymmetry in the distribution of power and its effects on the way States deal with the issue of sovereignty, especially when the increase of institutionalization is perceived as a menace for a diversified group of national interests (Hirst, 1996, p. 13).

At the same time, one of the causes for this type of relations between Latin-American countries is the national policy of each State. In this respect, Godoy and González (2009) point out that it is necessary to consider two important issues that may hamper multilateral processes in the Andean region: firstly, a lack of political will; secondly, the dynamics among political actors within each country (an issue that according to these authors has not been researched thoroughly).

This means that regional projects such as the CAN are under the influence of conflicting processes: on the one side, a general increasing tendency to create ways of governance that go beyond national spaces, or what is known as 'global governance', and on the other side, the pressures coming from dynamics in national politics.

This situation is expressed very clearly in migration policy. In this case, on the one hand the international context may impact the implementation of bloc politics, including introducing more flexibility in the borders of the regional territory as a way of deepening the process of integration. On the other hand, we see the domestic

effects of these policies[24] that generate social pressures. In addition, we should bear in mind the difficulty of adapting national legislation to international or bloc agreements given the notion of sovereignty used by Hirst in the prior quote. Apart from this we find conflicts of interests produced by social sectors opposed to the regionalization of human mobility.

On the other hand, the noticeable contradiction that arises when confirming that the region presents coincidences and divergences between regional and national migration policy can be explained by the differences in the political dynamics on these levels. That is, on the one side both the CAN and the Member States concur in certain approaches to treating migration; on the other side these approaches are implemented differently according to the priorities of each State. For instance, human rights protection[25] can be used in migration management. The four Andean countries have accepted the approach in the last decade but have aimed it at extra-community migration of national populations.

Consequently, one of the major obstacles to free mobility can be found in the existing gaps in formal adoption and implementation of regulations, as well as gaps in the guarantees of free mobility for citizens and the interests and beliefs that can be found in national authorities and civil society in general.

Regarding the second point, there is consensus on the CAN's crisis. This crisis affects negatively the capacity of this organization to influence the Andean and South American sphere. From this perspective, the birth of alternative structures of political and commercial integration, such as UNASUR or ALBA, is regarded as a potential menace. Nevertheless, given the important consolidation of supranational structures for debating migration, we should ask if even in the case of a shift of the CAN, or even of MERCOSUR, to new regional blocs, the steps taken up until now would contribute to a system of free regional human mobility. It may be that this is the 'right' moment for a regionalization of migration policy but at the same time a 'defective' moment for consolidating the CAN.

24 I am referring to the repercussions such as competition in labour markets or socio-cultural conflicts that usually take place between locals and immigrant.

25 Note of the editors: Human rights violations of undocumented migrants are not uncommon in the region. Also trafficking, especially of women and girls, is a problem that needs to be addressed (Cerrutti, 2009).

8.5 Annexes

Annex 8.1

Main plans and programmes on migration policy in force in the CAN countries (2000-2010)

Country	Plan or programme	Year	Main aspects
Bolivia	National Human Rights Action Plan Bolivia 2009-2013	2008	• Protection of Bolivians abroad: documents, facilitating regularization of migration, defence rights and insure voting. • Restructuration and reinforcement of Foreign Affairs Service: training and professionalization of public servants
Colombia	Programme Colombia unites us	2003	Topics: • Population trends • Transnational networks • Economic participation • Social protection • Consular matters • Education • Projects portfolio • Culture and political participation
Ecuador	National Plan for Human Development in migrations 2007-2010	2007	Objectives: • Develop and promote migration policy in Ecuador based on the respect and exercise of economic, social, cultural and human rights. • Generate and consolidate links of migrants with their families and their country • Encourage Ecuadorians to stay in their country and construct the conditions that will make possible the Voluntary Sustainable and Decent Return of migrant people. • Promote human development processes for migrants, their families and environment. • Promote intercultural universal citizenship construction processes
Peru	Peruvian Migration Policy	2005	• Improve consular services • Support policy and legal protection • Humanitarian assistance • Insertion mechanisms in the country of destination (bilateral negotiations) • Promotion of cultural links • Productive link programme Quinto Suyo • Political link: double nationality, voting abroad
Source: Araujo and Eguiguren, 2009a and 2009b; Secretaría Nacional del Migrante (2007) Compiled by the author			

Annex 8.2
Migration flows in the Andean region

a. Main destinations for Andean population in South America

	Destination								
Original nationality	Year	Argentina	Brazil	Venezuela	Ecuador	Panama	Chile	Colombia	Bolivia
Bolivians	2001	231,789	20,388				10,919		
Colombians	2001			608,691	51,556	21,069			
Ecuadorians	2001			28,606			9,393		
Peruvians	2006	271,995	39,195	59,399	33,663		180,544		51,572
Venezuelans	1993							43,285	

Source: Project IMILA; OIM-INEI-DIGEMIN, 2008.
Created by: FLACSO Ecuador Office, 2008 (modified by author)

b. Andean population with residence permit in the USA (2000-2005)

	2000	2001	2002	2003	2004	2005
Bolivia	1,744	1,804	1,660	1,365	1,719	2,164
Colombia	14,125	16,234	18,409	14,400	18,055	24,710
Ecuador	7,624	9,654	10,524	7,022	8,366	11,528
Peru	9,361	10,838	11,737	9,169	11,369	15,205

Source: US Census Bureau
Created by: FLACSO Ecuador Office, 2008 (modified by author)

c. Andean immigration by year of arrival in Spain (2000-2006)

	2000	2001	2002	2003	2004	2005	2006	Total
Bolivia	3,318	4,835	10,562	18,119	35,339	38,349	69,467	179,989
Colombia	45,868	71,014	34,042	10,888	16,610	20,541	27,864	226,827
Ecuador	91,120	82,571	88,732	72,581	11,936	11,588	14,292	372,820
Peru	5,893	7,057	7,884	13,310	12,968	17,095	18,884	83,091

Source: Estadísticas de variaciones residenciales, www.ine.es
Created by: FLACSO Ecuador Office, 2008 (modified by author)

d. Immigration in Ecuador on net migration rates (2000-2007)

Nationality	Income	Outlet	Balance	General balance
Colombia	1,607,715	1,013,588	594,127	48%
Peru	834,502	504,605	329,897	27%
EEUU	1,431,994	1,407,403	24,591	2%
Others	2,300,546	2,020,946	279,600	23%
Total	6,174,757	4,946,542	1,228,215	100%

Source: Dirección Nacional de Migración del Ecuador (2000-2007)
Created by: FLACSO Ecuador Office, 2008 (modified by author)
Note: It should be noted that Colombian and Peruvian immigration represent 75% of the general balance in Ecuador for the period 2000-2007,

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9

Introduction of free movement of people in the Caribbean

Floyd Morris[1]

9.1 Introduction

The issue of free movement of people is one that has occupied the minds of scholars and organizations for centuries (Pécoud and de Guchteneire, 2009). The issue has gained greater currency especially since the collapse of communism and the establishment of a unipolar world. Since the collapse of communism, we have seen a proliferation of regional arrangements, as countries embark on a new effort to capitalize on the opportunities to be gained from the new global order (Harris, 2009). In this new order, the issue of free movement of people has been at the forefront of discussion, as scholars and policy makers believe that in order for countries to maximize the opportunities offered by the new global order, there must be free movement of people. According to the Economic Commission for Latin America and the Caribbean (ECLAC):

> In various degrees, all of these agreements cover trade in services which includes the consideration of the free movement of persons, one of the most important areas of interest for developing countries. However, in reality none of them goes much further than the General Agreement on Trade in Services (GATS), which provides a regulative framework for services trade. The GATS regulatory framework only refers to temporary movements of highly qualified labour while low and unskilled labour migration, as well as long-term migration (over three months), are not included. Not surprising, since rules and regulations regarding the temporary or permanent admission of foreigners vary significantly from country to country and, dependent on present economic interests, labour market demands and national security concerns, governments are rather reluctant to hand authority over immigration to regional or even subregional bodies (ECLAC, 2006).

1 President of Jamaican Senate.

This proliferation of regional arrangements, contributed to the United Nations' adoption of the Convention on Migrants' Rights in 1990. The Convention clearly articulated the rights that migrants have. According to Antoine Pécoud et al. (2004), 'In a world in which more and more people are on the move, ignoring migrants' rights would seriously jeopardize the welfare, not only of migrants, but of all human beings'.

The discussion which has been taking place globally has not escaped the Caribbean. From the slave trade to the establishment of the Caribbean Community (CARICOM) in the early 1970s, this issue has occupied the minds of scholars and policy makers. Slaves were brought to the Caribbean from Africa to fill the labour needs of the growing plantation economies. There was great demand for labour on the various sugar and tobacco plantations within the Caribbean and this demand had to be filled. When the abolition of the Slave Trade came in the 18th Century it precipitated a decline in the sugar industry. Labourers on these plantations were now forced to seek employment opportunities elsewhere. Fortunately, there was a growing demand for labour in Britain, Canada and the United States of America[2], brought about by the industrial revolution that was then taking place. These countries passed legislation which facilitated the employment of migrant workers in certain low wage jobs and most individuals from the Caribbean capitalized on these opportunities (ECLAC, 2006).

In this chapter, I seek to answer some questions that are germane to the discussions and debates which have been taking place with regards to the subject of the free movement of people and labour in the Caribbean. These are:

- Why did CARICOM introduce the idea of free movement of people[3] ? Did it follow a general trend or are the activities based on own initiatives?

2 Note of the editors: These are still the most popular destinations for Caribbean extra-regional migration. In the Caribbean, the lack of opportunities and the weak labour market conditions are among the reasons for workers to migrate extra-regionally, which is why there are heavy outflows of high-skilled persons, many of whom are women. More females than males emigrate to Canada and the US, which is caused by the sex-segregated migrant labour market. Male migrants will often work as labourers – for example, as seasonal workers – whereas female migrants will more often work in the service sector. Relatively large numbers of Caribbean persons will work as teachers and healthcare professionals in Canada and the US. The fact that these professions are gender stereotyped helps account for the fact that the majority of Caribbean labour migrants in Canada and the US are female. In addition to economic migration, women also cross borders for personal and family reasons. Pienkos (2006) points out that this 'gender drain' might be due to women escaping Caribbean gender relations and patriarchal societies and the opportunities afforded by migration to postpone marriage and family life; however, there is need for a systematic study on these subjects. UNICEF (2009) also points out that migration may have profound negative impacts on the family, more specifically on migrant children and children who have been left behind. They struggle more often with depression and low self-esteem and are also more vulnerable to exploitation and trafficking.

3 Note of the editors: In 2013, the Caribbean region hosted 1.407 million migrants, which equals 3.3% of their total population. Female migrants accounted for 49.0% of the total migrant stock. This ratio was 48.0% in 1990 and 48.8% in 2000, indicating that female migration streams have always been important for the Caribbean and are even becoming more feminized. The members of CARICOM hosted 382 332 migrants, of which 49.3% were female (UN, 2013).

- Has CARICOM been inspired by other regional integration processes? Were best practices identified?
- Have the agreements on free movement of people been part of a broader set of negotiations or were they strictly focusing on free movement?
- Who were the actors in favour and against the idea of liberalizing the movement of people?
- Has the decision been influenced by international developments or discussions?

But before one can enter into a substantive response to these questions, it is pertinent that one gives a background to the development of CARICOM and for one to make a distinction between the free movement of people and the free movement of labour.

9.2 CARICOM

The Treaty of Chaguaramas which established the Caribbean Community, including the Caribbean Common Market, was signed by Barbados, Guyana, Jamaica and Trinidad and Tobago on 4 July 1973, in Chaguaramas, Trinidad and Tobago (CARICOM, 2004). It came into effect on 1 August 1973. The Caribbean Community and the Caribbean Common Market replaced the Caribbean Free Trade Association which ceased to exist on 1 May 1974.

The Treaty of Chaguaramas was a juridical hybrid consisting of the Caribbean Community as a separate legal entity from the Common Market which had its own distinct legal personality. Indeed, the legal separation of these two institutions was emphasized by the elaboration of two discrete legal instruments: the Treaty establishing the Caribbean Community and the Agreement establishing the Common Market (which was later annexed to the Treaty and designated the Common Market Annex) (Treaty of Chaguaramas 1973). This institutional arrangement allowed states to join the Community without being parties to the Common Market regime.

In addition to economic issues, the Community instrument addressed issues of foreign policy coordination and functional cooperation. Issues of economic integration, particularly those related to trade arrangements, were addressed in the Common Market Annex. Because of the juridically separate identity of the regional common market, it was possible for the Bahamas, for example, to become a member of the Community in 1983 without joining the Common Market.

Long before the formation of the European Union (EU), there were attempts to have a regional arrangement in the Caribbean. The West Indies Federation was one of the first regional arrangements to be forged in the Western Hemisphere (Ramphal, 1992). Established in 1958, the West Indies Federation comprised the ten territories of: Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, the then St Kitts-Nevis-Anguilla, Saint Lucia, St Vincent and Trinidad and Tobago. The Federation was established by the British Caribbean Federation Act of 1956 with the aim of establishing a political union among its members.

The Federation however faced several problems. These included: the governance and administrative structures imposed by the British; disagreements among the territories over policies, particularly with respect to taxation and central planning; unwillingness on the part of most Territorial Governments to give up power to the Federal Government; and the location of the Federal Capital. The decisive development, which led to the demise of the Federation, was the withdrawal of Jamaica – the largest member – after conducting a national referendum in 1961 on its continued participation in the arrangement. The results of the referendum showed majority support in favour of withdrawing from the Federation. This was to lead to a movement within Jamaica for the expedition of national independence from Britain. It also led to the now famous statement of Dr Eric Williams, the then Premier of Trinidad and Tobago that, 'One from ten leaves nought' (Williams, 1962). This statement referred to the withdrawal of Jamaica and was deployed as a justification for his decision to withdraw Trinidad and Tobago from the Federal arrangement a short while later. The Federation collapsed in January 1962. Several Caribbean countries that were part of the West Indies Federation, for example Jamaica, went on to gain political independence from Britain shortly thereafter.

But the political leaders of the Caribbean were not to abandon efforts to have a regional arrangement. There were countries within the region who felt that there was a definite need for a regional arrangement in order to facilitate the development of the people. It was this commitment to regional integration which led to the establishment of the Caribbean Free Trade Area (CARIFTA) in 1965. The CARIFTA was founded by Antigua and Barbuda, Barbados, Guyana, and Trinidad and Tobago on 15 December 1965, with the signing of the Dickenson Bay Agreement. They were joined on 1 July 1968 by Dominica, Grenada, St Kitts-Nevis-Anguilla, Saint Lucia, and St Vincent and the Grenadines; and on 1 August, 1968 by Montserrat and Jamaica. In 1971, Belize joined the Association.

These Caribbean countries had recently become independent, and CARIFTA was intended to unite their economies and to give them a joint presence on the international scene. Specifically, CARIFTA was intended to encourage balanced development of the region by:

- Increasing trade – buying and selling more goods among the Member States
- Diversifying trade – expanding the variety of goods and services available for trade
- Liberalizing trade – removing tariffs and quotas on goods produced and traded within the area
- Ensuring fair competition – setting up rules for all members to follow to protect the smaller enterprises.

In 1973, CARIFTA was morphed into the Caribbean Community (CARICOM). After the demise of the West Indian Federation in the early 1960s, there were leaders who still dreamt of a deliberative body which would seek to advance the development of the Caribbean. This became a reality in 1973 when CARICOM was established by the Treaty of Chaguaramas. Its objectives were:

- The economic integration of the Member States by the establishment of a common market regime (hereinafter referred to as 'the Common Market') in accordance with the provisions of the Annex to this Treaty with the following aims:
  - The strengthening, coordination and regulation of the economic and trade relations among Member States in order to promote their accelerated harmonious and balanced development[4] ;
  - The sustained expansion and continuing integration of economic activities, the benefits of which shall be equitably shared taking into account the need to provide special opportunities for the Less Developed Countries;
  - The achievement of a greater measure of economic independence and effectiveness of its Member States in dealing with States; groups of states and entities of whatever description;
- The coordination of the foreign policies of Member States; and
- Functional cooperation, including:
  - The efficient operation of certain common services and activities for the benefit of its peoples;
  - The promotion of greater understanding among its peoples and the advancement of their social, cultural and technological development;
  - Activities in the fields specified in the Schedule and referred to in Article 18 of this Treaty (Original Treaty of Chaguaramas, 1973).

The Original Treaty was subsequently amended in 1989 at Grand Anse, Grenada, to meet certain new realities of CARICOM. By 1989, significant changes were taking place in the global political landscape. Communism was collapsing and more countries were embracing the market philosophy. These realities never escaped the eyes of CARICOM leaders and contributed to the revision of the Original Treaty of Chaguaramas. See Annex 9.1 for the new objectives.

4 Note of the editors: As part of attaining this harmonious and balanced development, the CARICOM Gender and Development Programme was erected. The programme aims to establish policies and programmes to promote the development of youth and women in the community and to encourage and enhance their participation in social, cultural, political and economic activities. The 2009-2011, for example, programme focused on the promotion of Human Resource Development, Gender Equity and the protection of disadvantaged groups. This resulted in the implementation of more gender sensitive policies, the development and institution of diversity and social inclusion programmes and the strengthening of the institutional infrastructure on child protection (CCS, 2011).

9.3 Free movement of people in CARICOM

It must be noted that under the Revised Treaty of Chaguaramas, some additional objectives were added. However, for the purposes of this chapter, objectives 1 and 2 are of most significance. These objectives are of significance due to the role they have to play in the free movement of people within CARICOM. In order to prevent discrimination against CARICOM nationals, a new article was incorporated. Under the Revised Treaty Article 7 was adopted and states:

- Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination solely on the grounds of nationality shall be prohibited.
- The Community Council shall, after consultation with the competent Organs, establish rules to prohibit any such discrimination (Revised Treaty of Chaguaramas, 1989).

Recognizing some of the parochial issues that had dogged CARICOM over the years, such a clause had to be added in order to prevent discrimination amongst nationals within the regional space.

As a part of the Revised Treaty, a special Chapter 3 was also created to establish the free movement of nationals and capital. This chapter covers Articles 31-50. However, for the purposes of this paper, Articles 45 and 46 are of great significance. Please see Annex 9.2 for the new articles of the Treaty.

These provisions clearly outline the approach of CARICOM towards the establishment of the free movement of people. But in order for us to delve into the gravamen of this paper, it is imperative for us to make a distinction between the concepts of 'free movement of people' and 'free movement of labour.'

The concept of free movement of people is an overarching term that is used to refer to the relatively easy movement of persons within a global space. The concept of free movement of labour refers to the relatively easy movement of individuals who are seeking employment within a global space. It must be noted that with the concept of free movement of people, individuals might not be seeking employment as the primary objective; individuals might choose to migrate for retirement purposes, for example. Free movement of labour on the other hand specifically refers to individuals who are in the process of moving to seek employment.

Both concepts of 'free movement of people' and 'free movement of labour' are grounded in migration theory. Ernest Ravenstein, often described as the 'father' of migration theory, argues in his Laws of Migration that migration takes place as a consequence of certain push-pull factors. There are certain oppressive factors such as high taxes and bad economic policies that can force people out of an environment. At the same time, there are favourable conditions, grounded in economics, which pull people out (and into other states) (Ravenstein, 1889). Other scholars such as Piper (2003) and Taran (2000) have all done extensive work on the subject of migration. More recently, Pécoud and de Guchteneire have brought a modern perspective to the issues. In their book *Migration without Borders* (2009), Pécoud and de Guchteneire

sought to highlight some of the more contemporary issues relating to the issue of free movement of people and labour[5].

All the issues articulated by the various scholars are relevant to the Caribbean. Ever since the industrial revolution, individuals from the Caribbean have been travelling to booming economies such as the United States and Britain seeking economic opportunities (Lewis, 1954). Oftentimes, the returns earned from their employment were sent back to the Caribbean for the support of their families (Ishmael, 2009). This is the pattern of extra-regional migration[6] which took place in the Caribbean.

But there has been intra-regional migration taking place within the Caribbean for centuries. Citizens have been moving from one island to the next. In most cases, the University of the West Indies, which is the major tertiary institution in the English-Speaking Caribbean, is the hub for migration activities. Individuals from the islands would go to pursue advanced education and never return to their homes. This pattern has however expanded since the establishment of CARICOM and the intensification of trade between the islands.

In the embryonic stages of CARICOM, the issue of the free movement of people was not a major agenda item for the regional organization. Its primary concern was to achieve 'sustained economic development based on international competitiveness, coordinated economic and foreign policies, functional cooperation and enhanced trade and economic relations with third States' (Revised Treaty of Chaguaramas, 2001).

However, since 1973 when CARICOM was formed, a number of global developments have impacted the perspectives of leaders and policy makers within the region. The collapse of communism in Eastern Europe; the evolution of the General Agreement on Tariffs and Trade (GATT) into the World Trade Organization and the subsequent regulatory changes that have developed from this organization regarding trade; and the emergence of China as a new global economic superpower, have all impacted how business is done in the world today. According to Dr Edward Green (2001), Assistant Secretary-General of CARICOM,

> These feelings of apprehension and at times alienation are understandable in the context of the rapid changes in the Global Economy to which

5 Note of the editors: For example, Pécoud and de Guchteneire (2009) point out that due to massive increase in asylum seeking worldwide, the number of refugees has increased to previously unknown levels. The Caribbean region has held a series of regional conferences in recent years to share good practices on refugee protection and international migration. At the 2013 conference in The Bahamas they focused, among other issues, on the specific needs of victims of trafficking, unaccompanied or separated children and women at risk (UNHCR, 2013). The problem in the region is significant: young women and girls are being trafficked from the Dominican Republic to various islands in the Eastern Caribbean, destined for prostitution on islands with a prosperous tourist industry, such as Antigua (Thomas-Hope, 2005).

6 Note of the editors: A study by Quinlan (2005) examined the odds of migration for men and women from a rural community in the Commonwealth of Dominica. His findings were that women were significantly more likely to migrate, whether internally or internationally, than men, but that they are less likely to migrate when they have matrilineal kin residing in the community.

> Caribbean policy makers are forced to respond instantly and rapidly. The trends in globalization and liberalization are creating a paradigm shift, and in particular, the Caribbean Secretariat. Subsidies for our sugar and bananas and for example other traditional exports can no longer hope for protection.

Green (ibid.) continued:

> In addition CARICOM countries can no longer depend on maintaining traditional exports as the main source of revenue as they used to in Europe and North America. And, over the past five years CARICOM exports to the European Union have gone down in value as the region continues to decline in relative importance to that market. The region's performance in the other main market the USA is even worse.

Being a group of small island states with just over 10 million people, CARICOM has had to take stock of these changes and formulate new approaches to dealing with them. The new global environment required these small island states to compete with large countries with significant population size. These large countries not only have land mass, but surplus labour, which helps to drive down the cost of production. This puts small island states, like those of the Caribbean, at a distinct disadvantage. Speaking at the launch of the book *CARICOM: Our Caribbean Community - An Introduction*, on 26 November 2004, former Prime Minister of Jamaica P.J. Patterson (2004) stated:

> The contemporary demands and challenges of today's world make a compelling case for the rationalizing and harmonizing of our economic systems and social institutions. Developing geopolitical trends portend even greater challenges to come, make regional economic integration an inevitable direction.

The challenge, therefore, is to enhance the process of integration, and critical to this is the free movement of people. Steven Mac Andrew (2005) best articulates the situation; 'Integration was and is thus our only option to survive in the current global economic constellation, because it helps to debilitate the effects of our smallness and vulnerability by pooling all our resources, including human resources'.

It is therefore fair to conclude that the issue of free movement of people, in the current Caribbean context, has been largely driven by a series of global occurrences. These global occurrences are inescapable and for small states to survive they have to pool their resources; the states within CARICOM have recognized this imperative (Carrington, 2006).

In July 1989, at Grand Anse, Grenada, leaders within CARICOM strengthened their resolve to deepen the integration movement. According to the Grand Anse Declaration:

> At this our Tenth Meeting here in Grenada, we, the Heads of Government of the Caribbean Community inspired by the spirit of cooperation and solidarity among us are moved by the need to work expeditiously together to deepen the integration process and strengthen the Caribbean Community in all of its dimensions to respond to the challenges and opportunities presented by the changes in the global economy.

This reinvigorated approach towards integration should have taken place within a 4 year span, culminating in 1993. The Grand Anse Declaration would cover a number of areas. Please see Annex 9.3. The Declaration also covered certain specific matters germane to this paper:

- (iv) The elimination, by December 1990, of the requirement for passports for CARICOM nationals travelling to other CARICOM countries.
- (v) The elimination of the requirement for work permits for CARICOM nationals beginning with the visual and performing arts, sports and the media travelling to CARICOM countries for specific regional events.

Numbers iv and v above are of particular importance to this paper. The removal of passport requirements and the abolition of the use of work permits are essential for increasing regional mobility. These ideals as stated within the Grand Anse Declaration should have been accomplished within a 4 year timeline. But 21 years after the Grand Anse Declaration, these objectives have still not been fully realized. Once again, bureaucratic bundling and parochialism have impeded the smooth implementation of these measures, necessary for real integration within CARICOM.

Writing in the Jamaica Observer in March 2010, noted Caribbean journalist Rickey Singh (2010) stated:

> In CARICOM, nationals can often experience quite shabby, if not humiliating treatment by some immigration authorities, compared with the deference and preference shown to foreigners of a certain pigmentation and nationality. With some nine categories of free movement of 'skilled workers' approved over the years in CARICOM's slow march on labour mobility for the CSME, the reality is that no enabling regional legislation has been enacted to facilitate the crucial issue of contingent rights. As a result, a number of Community nationals continue to experience problems, at times quite embarrassing, to obtain relevant social services for family members, including health and education.

This statement by Singh accurately captures the experience of CARICOM nationals and this explains the reason for parochialism and cynicism amongst nationals towards regional integration. In the said article, Singh (ibid.) stated that '… member states … have contributed not only to the severe slowing down of the free movement project, but have created unfortunate bitterness and hostility by politically expedient immigration initiatives'. Nationals within CARICOM continue to complain about the

hassle they encounter within different Member States, and this includes individuals within the approved categories of skilled labour.

Recognizing the failure of CARICOM to implement the full agreements from the Grand Anse Declaration, another attempt is being made to deepen the integration process, this time through the Caribbean Single Market (CSM) and, ultimately, the Caribbean Single Market and Economy (CSME). In July 2001, the Revised Treaty of Chaguaramas came into effect which was to see the establishment of the Caribbean Single Market and then the Caribbean Single Market and Economy. To a great extent, the new approach towards regional integration was modelled on that of the EU and this is demonstrated by some of the mechanisms that have been recommended to facilitate the accomplishment of the CSME.

Jamaica, Barbados, and Trinidad and Tobago, were the first signatories to the CSM. These three countries therefore make an excellent case study for the implementation of the provisions for the free movement of people. As stated in the Grand Anse Declaration and the Revised Treaty of Chaguaramas, measures were to be put in place to facilitate the free movement of people and the free movement of labour. These measures should have involved amongst other things, the removal of passport and work permit requirements for CARICOM nationals and the transfer of social security benefits for these nationals. The measures would be supported by the necessary legislation to protect the rights of these nationals and would involve the creation of a Caribbean Court of Justice (CCJ) to deal with trade disputes and other concerns of CARICOM nationals. The question is, have these measures been fully implemented in the region? An examination of what has taken place in Jamaica, Barbados, and Trinidad and Tobago, would provide the answers.

Coming out of the Grand Anse Declaration, member countries of CARICOM strengthened their resolve to eliminate the use of passport for nationals within the regional space. Hassle free travel was cited as one of the major priorities of the Caribbean Community. Hassle Free Travel refers to the freedom of CARICOM nationals to travel 'into and within the jurisdiction of any Member State without harassment or the imposition of impediment'. This is intended to foster a greater sense of community. It is also designed to encourage greater intra-CARICOM tourism.

After some 15 years of delays, member countries have commenced the process of a hassle free travel. This they have done through the issuance of a CARICOM Passport. Some 12 countries, including, Jamaica, Barbados and Trinidad and Tobago, have been issuing CARICOM Passports to their nationals.

On the issue of work permits, Jamaica, Barbados, Trinidad and Tobago, have lapsed requirements for the approved categories of workers under the Revised Treaty. Skilled nationals can therefore travel into these countries and receive employment without a work permit. This was made possible through the passage of legislation prior to 2006, when the CSM came into effect in these three countries. From as early as 1997, Jamaica had passed legislation for the free movement of certain categories of skilled CARICOM nationals. Barbados and Trinidad and Tobago, subsequently enacted legislation enabling the approved categories of workers to work within their jurisdiction without the use of a work permit. These approved categories of workers

need to get a CSME Certificate and once this is done, they can be employed without a work permit in the various CARICOM countries that have signed on to the CSME (Table 9.1). To get a CSME Certificate, one needs to present two passport size pictures, a copy of the degree granted from a tertiary institution and the completion of an application form at any of the Ministry of Labour offices within the CARICOM region. Within a matter of days, the application is processed and the applicant is able to access the certificate. There is no expiry date on the certificate and the process is relatively smooth.

Table 9.1 CARICOM skills certificates granted by nationalities between January 2006 and December 2010 (Jamaica)

Nationality	2006	2008	2010
Antiguan	1	9	1
Barbadian	19	21	6
Belizean	3	4	1
Commonwealth of Dominica	2	5	0
Grenadian	0	0	1
Guyanese	20	17	12
Haitian	0	4	0
Jamaican	212	278	180
St. Kitts	2	4	10
St. Lucian	3	2	0
Surinamese	0	3	1
Trinidadian	30	30	
Vincentian	3	2	2
Total	295	379	215

This researcher was only able to gather an accumulative figure of certificates issued in Barbados and Trinidad as the data received by the CSME office in Barbados, was not available in a standardized format. In Barbados, 528 CSME certificates were issued between 2006 and 2009. In Trinidad and Tobago, 1,921 certificates were issued between 2001 and 2009.

Notwithstanding the accomplishment for the removal of work permits in these countries, there have been challenges amongst other categories of workers. Workers such as artisans, have however had profound difficulties in securing employment in these countries. These lower end labourers are often discriminated against, irrespective of the fact that they have a meaningful contribution to make to the integration process.

According to former Prime Minister of Barbados, Owen Arthur:

> The carpenters, the masons and other nationals without formal education had made this region their common economic space and have been moving freely throughout the region before we came forward with the CSME (CARICOM Single Market and Economy) to create a single economic space (Arthur, 2003).

Arthur was speaking to a political rally in his constituency in Barbados in February 2003.

P.J. Patterson, again, articulated some poignant views on the issue of free movement of labour in the Caribbean at the same book launch in 2004. Patterson stated:

> It is in this context that we can appreciate the importance of an institution such as the University of the West Indies; or an agreement such as that enabling the portability of pension benefits; as well as the decision taken by Heads of Government in Trinidad earlier this month to expand the categories of CARICOM nationals eligible for free movement within the Community beyond those already approved – and include additional artisan categories of workers as proposed by the Caribbean labour movement (Patterson, 2004).

Nevertheless, although politicians within the region have demonstrated a serious propensity to make factual utterances, when the time comes for action very little is done to address the situation of which they speak glowingly (Ramphal, 1992). A decade after these speeches were delivered, workers without formal education within the region are subjected to some of the most discriminatory acts. What the CSM has done thus far is to create an elite band of individuals within the region who through education and financial resources can travel throughout the regional space without any major hassle.

As a part of the effort to facilitate the free movement of people and labour in CARICOM, measures had to be put in place to facilitate the transfer of pension benefits of workers. The CARICOM Agreement covers the following Social Security payments:

- Invalidity pensions;
- Disablement pensions;
- Old age or retirement pensions;
- Survivors' pensions;
- Death benefits in the form of pensions (CARICOM Agreement, 1995).

A comparison between CARICOM and the EU shows that in the European Union more areas are covered. While the European Union also includes sickness and

maternity benefits, unemployment benefits and family benefits[7], most of these benefits are not currently offered by the Social Security Organisations in the Caribbean Region.

According to Mac Andrew (2005):

> The CARICOM Agreement on Social Security for some time now has been one of the best, if not the best implemented CARICOM Single Market and Economy related measure, since all Member States with an existing social security organization have fully operationalized the Agreement, resulting in the fact that in most Member States CARICOM Nationals are already enjoying benefits under Agreement.

The CARICOM Agreement on Social Security can be considered the major supportive social protection measure in the CARICOM Single Market and Economy with respect to the free movement of labour. The Agreement requires social security organizations within member countries to take into account contributions made to another social security organization in the single economic space in order to determine the benefits to which a claimant is entitled.

In order to facilitate the development of the CSME, which involves the free movement of people, the issue of justice is essential (Nicholson, 2004). The Revised Treaty of Chaguaramas, recognized this and incorporated the need for a regional appellate court which would ultimately become the final appeal court for countries within CARICOM (Revised Treaty of Chaguaramas, 1989). From as early as 1972, Caribbean countries had been contemplating the establishment of a regional court to end the system whereby appeals were made to the Privy Council in the UK (Nicholson, 2004). This movement gained momentum in 1989, when leaders at the Grand Anse meeting agreed to the establishment of the Caribbean Court of Justice (CCJ). The CCJ was set up through a number of instruments, chief of which was the Agreement to Establish the CCJ. It contains all the main provisions which give effect to the Court. One notable provision of the agreement to establish the CCJ is the right of individual citizens to take matters directly to the CCJ if, in the process of movement throughout the Caribbean, their rights are violated or transgressed. Please see Annex 9.4 for extracts from the agreement establishing the CCJ.

But efforts to establish the CCJ by member states within CARICOM have been fraught with problems. In Jamaica, for example, the efforts to establish the CCJ as the final appellate court have been met with strong opposition from certain groups within civil society and one of the major political parties, the Jamaica Labour Party. The JLP has consistently maintained that it opposes any attempt for Jamaica to be a signatory to the CCJ as the final appeals court for the country. With the 2010 elections which brought the People's National Party to power, the prospects of Jamaica accepting the court's appellate jurisdiction have improved. The party supports acceptance of the

7 Note of the editors: For example, in most European Union countries, fathers have a right to paternity leave after the birth of their child. In most CARICOM countries, this is not the case (WEF, 2013).

CCJ in all its forms, and it enjoys the required two-thirds majority in the House of Representatives, though not in the Senate (*Jamaica Observer*, 2014). However the JLP – now in opposition – are insisting that a referendum must be held for the citizens of the country to decide on the issue (ibid.). Until now this position has effectively stalled Jamaica's efforts to move away from the Privy Council in London as the final appellate court and to transfer that authority to the CCJ.

Trinidad and Tobago has suffered similar set-backs to Jamaica. While in government the then-United National Congress (UNC) supported and endorsed the establishment of the CCJ, it changed its position whilst in opposition (Pande, 2004). This has contributed to Trinidad and Tobago not signing the respective documents for the CCJ to become the final appellate court for that country, even though the seat of the CCJ is in Port of Spain.

Barbados on the other hand was one of the first CARICOM countries to have ratified the CCJ and enacted domestic legislation to facilitate the establishment of the court. The difference in Barbados is that there was consensus amongst the parliamentary opposition on the matter. Barbados therefore made a simple amendment to its constitution to give effect to the CCJ as its final appellate court. Barbados is now one of four CARICOM countries to subscribe to the CCJ in all its forms.

Table 9.2 Summary of implementation status of revised treaty of CARICOM countries for the free movement of people and labour

Country	Issuance of CARICOM Passport	Acceptance of University Graduates1	Acceptance of Sportsmen, Musician, etc.	Acceptance of artisans and domestic helpers	Portability of social security benefits	Adoption of the CCJ in all its forms
Antigua						
Barbados						*
Belize						*
Commonwealth of Dominica						*
Grenada						
Guyana						*
Haiti						
Jamaica						
St. Kitts						
St. Lucia						
Suriname						
Trinidad						
St. Vincent						

Notes: The '*' in the table above, indicates that the respective country has approved the various headings which will result in the 'free movement of people and labour' in CARICOM. It must be noted that of all the countries listed in the table, only Barbados, Belize, Guyana and the Commonwealth of Dominica, have signed up to or implemented all the provisions to facilitate the free movement of people and labour.
Suriname has not implemented the agreement for the transfer of social security benefits largely because their system for social security is different from the practice in the Caribbean. There are therefore some major administrative issues to be resolved before this particular agreement becomes a reality in Suriname. 1. Note of the editors: CARICOM countries have a very high enrolment rate of women in tertiary education. In most of these countries, women enrol more in tertiary education than men. For example, in Barbados, the female enrolment in tertiary education, expressed as a percentage of the number of girls who had left secondary school in the five previous years, was 90%. For men, this figure was only 36%. It is therefore remarkable that women are underrepresented in decision making processes. In most CARICOM countries, there is usually no more than 1 woman for every 5 men in the Parliament (Barbados, Belize, and Suriname). Exceptions are Guyana and Trinidad, where the female-male ratios of parliamentary representatives are 0.46 and 0.40 respectively (WEF, 2013).

The member countries that are involved with the CSME have made some progress towards the implementation of the free movement of people and labour. However, there are some major challenges that have affected the process. The challenges of the CCJ, the introduction of CARICOM passports, and the full implementation of all the approved categories of workers to move and work freely in the region, are some of the frustrating issues confronting a smooth integration process in the Caribbean. What these challenges have clearly done is to place impediments in the path of nationals within the regional space to move freely, thus hindering real progress in CARICOM's efforts towards the establishment of the CSME. According to Patterson (2004):

> As small developing states, we are also vulnerable in the economic sense. We must increase our individual and collective productive base and our capacity to compete effectively in world trade as well as in international financial services. The single market and economy offers this kind of mitigation. We have to utilize the CSME to expand output and employment in all Member States as we adjust to hemispheric and global liberalization.

For the charge of Patterson to be realized, the challenges confronting the free movement of people and labour in the region must be addressed expeditiously.

9.4 Conclusion

In concluding, one can summarize the answers to the questions posed at the beginning of this chapter.

- CARICOM introduced the idea of free movement of people largely because the world had moved to an era of increasing liberalisation of economies and services and it felt that in order to maximize the development of the region, nationals should be given the opportunity to move freely throughout the region.

- The regional organization has been inspired by other regional integration movements such as the European Union. While it must be noted that CARICOM, at over thirty years old, is a creature of itself, best practices have been identified from other regional integration processes, such as the social security system that has been established in the European Union.
- The issue of free movement of people has been a part of a wide compendium of strategies designed to facilitate the full integration of the region. Free movement is just one of the area objectives identified in pursuit of this goal.
- The issue of free movement of people has been receiving what this researcher regards as a 'lethargic' response by leaders within the Caribbean. This is primarily so because they are fearful of the repercussions such a move will have on their domestic economy and the possible political backlash it will have on them. Some states, for example Jamaica, have moved to introduce the strategies towards free movement of people. Others however, notably the Bahamas, have consistently stayed away from the issue.

The issue of the free movement of people has certainly been influenced by international developments and discussions. The collapse of communism has contributed to a proliferation of market policies throughout the world and this has not escaped the Caribbean. Meanwhile, discussions in the World Trade Organization concerning the liberalization of services have definitely contributed to the placing of free movement of people onto the agenda of CARICOM.

Annexes

Annex 9.1

Extract of New Objectives from the Revised Treaty of Chaguaramas

- Improved standards of living and work;
- Full employment of labour and other factors of production;
- Accelerated, coordinated and sustained economic development and convergence;
- Expansion of trade and economic relations with third States;
- Enhanced levels of international competitiveness;
- Organization for increased production and productivity;
- The achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States and entities of any description;
- Enhanced coordination of Member States' foreign and {foreign] economic policies; and
- Enhanced functional cooperation, including:
  - More efficient operation of common services and activities for the benefit of its peoples;

— Accelerated promotion of greater understanding among its peoples and the advancement of their social, cultural and technological development;
— Intensified activities in areas such as health, education, transportation, and telecommunications.

Annex 9.2

Articles 45 and 46 of Treaty

ARTICLE 45 – Movement of Community Nationals

Member States commit themselves to the goal of free movement of their nationals within the Community.

ARTICLE 46 – Movement of Skilled Community Nationals

- Without prejudice to the rights recognized and agreed to be accorded by Member States in Articles 32, 33, 37, 38 and 40 among themselves and to Community nationals, Member States have agreed, and undertake as a first step towards achieving the goal set out in Article 45, to accord to the following categories of Community nationals the right to seek employment in their jurisdictions:
  — University graduates;
  — Media workers;
  — Sportspersons;
  — Artists; and
  — Musicians, recognized as such by the competent authorities of the receiving Member States.
- 2. Member States shall establish appropriate legislative, administrative and procedural arrangements to:
  — Facilitate the movement of skills within the contemplation of this Article;
  — Provide for movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments, including:
    → The elimination of the requirement for passports for Community nationals travelling to their jurisdictions;
    → The elimination of the requirement for work permits for Community nationals seeking approved employment in their jurisdictions;
    → Establishment of mechanisms for certifying and establishing equivalency of degrees and for accrediting institutions;
    → Harmonization and transferability of social security benefits.
- 3. Nothing in this Treaty shall be construed as inhibiting Member States from according Community nationals unrestricted access to, and movement

within, their jurisdictions subject to such conditions as the public interest may require.

- 4. The Conference shall keep the provisions of this Article under review in order to:
  - — Enlarge, as appropriate, the classes of persons entitled to move and work freely in the Community; and
  - — Monitor and secure compliance therewith.

Annex 9.3

Extract from Grand Anse Declaration

- The three Common Market Instruments required by the Treaty of Chaguaramas – the Common External Tariff, the Rules of Origin, and a Harmonized Scheme of Fiscal Incentives fully revised, agreed and effective by January 1991;
- Customs cooperation and our Customs Administrations strengthened to prepare ourselves for movement towards a Customs Union
- The signature by all of us to the Agreement establishing the CARICOM Industrial Programming Scheme (CIPS) by 30 September 1989;
- The enactment, by January 1990 of the legislation required to give effect to the CIPS and the CARICOM Enterprise Regime (CER);
- A scheme for the movement of capital introduced by 1993 starting with the cross-listing and trading of securities on existing stock exchange;
- Technical work to commence immediately on the establishment of a regional Equity/ Venture Capital Fund;
- The CARICOM Multilateral Clearing Facility strengthened and re-established for current and capital transactions by December 1990;
- Further arrangements for intensifying consultation and cooperation on monetary, financial and exchange rate policies by July 1990;
- The removal of all remaining barriers to trade by July 1991;
- immediate activation of Article 39 of the Annex to the Treaty of Chaguaramas in order to promote consultation, cooperation and coordination of policies at the macro-economic, sectoral and project levels;
- Arrangements by January 1991 for the free movement of skilled and professional personnel as well as for contract workers on a seasonal or project basis;
- Immediate and continuing action to develop by 4 July 1992, a regional system of air and sea transportation including the pooling of resources by existing air and sea carriers conscious that such a system is indispensable to the development of a Single Market and Community;
- Greater collective effort for joint representation in international economic negotiations and the sharing of facilities and offices to this end, with immediate effect.'

Annex 9.4

Extract from the Agreement to establish the CCJ

Part I

Part 1 establishes the Court with:

- Original and Appellate Jurisdictions
- The Seat of the Court. The Seat of the Court is located in Trinidad and Tobago. However, the Court may sit in the territory of any other Contracting Party as circumstances warrant.
- The Constitution of the Court
- The Establishment of the Regional Judicial and Legal Services Commission. It sets out its composition and responsibility for appointment and discipline of judges of the Court, except the President.
- Tenure of Office of judge
- Oath of Office

Part II: Original Jurisdiction

International Law is the law to be applied by the Court in the exercise of its Original Jurisdiction. Articles 1X(a) and 1X(f) give the CCJ exclusive and compulsory jurisdiction to hear and deliver judgment on disputes concerning the interpretation and application of the Treaty.

The Revised Treaty of Chaguaramas will create a macro-economic climate to counter the threat of globalization in the Caribbean. This Revised Treaty will establish The CARICOM Single Market and Economy. The Treaty, as revised by the nine Protocols, will confer rights and impose obligations on States and States Parties and it is envisaged that the Original jurisdiction of the Court will be occupied the most.

Where a court or tribunal of a Member State is seized of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the court or tribunal shall refer the question to the CCJ for determination before delivering judgment. The purpose of this provision is to ensure certainty in the law. Business persons seeking to invest in this macro-economic environment need to predict outcomes. To further cement this aspect for certainty, the Agreement provides for *stare decisis* or judicial precedent. This is not a concept of International Law but is adopted to ensure certainty. The doctrine of *stare decisis* or judicial precedent requires the Court to pronounce in the same manner provided the circumstances of the case are similar to one which was heard already.

Another important feature of the Agreement is that it allows nationals or individuals to pursue claims against a state. International Law only recognizes states as subjects. Therefore in an action before an International Tribunal the parties would be States. For example State A v State B. *Locus standi* allows an individual the opportunity to apply to the CCJ for special leave under certain conditions to espouse his action against a State. Such a clause is critical to the free movement of people within

CARICOM as it will serve to protect the rights of nationals who travel throughout the region.

Part III: Appellate Jurisdiction

The CCJ in exercise of its appellate jurisdiction is a Superior Court of record with such jurisdiction and powers conferred on it by this Agreement or by the Constitution or other law of a Contracting Party. Appeals shall lie to the Court from decisions of the Court of Appeal of a Contracting as of right, with leave, or with special leave of the CCJ itself. A person may appeal from a civil or criminal matter.

This Appellate jurisdiction is the same which is presently exercised by the Privy Council and which is enshrined in the Constitutions of all independent Member States.

Part III of the Agreement contains other important provisions:

Financial Provisions

Every State that is a signatory to the Agreement has to pay its proportionate share of expenses of the CCJ. Ministers of Finance of the signatory States are mandated to make provision in their National Budgets for the first 5 years. A Trust Fund is being established for the purpose of sustaining the operations of the court and will be administered by the Caribbean Development Bank. Contracting Parties are required to put up a Bond in the amount of their assessed contribution for the first 5 years. Failure to pay future contributions shall lead to forfeiture of the Bond.

The past history of contributions by Caribbean States to regional institutions has not been very good and the above-mentioned provisions are seen as a way of ensuring contributions to the CCJ. Non payment by a State of its contributions to the budget of the Court would result in the offending State being unable to access the Court's services. However, an individual of the offending State would not be denied access to the Court in the Original or Appellate jurisdiction of the Court.

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Part IV:

Perspectives from Europe and Central Asia

10

The European Union: from freedom of movement in the internal market to the abolition of internal borders in the area of freedom, security and justice

Philippe De Bruycker[1]

10.1 Introduction

The beginning of freedom of movement in Europe is intrinsically linked to the establishment of a common market with the creation of the European Economic Community by the Treaty of Rome in 1957 and its four freedoms for goods, capital, services and persons. It is therefore not surprising that freedom of movement was initially limited to workers and was achieved on 15 October 1968 with Regulation 1612/68[2] regarding employees.

The scope of the beneficiaries of freedom of movement enlarged progressively with the political will to bring the European integration process closer to its citizens and the pressure of the jurisprudence of the European Court of Justice. It nowadays includes all those fulfilling minimum conditions and has even been recognized as an attribute of European citizenship by Article 20, §2, a) Treaty on the Functioning of the European Union (TFEU), following which 'Citizens of the Union shall enjoy the right to move and reside freely within the territory of the Member States'. The subject is nowadays regulated by a single legal instrument that has repealed a myriad of previous categorical texts, apart from the regulation on workers: the directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (European Union, 2004). These rules that have been adopted in the framework of the internal market will be the object of the first part of the present contribution.

The title of directive 2004/38 shows that non-EU citizens ('third-country nationals' or TCNs) are excluded from freedom of movement unless they are covered

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2 The text of 1968 amended several times was codified by Regulation 492/2011 (European Parliament and Council of the European Union, 2011, pp. 1-12).

by one of the very important exceptions that will be detailed below. This is clearly confirmed by the EU Charter on fundamental rights, following which:

- Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
- Freedom of movement and residence *may* be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

One will notice that previous texts differentiate between freedom to move and to reside depending on the length of stay: movement is confined to short stays of maximum three months while residence is characterized by long stays of more than 3 months. This being said, the expression 'freedom of movement' is often used in a broad sense encompassing residence. This may create a certain confusion, which explains why expressions like freedom to circulate or to travel are used by certain authors to mark a distinction with the freedom to reside. Moreover, a new concept of mobility is emerging for third-country nationals as we will see below.

The present contribution will in its second part demonstrate the extent to which freedom of movement and of residence has been extended by secondary law (meaning rules adopted on the basis of the treaty) concerning mainly TCNs. This has actually been done in the framework of another European policy, the Area of Freedom, Security and Justice, that is much younger than the internal market policy, having been launched only in 1999. It is within the framework of this area, which is not coterminous with the EU, that the controls at internal borders have been abolished.

The present contribution will, for both the free movement area in the internal market, and for the Area of Freedom, Security, and Justice without internal border controls, successively analyse: (1) their content, (2) geographical scope, (3) beneficiaries, (4) the length of period of movement and of residence, (5) the status of persons moving to or residing in another Member State, and finally (6) the still existing limits to these rights. The objective is to present, as clearly as possible, these two intrinsically linked sets of rules which can often lead to a certain level of confusion due to their high level of complexity.

10.2 The freedom of movement and of residence in the internal market

10.2.1 Content

Freedom of movement of persons started with workers. The Treaty of Rome establishing the European Economic Community (EEC) in 1957 foresaw in Article 39 (nowadays Article 45 TFEU) §1 that 'Freedom of movement of workers shall be secured within the Union'. The third paragraph adds that 'It shall entail the right to accept offers of employment actually made' (point a) and 'to stay in a Member State for the purpose of employment' (point c). A similar provision recognized a right to establishment for self-employed workers. This freedom for workers was actually a request from Italy: facing a high level of unemployment during the fifties, it wanted

to promote the emigration of its citizens. The interesting point is that, for reasons that have been elucidated by historians[3], the other (at that time five) Member States of the EEC agreed to give up most of their power to control the migration of their citizens between themselves. Freedom of movement relies indeed on the idea that immigration is an individual right; the Member States can limit this right only in exceptional cases (see below), and never for economic reasons. Any requirement for a work permit is unimaginable within a common market, as it is based on a logic of supply of European workers competing with citizen in their country's labour market, rather than that of a controlled demand of employers obliged to ask for authorization to recruit a TCN instead of a national. The freedom of movement of workers had to be realized before the end of the transitional period of 12 years foreseen by the Treaty of Rome for the completion of the common market, namely in 1970. This was done in three steps, by three successive regulations in 1961, 1964 and finally 1968 when regulation 1612 was adopted on 15 October. The fact that this happened eighteen months before the deadline demonstrates that this was no longer an issue of conflict for the Member States.

Despite these remarkable developments, freedom of movement was still limited to workers. A shift away from this exclusively economic logic appeared progressively during the seventies and eighties with the growing attention given to the rights of European citizens and the jurisprudence of the European Court of Justice that expanded slightly the beneficiaries of freedom of movement. This evolution prompted the European Commission to make new proposals that led to the adoption of three directives, all on 29 June 1990: one for students, one for pensioners, and a general one for all other persons not belonging to any existing category. This more or less long evolution was not easy; the first Commission proposal of 1979 had been blocked by the Council of Ministers for 10 years. Contrary to what happened with workers, freedom of movement for other persons had become a difficult issue in the European Union.

It is only in 1992 that the notion of European citizenship appeared formally in the European legal order with the Treaty of Maastricht (nowadays under Article 20 TFEU). An explicit link is established between citizenship and freedom of movement under Article 21 TFEU, which states that 'Every citizen shall have the right move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

The extent to which the creation of a European citizenship is mainly symbolic is a question that has been raised on occasion. In fact, European citizenship grants substantive political rights to Europeans to vote and to be elected at local and European elections in the EU Member State in which they live. Moreover, if the link established between European citizenship and free movement seemed symbolic to lawyers at the beginning, the Court of Justice built on its basis a new jurisprudence

3 See the extremely interesting book of Goedings (2005), *Labour Migration in an Integrating Europe, National Migration Policies and the Free Movement of Workers, 1950-1968*.

extending basic social rights to all Europeans by affirming that 'Union citizenship is destined to be the fundamental status of nationals of the Member States' (Court of Justice of the European Union [CJEU], 2001, C-184/99, point 31). Finally, European citizenship has provided the opportunity to unify to a large extent under one single legal instrument, all the previous categories of beneficiaries of freedom of movement covered by different norms. This was the object of directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, adopted on 29 April 2004[4]. This directive is nowadays the main instrument regulating freedom of movement of European citizens. The only instrument that was not repealed for mysterious reasons was Regulation 1612/68 of 15 October 1968 on freedom of movement for (employed) workers within the Union.

The directive 2004/38 has not only codified the rules on freedom of movement, but has also innovated on a number of interesting points (see also below) in order to facilitate the free movement of European citizens. The obligation for citizens to have a residence card has been abolished and replaced by a simple registration that is no longer even required by every Member State but left at their discretion. In order to avoid the burdensome bureaucratic requirements of unnecessary documents – which varied according to the Member State concerned – article 8, §3 of the directive specifies precisely the kind of proof that can be required from European citizens by the national authorities for issuing the registration certificate.

One will notice that there exists a European 'citizenship' and not a European nationality (see Lanfranchi et al., 2012). As article 20, §1 TFEU states that 'Every person holding the nationality of a Member State shall be a citizen of the Union', the only way to be a EU citizen is to be a national of one of the Member States. The same provision specifies that 'Citizenship of the Union shall be additional to and not replace national citizenship'. Nationality law is still a field of exclusive competence for where the EU cannot intervene, even if the Member States must have due respect to EU law, in particular the principle of proportionality, when exercising their powers (CJEU, 2010, C-135/08).

One of the strangest elements of European law demonstrates the current limits of the European citizenship: a European citizen does not fall under EU law while in its Member State of nationality because that person is considered to be in an 'internal situation', meaning outside the scope of European law. In other words, Europeans are citizens of the EU in all Member States, except in their State of origin. This may lead to situations were nationals are treated by their own State less favourably than citizens from other Member States, what is called 'reverse discrimination' because EU law forbids in principle discrimination on the basis of nationality. This happens often regarding family reunification, where national rules may be less favourable than EU law which is indeed very generous. The complexity of this jurisprudence is illustrated by the fact that an EU citizen returning to his/her Member State of origin, after having made use of freedom of movement, is covered by EU law. This is to prevent any loss of

4 Official Journal of the European Union, Serie L (Legislation), no. 229 of 29 June 2004, pp. 35-48.

rights that the EU citizen might suffer by going back home. In its last jurisprudence, the Court of Justice of the European Union (2011, C-256/11) considers that:

> EU law is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of the citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen.

The evolution from the idea that these types of cases are outside the scope of EU law, to the refusal of instances of reverse discrimination when they lead to the deprivation of a right attached to European citizenship, is welcome, even if this last criteria lacks clarity and has to still, unfortunately, be applied by the national judge…

10.2.2 Area of free movement

Being a classical policy created by the Treaty of Rome in 1957, the freedom of movement can be exercised by European citizens in all of the 27 Member States of the European Union. The scope is even larger as some third (non-EU) countries are associated with the policy of freedom of movement:

- This is firstly the case for the three states participating in the European Economic Area (EEA), namely Iceland, Norway and Lichtenstein;
- Secondly, for Switzerland on the basis of a bilateral agreement signed with the EU.

The total number of concerned countries forming the area of freedom of movement is thirty-one.

The participation of all Member States seems logical for one of the pillars of the European integration process, but, as we will see below, this is not the case for the abolition of internal border controls that is limited to the Schengen area. The only exception to this principle is the transitional rules for workers (and not for non-economically active citizens who benefit immediately and completely from freedom of movement) that are sometimes adopted in case of the enlargement of the EU, through the addition of new Member States. This has been the case in particular with the inclusion of new Member States: eight out of ten Central and Eastern European[5] states joined in 2004, followed by Bulgaria and Romania in 2007, and Croatia in 2013.

The transitional rules are adopted to prevent problems arising from large-scale flows of workers, in particular from new to old Member States, which could result from variations in economic development and personal incomes inside the enlarged

5 With the exception of Malta and Cyprus with which no difficulties are foreseen due to the small size of their labour market.

EU area. The provisional rules expired for the 8 new Member States in 2011 and for Bulgaria and Romania in 2014. Although the EU's enlargement process is slowing, and thus the application of transitional restrictions has become rarer, it is nevertheless interesting to present the system in order to show how the enlargement of an area of freedom of movement can be managed.

The main characteristic of the system is that it is not a general one, but that it is tailor made to the labour market situation of every Member State. Each of the existing (meaning before enlargement) Member States has the possibility to enact necessary measures to limit the inflow of workers from the acceding Member States, in particular by imposing work permits that are delivered only after a labour market test. However, this is only possible during the first two years, and Member States must inform the European Commission of the measures to be imposed. Before the end of this first period, the Commission will deliver a general report to inform the Member States about the evolution of the situation. On this basis, the Member States have the possibility to prolong the transitional measures for three more years. After these five years, the Member States can prolong the measures for two final years, but this time only if they prove to the Commission that there are serious disturbances of the labour market or a risk thereof. So, aside from a scope that extends beyond the boundaries of the EU, the second key characteristic of the system is that it is strictly limited in time to a maximum of seven years, divided as explained above into three different sub-periods.

10.2.3 Beneficiaries

The primary beneficiaries of freedom of movement are of course EU citizens on the basis of EU treaties (3.1.). However, there are surprisingly also important categories of third-country nationals (3.2.) who benefit indirectly from this right in almost the same ways as European citizens[6].

6 According to EIGE (2005), many people are moving internally within the European Union and the proportion of women among them is high. They point out that people's experiences of gender, gender roles and gender inequality impact migration significantly, as it decides who migrates, how and where they end up. For example, migration can lead to both economic and social autonomy for women, which could lead to challenging the traditional or restrictive gender roles. Migration can on the other hand also strengthen existing gender stereotypes, of women's dependency or lack of decision-making power. The EU recognizes the important role of women and has in 2010 adopted the "Plan of Action on Gender Equality and Women›s Empowerment in Development". The aim is to, among others, "build in-house capacity on gender equality issues in development", and "place gender equality issues systematically on the agenda of political and development policy dialogue" (EC, 2010, p.6). On the subject of migrant women, there is the ENoMW, the European Network of Migrant Women. They promote equal treatment, equal rights and better integration for migrant women in Europe and advocate that strategies for the integration and social inclusion of migrant women be included in the EU legal framework (ENoMW, n.d.).

European Citizens

Despite the fact that Europeans are nowadays considered citizens, the directive 2004/38 still distinguishes between four different categories. The rules differ only regarding the condition of admission depending on the person's objective during their stay.

- Firstly, workers[7]. Those persons only have to produce either a confirmation of engagement from the employer/certificate of employment, or a proof that they are self-employed. They enjoy the same treatment as nationals on the labour market. It is interesting to note that job-seekers are also entitled to move in order to find work and cannot be expelled as long as they can provide evidence that they are still seeking employment and they have a genuine chance of being engaged following Article 14, §4, b) of directive 2004/38. A cutoff period of six months has been deemed reasonable by the Court of Justice (CJEU, 1991, C-292/08), but there is currently no maximum time period and a case-by-case approach must be applied. During this period, these persons are entitled to the same resources and assistance provided by employment offices as the nationals of the host Member State. A European portal for job mobility called 'Eures' has been created to help workers and employers to get in contact across the EU. However, there is still an important limitation to the freedom of movement of workers as it does not apply to 'employment in the public service', a notion that has been narrowly interpreted by the Court of Justice as we will see below.
- Secondly, students. They have to prove that they are enrolled in an accredited public or private education establishment and have comprehensive health insurance coverage in the host Member State. They do not need to prove that they have financial resources, but can sign a declaration certifying that they have sufficient resources not to become a burden on the social welfare system of the host Member State during their period of residence. A European programme called Erasmus was created in 1987 to encourage student mobility in the European Union. More than 2 million students have taken part in exchanges between European universities within this framework.
- Thirdly, all other persons, upon the condition that they have sufficient resources so as to not become a burden on the social assistance system of the host Member State as well as comprehensive health insurance coverage. This category includes all persons who do not belong to the two previous categories, for instance persons who desire to retire in one of the Member States. It illustrates clearly that all EU citizens benefit from freedom of movement if they can fulfil the two basic conditions – sufficient resources and health insurance. One will note that in this case, EU citizens have to prove that they actually have financial resources and do not benefit from

7 For detailed information about workers, see the website of the European Network on Free Movement of Workers funded by the European Commission and their yearly report as well as publications available on line at http://ec.europa.eu/social/main.jsp?catId=475&langId=en

the system of alleviated proof like students, who can provide a simple declaration. Member states must nevertheless take into account the personal situation of every person, and the amount that they require cannot be higher than the threshold below which nationals become eligible for social assistance, nor can it be higher than the minimum social security pension that is guaranteed.

- Fourthly, family members of EU citizens. Freedom of movement would be a limited right if it were not possible for EU citizens to bring members of their family to their host Member State. In order to favour mobility within the EU, the right to family reunification is guaranteed to all EU citizens, in contrast to the strict conditions for family reunification for third-country nationals living in the EU, which is regulated by directive 2003/86 in the framework of the EU's immigration policy.

Family reunification raised the issue of the definition of a family, which became the object of difficult negotiations between Council and Parliament involving the Commission. This notion can indeed be understood in a narrow or broad sense and is constantly evolving, with new forms of family life outside marriage and within homosexual couples. Article 2, §2 of directive 2004/38 grants family reunification to the spouse, children who are under the age of 21 or are dependants, and even to direct relatives in the ascending line if they are dependants. Partners outside formal marriage are admitted upon strict conditions; on the basis of a registered partnership concluded in a Member State and if the legislation of the host Member State treats registered partnerships as equivalent to marriage. Moreover, the admission of other family members, including partners in a simple long-term relationship, must be 'facilitated' by Member States if they are dependents or members of the household of the EU citizen or in need of the personal care of the EU citizen for a serious health problem. If the notion of spouse cannot for the moment be interpreted as including same-sex persons because this is not (yet) admitted by most of the Member States, the silence of the directive about the 'partner' seems to allow the inclusion of same sex couples.

Third-Country Nationals

Third-country nationals normally do not benefit from the freedom of movement reserved to European citizens. There are nevertheless important categories among those persons who enjoy that right on the basis of family links with a European citizen, an agreement concluded by their country of origin with the European Union, or their work relationship with a company operating in the EU.

- Firstly, reunification with a European citizen has been extended to family members independently of their nationality following the same logic aimed at facilitating mobility. Europeans would indeed have difficulty to move within the EU if they could not bring with them their family because of their third country nationality. Third-country nationals can benefit from EU law through the citizen that they accompany or join in what can be

considered as a case of 'mixed' family reunification[8]. This is not only the case for a family link created with a third-country national already living in the European Union, or in case of movement between Member States, but also for the first entry of the family member into the EU. The Court of Justice (2008, C-127/08) has even extended this decision to third-country nationals staying illegally in the European Union in a famous case that provoked strong opposition from some Member States considering that this jurisprudence deprives them of the possibility to fight abuses of family reunification, for instance through 'white marriages'.

The status of those third-country nationals is extremely advantageous as they are assimilated with the European citizen with whom they have a family link. Apart from the right to residence, they also have the right to take up employment or self-employment. There are nevertheless some differences with the situation of European citizens, a reminder that those family members remain on some points third-country nationals. In particular, those persons can be subject to a visa obligation depending on their nationality, following the rules of the visa policy governed by regulation 539/2001. However, in their case the delivery of the visa is a right, except if there are sufficient reasons of public order, public security and public health to refuse it (even then, these reasons have to be balanced with the right to family life (see below)). Therefore, directive 2004/38 foresees that 'member states must grant such persons every facility to obtain the necessary visa', that it is free of charge and must be delivered 'as soon as possible' and 'on the basis of an accelerated procedure'. Those persons are also still subject to the obligation to have a residence card, while European citizens only have to register in their host Member State; however, this obligation is more a guarantee for third-country nationals who otherwise would not have the means to prove that they benefit from their status as they only have a foreign identity card or passport. It is clear that this card, having its source in EU law, does not create but only recognizes the right of residence. Finally, as third-country nationals only benefit from EU law indirectly through the European citizen with whom they have a family link, some provisions have been included in directive 2004/38 to prevent those persons, under certain conditions, from losing their residence right in case of disruption of the family tie, either because of the death or departure of the European citizen, or in the event of divorce, annulment of marriage or termination of partnership.

- Secondly, persons coming from a third country signatory of an agreement with the European Union that extends freedom of movement to its nationals. As already mentioned above, this is the case for nationals from Iceland, Norway and Lichtenstein that are part of the European Economic Area and also those from Switzerland on the basis of a specific external agreement concluded with that country. This is not the case for the agreements concluded with Turkey. Even if freedom of movement has been envisaged with that country

8 So-called « pure » family reunification (between two third-country nationals) is regulated by directive 2003/86 (Council of the European Union, 2003) in the framework of the immigration policy.

in the association agreement concluded in 1963, this extension has still not been implemented. Turkish citizens thus only benefit from EU law once they have been admitted by a Member State (that said, EU Member States are often sanctioned by the Court of Justice for their excessively restrictive application of these rules). The EU has been much more cautious in the other numerous external agreements (of association or cooperation) concluded with other third countries, which do not include provisions on freedom of movement but only contain rules on non-discrimination of their nationals once admitted (for instance in the case of the agreements concluded with Northern African countries in the framework of the Mediterranean policy).

- Thirdly, persons benefiting from freedom of services. The Court of Justice (1990, C-113/89) has developed a jurisprudence considering that this freedom – foreseen in the internal market – does include the possibility for European companies to post their personnel, including third country nationals legally residing in the Member State of origin of the company, in another Member State to provide a service. Although the principle has been agreed upon, problems arise regarding the type of control and formalities that Member States may impose in this case (for instance the requirement of a work permit for those persons is held to be in contradiction with the freedom of services). This is another example of third country nationals benefiting indirectly from freedom of movement because of their work relationship with a European company. However, the presence of these persons is temporary (actually limited to the length of the provision of the concerned service) and governed by directive 96/71 concerning the posting of workers in the framework of the provision of services.

10.2.4 Periods of movement

Three periods have to be distinguished regarding EU citizens moving and residing in another Member State:

- Short stays cover travelling in the EU for less than three months. This type of stay is not subject to any other condition than providing proof of European citizenship. It is in particular not subject to any conditions relating to financial resources.
- Long stays for more than three months are open to persons depending on which of the three categories envisaged by directive 2004/38 they belong to and provided that the basic conditions required are fulfilled. This stay is not limited in time as long as the persons fulfil the conditions required depending on the category they belong to. European citizens may have to register if the host Member State is requiring this formality.
- Permanent residence is an innovation of directive 2004/38. It is a status open to European citizens who have resided in one Member State continuously for five years. Its main interest is that the stay of the holders of that status is no longer subject to any condition, so that they can apply for social aid

without any fear of losing their right of residence. It nevertheless does not grant an absolute right of residence as permanent residents can still be expelled for reasons of public order or public security in certain restrictive circumstances.

10.2.5 Status of moving persons

Freedom of movement implies non-discrimination policies are effective. This principle was foreseen to encourage European citizens to move by forbidding any discrimination on the basis of nationality. Non-discrimination is also considered to be a tool favouring the integration of European citizens in their host Member State. Building on Article 18 TFEU, Article 24, §1 of directive 2004/38 states that 'Union citizens residing on the basis of this directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty'.

The Court of Justice has reinforced the effects of that provision. Its jurisprudence has extended the prohibition of direct discrimination, when the criterion of nationality is explicitly used by one legal instrument, to indirect discrimination, when a criterion appears neutral because it is not based on nationality but, for instance, on another one like residence that has the same results as nationality. This kind of discrimination is legally forbidden because of its effects in fact rather than in law. The Court goes even further by refusing measures which, while applicable without discrimination to all workers (nationals and Europeans from other Member States), have the effect of making freedom of movement more difficult to exercise, unless these measures can be justified. Finally, the scope of implementation of the principle of non-discrimination referring to 'the scope of the treaty', which is very large, has been extensively interpreted by the Court. Even rules of civil law on the names of persons have been considered as falling under the scope of the treaties (CJEU, 2008, Case 353/06). This jurisprudence, following a teleological interpretation, is guided by the objective of freedom of movement that the Court of Justice is tasked with facilitating as envisaged by the European Treaties.

Finally, two accompanying policies have been created in order to facilitate freedom of movement and turn it into a reality.

The first one is about social security. Freedom of movement would be extremely difficult to exercise if workers were confronted by different social systems. They would have to comply with divergent rules requiring several conditions that could cause them to lose their rights in their Member State of origin before acquiring rights in their host Member State. Therefore a system of coordination between Member States has been foreseen. As it is clear from the term used, this European policy is not based on the harmonization of national policies which would be almost impossible to achieve, but on a mechanism aimed at making possible the movement of persons between Member States with different systems. This coordination is based on some basic principles like the aggregation of periods of insurance, work or residence through the Member States and the right to export social security benefits within the Union, together with cooperation between the social security institutions of Member States.

The second policy concerns the mutual recognition of degree qualifications. Again, freedom of movement of workers would remain theoretical if European citizens, in their host Member State, could not rely on the degree they obtained after studying in their Member State of origin or another Member State (the latter situation being ever more common due to the increasing mobility of students). The Court of Justice considers that the freedom of movement of workers leads to a duty of Member States to offer fair procedures of recognition of professional qualifications which take into account the knowledge and qualifications already acquired by a person from another Member State when requiring certain qualifications for access to a particular profession. To regulate this issue, the EU has adopted directive 2005/36 on the recognition of professional qualifications, making a distinction between three types of professions. The professions for which the educational programmes have been harmonized at a minimum level (mainly professions in the health sector, as well as industrial, commercial, and craft activities), benefit from a system of automatic recognition. Other professions fall under what is called the general system of recognition under which the Member States are in principle obliged to recognize the qualifications of other EU Member States, unless there is a substantial difference between the qualifications required in the host Member State and the ones of the person in question who, in that case, may be asked to pass an aptitude test or to take a course. One has to take into consideration that the recognition of degrees does not refer only to the nationality of its holder – addressed below in the case of third country nationals – but also to the 'nationality of the degree', meaning the state where the qualification has been acquired. If the qualification is a third one because the person studied outside the EU in a third state, the directive 2005/36 does not apply to the first recognition by a Member State (which is then regulated by national law), but only to a subsequent one if the holder moves within the EU to a second Member State once a first Member State has already taken a decision regarding recognition.

10.2.6 Limits to freedom of movement

There are still two limits to freedom of movement.

Firstly, regarding workers, article 45, §4 TFEU foresees that freedom of movement 'shall not apply to employment in the public service'. This provision raises obviously the question of what is meant precisely by 'public service'. This is very important as public employment accounts for around 20% of total employment in the EU. Due to the fact that it is an exception to the principle of freedom of movement, the Court of Justice has interpreted the notion of 'public service' narrowly as including 'posts which involve direct or indirect participation in the exercise of public authority and duties designed to safeguard the general interests of the State'. This includes in particular the army, police, judiciary, tax authorities, and diplomatic corps. It is in this way clear that the nature of the legal relationship between the employee and its employer is not important and that positions such as postal or railway workers, plumbers, gardeners, electricians, teachers, nurses, and civil researchers may not be reserved to nationals

despite the fact that they may belong to the public sector (see European Commission, 2010).

Secondly, regarding all persons, chapter VI of directive 2004/38 allows Member States to restrict freedom of movement on grounds of public policy, public security or public health. These are actually the traditional grounds on the basis of which aliens can be expelled from a country. The fact that they can still be the objects of such measures by their host Member State is one of the major elements distinguishing the status of European citizens from nationals of Member States. It is however clear that these reasons have to be interpreted narrowly because they represent an exception to the principle of free movement. The Court of Justice has developed on this issue an important jurisprudence that has been integrated in the text of directive 2004/38. Article 27, §2 foresees that those 'measures shall be based exclusively on the personal conduct of the individual concerned' and adds that 'previous criminal convictions shall not in themselves constitute grounds for taking such measures'. The second indent of that provision is essential when it states that 'the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. This implies in general the existence of a trend by the individual to replicate the behaviour in the future (CJEU, 2012, C-348/09). Moreover, article 28, §1 adds that before taking an expulsion decision, 'the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'.

Some procedural safeguards are foreseen by directive 2004/38, in particular the right for European citizens to appeal in such a case before a judicial authority. Up to a maximum of three years after its implementation, persons may submit an application for lifting the exclusion that may derive from the expulsion order on the basis of a change of circumstances. Member States must answer this appeal within six months. Some persons have a stronger protection against expulsion: permanent residents can only be expelled on the basis of *serious* grounds of public policy or security; and persons residing in the host Member State for 10 years can only be expelled on the basis of imperative grounds of public security and not of public policy. However, the Court is not developing a restrictive interpretation of the notion of public security. Rather, in its jurisprudence it appears to be strangely mixed with public policy, despite the fact the two notions are always mentioned separately in EU law instruments[9].

Finally, measures based on public health can only be taken against epidemic diseases defined by the World Health Organization or diseases which are the subject of protection provisions, in which case it also applies to nationals. Moreover, diseases occurring three months after the arrival of the person shall not constitute grounds for expulsion.

9 See the previous case (C-348/09) where the Court ruled against the opinion of its advocate general.

10.3 The abolition of internal borders in an area of freedom, security and justice

10.3.1 Content

The area of freedom, security and justice was only created in 1997 with the signature of the Treaty of Amsterdam. As such, it is a policy much younger that the common market created 40 years before, which explains why it is less developed than the policies regulating freedom of movement. Following Article 3, §2 of the Treaty on European Union (TEU)[10], 'the Union shall offer to its citizens an area of freedom, security and justice (AFSJ) without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. In fact, the building of the AFSJ started during the eighties, before its official recognition in the Treaty of Amsterdam. Regarding the free movement of persons, the so-called Schengen agreements of 1985 and 1990 are of particular interest.

The Schengen 'acquis' (this is a French word meaning all the applicable Schengen rules) is one of the most complicated areas of European law. It refers to rules that were originally adopted outside the EU in the framework of intergovernmental cooperation: first a general agreement on 14 June 1985, and second a detailed convention on 19 June 1990. The name comes from the place where those international conventions were signed, Schengen, a village in Luxembourg chosen because of its symbolic location at the intersection of the borders of the neighbouring countries of Luxembourg, Germany and France. The objective of Schengen cooperation was to 'achieve the abolition of checks at their common borders on the movement of nationals of the Member States of the European Communities' (Schengen Agreement, Preamble). The identification of this objective with the achievement of the internal market of the EU allows us to consider Schengen as a kind of laboratory of the European integration process used to avoid having recourse to the institutional framework of the European Community.

It is in the Schengen area that internal controls (rather than internal borders) were lifted on 26 March 1995 between seven EU Member States (Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Portugal). This group of pioneer Member States became an area of free movement more advanced than the EU because persons crossing their internal borders were no longer subject to controls. As all persons are concerned by the abolition of controls, independent of their nationality and of their European citizenship status, TCNs acquired a limited right to move freely within the Schengen area[11]. Because a person entering through one State can *de jure* or *de facto*

10 The EU relies on two treaties: the TEU is the basic treaty setting the general principles at the basis of the EU while the TFEU contains detailed rules about the competences and institutions of the EU.

11 On the contrary, European citizens did not gain with Schengen the right to move freely that they already derived from EU law, but only the right not to be controlled at the internal borders within the Schengen area.

move inside the entire area, the participating States agreed upon compulsory measures in order to preserve the coherence of the Schengen area. These measures have aimed at the harmonization of national rules regarding the entry of persons; prominent among them are the short-term (Schengen) visa policy and the coordinated control of their common external borders.

Due to its success, Schengen cooperation was integrated into the EU by a protocol annexed to the Treaty of Amsterdam so as to prevent Schengen from becoming an organization in competition with the European Union. The complexity of that legal construction comes from the fact that the Schengen area does not coincide with the membership of the EU, being simultaneously, as we will see below, larger and smaller than the EU with its 27 Member States.

10.3.2 Area without internal border controls

Being a quite new policy (even if it does have roots going back to the Schengen Agreement of 1985), Freedom, Security and Justice is one of the areas characterized by 'differentiation'. Differentiation is where not all of the Member States follow the same rhythm of integration and do not participate in all EU policies, but participate in other policies as well, such as the economic and monetary union (not all of the Member States participate in the Euro). Three Member States had problems with this new policy. When Schengen was integrated into the EU along with the new immigration and asylum policies launched by the Amsterdam Treaty, they refused to participate in this new area and were exempted from it on the basis of specific protocols that are excessively complicated.

The United Kingdom refused to abolish internal border controls with the other Member States in order to continue to benefit from its geographical position as an island protected by sea borders that are quite difficult to cross and that constitute a natural barrier against illegal immigration from the continent. Were these controls to be abolished, illegals from the continent would indeed have the possibility to enter the UK, if not *de jure* at least *de facto*. Moreover, a well-known British tradition is to implement controls at the border, and not on the territory as the Schengen States continue to do. Indeed, the only controls on persons that are prohibited by Schengen are the ones at internal borders, while controls on the rest of the territory remain (this explains why controls of persons have not diminished but might even have increased in the Schengen Area). Ireland, which is also an island, might not share the views of UK but followed its position in order to preserve its free travel area with the UK, which includes the problematic case of Northern Ireland. Finally, Denmark which is located on the continent had a different reason to oppose the new Area of Freedom, Security and Justice. This Member State is not against common policies in that area as long as they remain intergovernmental. Therefore, while it agreed to participate in Schengen cooperation when it was built outside the framework of the European institutions, it refused to participate in the new Schengen under the auspices of the European Union. This explains why the developments of the Schengen acquis will remain international law for Denmark and so do not become EU law for that Member State.

Schengen is also a closed club built on trust and solidarity between its members as its peripheral participating states are implementing border controls for all the others in a common space and can benefit from financial support through the Borders Fund when their burden in terms of external border controls is higher than the other participating states. Therefore, new States willing to enter the area must prove, even if they are members of the EU, that they can apply the rules of the Schengen acquis not only legally but also practically. This refers in particular to the control of external borders and the short-term visa policy, even if the blocking of the admission of Bulgaria and Romania in Schengen by some Member States in the Council of Ministers has shown that such a debate can be polluted by political considerations not linked to these issues.

The picture of the Schengen area is at the same time smaller and larger than the EU, similar to the area of free movement for European citizens, but in a more complicated way due to the special position of some states apart from the case of Denmark underlined above:

- Some EU Member States do not participate to the Schengen area: United Kingdom and Ireland because of the above-mentioned reasons; this is also the case of Bulgaria and Romania that have not yet been accepted into the Schengen area. It is likewise the case of Cyprus, which cannot enter Schengen as long as it does not control its external border, with the Northern part of Cyprus still occupied by Turkey.
- The same third (non-EU) States participating in the area of freedom of movement for European citizens, participate also in the Schengen area on the basis of special arrangements: firstly, two Nordic States (Iceland and Norway) because they belong to the Nordic area, together with Finland, Sweden and Denmark, which did not want to dismantle this area when entering Schengen; secondly, Switzerland[12] and Lichtenstein which were in a way islands lost in the middle of the Schengen area.

In total, the number of countries participating in the Schengen area without border controls is twenty-six, but this will change in the future with the joining of Romania and Bulgaria, which are predicted to join starting in 2017, and with the resolution of the special case of Cyprus the day the conflict with Turkey is solved.

The specificity of Schengen as regards its relation to the EU is not only geographical. It remains on some points as it was born, a kind of intergovernmental framework despite its integration into the Union. The evaluation mechanism of the

12 Note of the editors: In a referendum held on 9 February 2014 Swiss voters opted to limit the numbers of EU citizens entering the country to work. The result of the referendum meant that the Swiss government has been unable to extend its open border and labour market agreements with the EU to new member state Croatia. Because Switzerland is barred from discriminating between EU member states on the issue of free movement, the referendum has called into question the entire framework of bilateral agreements between the EU and Switzerland concerning free movement. In April 2014 Switzerland introduced a new quota system for citizens from Croatia and the rest of the EU, described as a 'provisional' solution by the European Commission. At the time of editing (December 2014) the dispute has yet to be resolved. See Traynor (2014), *The Local* (2014).

implementation of the Schengen acquis by Member States, foreseen by Article 70 TFEU, reflects this heritage by envisaging a peer review mechanism of Member States by Member States. This explains the tension with the Commission, which is normally in charge of the evaluation of policies in the European Union, without even speaking of the institutional war that it has generated with the European Parliament, which has been almost excluded from the conception and implementation of the evaluation mechanism.

10.3.3 Beneficiaries

The Schengen area is often the object of misunderstandings regarding its added value. Freedom of movement existed of course before Schengen, but only for European citizens in the framework of the internal market as explained above. They therefore got limited benefits from the policy. The position of third country nationals is very different: as they do not benefit from freedom of movement as part of the internal market, Schengen had to clarify their rights, which was done in a limited way to be completed under the immigration policy.

European citizens[13]

The benefit of Schengen for EU citizens is the abolition of internal border controls. They have therefore acquired the right to cross internal borders within that area without being subjected to any kind of control, with only some limited exceptions. The possibility to travel within the Schengen area – and even to enter it from a third country – on the basis of their national identity card without having to show their passport, reinforces the fact that they inhabit a common space where EU citizens are nowhere foreigners. Article 5, §4 of directive 2004/38 goes even further by stating that where 'a Union citizen does not have the necessary travel documents, the Member State concerned shall give such person every reasonable opportunity to prove by other means that they are covered by the right of free movement and residence'.

Such a context explains that it is almost impossible for EU Member States to claim that they still have an immigration policy within the European Union towards European citizens in law, and in fact even towards third country nationals. This became clear with the willingness of France to send back to Bulgaria and Romania their citizens of Roma origin. Even if those persons do not have the right to reside in France because they do not fulfil the minimum conditions that are still legally required for stays of more than three months, to return them by force to their Member State of origin is a vain exercise as they have the possibility to return for a (claimed) short stay the next day without being the object of border controls. Even if the Court of Justice has ruled that Directive 2004/38 'does not preclude national legislation that allows the

13 Note of the editors: For more information on gender, migration and labour in various European countries, see Slany et al. (2010). They present a comprehensive study that gives a broad overview of the topic in the UK, France, Germany, Sweden, Spain, Portugal, Greece, Cyprus, Poland and Slovenia.

right of a national of a Member State to travel to another Member State to be restricted, in particular on the ground that he has previously been repatriated from the latter Member State on account of his illegal residence there', it has added that this can only be the case 'if the personal conduct of that national constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it'. These very demanding conditions are hard to satisfy.

Third Country Nationals

As it was decided to abolish any kind of control on persons in Schengen, including controls to check if persons are or are not EU citizens deemed contrary to that objective, it has been necessary to clarify the situation of third country nationals within the Schengen area.

The Schengen acquis has done this in a limited way by giving those persons the right to move for only a period limited to three months. This possibility is given to all third country nationals in possession of a short-term visa travelling to the Schengen area or to third country nationals residing in the Schengen area on the basis of a residence permit (or even a long-term visa as long as it is valid). Contrary to the situation of EU citizens, this right is not absolute and some conditions must be fulfilled in order to exercise it as we will see below.

The possibilities for third-country nationals to reside in another Member State for more than three months are regulated in the framework of the immigration policy. As those persons do not benefit from freedom of residence on the basis of the treaties like EU citizens, they will only acquire the right of 'mobility' on the basis of specific legislation. Such rules have been adopted for three categories of persons.

The first category concerns students under directive 2004.114. They have a quite limited right to move to another Member State in order to follow part of their programme or complete it by related courses if they participate in an exchange programme or have been a student for two years already[14].

The second category covers researchers. A directive was adopted on 12 October 2005 in order to facilitate the admission of third-country researchers in the EU, which is in need of such highly skilled persons. Through an innovative system of hosting agreements that they can conclude with researchers, research organizations take over the responsibility for controlling the object of stay and its financial conditions, with the exception of public policy, public security and public health, which remain in the hands of immigration authorities. Researchers admitted by one Member State can continue their research work in a second Member State on the basis of the hosting

14 Note of the editors: Schmelz (2008) points out that migrant women leave their home country for various reasons, such as family or economic reasons. There is also a growing number of both skilled and highly skilled (young) women who migrate for educational reasons.

agreement already concluded provided that they are not moving for more than three months and that they have sufficient resources. For stays of more than three months, Member States may require the conclusion of another hosting agreement with one of their research organizations. Following article 13, §4, 'the visas or residence permits that may be required for exercising mobility shall be granted in a timely manner within a period that does not hamper the pursuit of the research, whilst leaving the competent authorities sufficient time to process the applications'.

The third category concerns highly qualified workers[15] holding what is called a 'blue card' regulated by directive 2009/50 of 25 May 2009. Those persons have the right to move for the purpose of highly skilled employment after 18 months of legal residence in one Member State. However, following a scheme similar to the long-term resident directive, the reference by article 18, §4, point a), to articles 7 to 14 about first admission giving Member States the right to do a labour market test and apply priority rules, as well as to article 6 about the right of Member States to determine the volume of admission of third-country nationals, undermines the idea of freedom of movement of highly skilled workers in the EU. In other words, the card of those persons is not as blue as the European flag.

A new fourth category covers intra-corporate transferees. The emergence of this category dates from 15 May 2014 with the adoption of directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer[16].

Therefore, rules on the mobility of third-country nationals – like the initial rules on freedom of residence for EU citizens before their unification by directive 2004/38 – are based on several complicated categories. One will have to wait for more progress in the building of the common immigration policy to observe what could be a similar evolution. Third country nationals can also benefit from the right to reside in another Member State when they acquire the status of long-term resident regulated by directive 2003/109 that seems, at first look, to form a single category. As its acquisition is related to the length of residence of the concerned person, it will be analysed below.

15 Meaning persons having a degree delivered on the basis of three years of studies (so a Bachelor degree) or five years of professional experience of a level comparable to such a degree.

16 According to the directive, intra-corporate transferees are 'entitled to stay in any second Member State and work in any other entity, established in the latter and belonging to the same undertaking or group of undertakings, for a period of up to 90 days in any 180-day period per Member State' (Art. 21(1)). Transferees may also attain long-term mobility – that is, the right to stay in a second Member State for longer than 90 days in any 180-day period – upon the production of a work contract, a valid travel document and, crucially, 'evidence that the host entity in the second Member State and the undertaking established in a third country belong to the same undertaking or group of undertakings' (Art. 22(2)).

10.3.4 Periods of free movement

As explained above, third country nationals do benefit from freedom of movement for short stays of less than three months on the basis of the Schengen acquis. In contrast to European citizens, this right to travel is subject to several conditions that were recalled by France during its conflict with Italy about the legalization of around 20,000 Tunisians, of whom many were looking to travel to France. These conditions, established by the Schengen Convention of 19 June 1990 referring to the Schengen Borders Code, require a justification for the purpose of stay and sufficient financial resources for its length.

As third country nationals do not benefit from freedom of movement for stays of more than three months under the European treaties, they can only acquire this right on the basis of secondary legislation adopted in the framework of the immigration policy. Apart from the right to mobility given to those of them who are or have become students, researchers or highly qualified holders of a blue card, they can benefit to a certain extent from freedom of movement by acquiring the status of long-term resident on the basis of directive 2003/109, which refers interestingly to the EU's internal market objectives. This status for third country nationals is a kind of equivalent to permanent residence for European citizens. Like the latter, it can be acquired after five years of legal and continuous residence and upon certain conditions: having stable and regular resources to avoid recourse to social assistance; health insurance for all risks normally covered for nationals; plus possibly integration conditions in accordance with national legislation; and even appropriate accommodation, though this last element is contested as it is only mentioned under the necessary proofs and not under the substantial conditions. The two first elements are not surprising as they are the minimum requirements that are still legally required from European citizens in order to benefit from freedom of movement. Member States want indeed to be sure that long-term residents moving within the EU will not become a social burden for them.

This status open to all third-country nationals goes back to a logic of categories when it is about freedom of movement as Article 14, §2 distinguishes between the three groups of EU citizens defined in directive 2004/38. Moreover, the same rights are not given to all categories. Students and inactive persons do enjoy freedom of movement if they fulfil the required conditions (these conditions are nevertheless more demanding than the ones foreseen for European Citizens). On the contrary, workers from third countries are surprisingly still subject to national rules. Article 14, §3 of directive 2003/109 allows each Member State to conduct, if they wish, a labour market test and to apply priority rules in favour of persons already present on their labour market. Moreover, Article 21, §2, second indent gives Member States the power to restrict access to employed activities different than those for which they have been admitted for a period of maximum 12 months. The European Commission (2011*a*) revealed in its report on the implementation of the directive that its transposition by Member States 'falls short of the ambition of freedom of movement', that the provisions of the directive do not actually guarantee. All things considered, it is clear that freedom of workers is far from being guaranteed for third country nationals like it is for European citizens, despite the hopes that the directive on long-term residents raised.

10.3.5 Status of moving persons

As they do not benefit from the principle of freedom of movement, third country nationals are also not within the scope of the general principle of non-discrimination on the basis of their nationality. However, some immigration instruments[17] contain provisions on non-discrimination of third country nationals that are currently more or less filling the gap between the status of third-country nationals and European citizens, even if many Member States have already legislated to try and prevent discrimination between persons on the basis of their nationality.

This is firstly the case of directive 2011/98 which aims to guarantee a common set of rights to all third country nationals working legally in the EU, even if they have been admitted for another purpose (for instance family reunification) other than work. The right to equal treatment covers working conditions, freedom of association and affiliation to organizations representing workers or employers, education and vocational training, tax benefits, access to goods and services (including procedures for obtaining housing), and advice services afforded by employment offices. It is secondly the case of directive 2003/109 guaranteeing equal treatment to long-term residents. The latter instrument extends equality beyond the previous directive to study grants as well as social assistance and protection. Moreover, its provisions give Member States less margin of manoeuvre to restrict equal treatment. The Court of Justice (2012, C-571/10) already considered that directive 2003/109 combined with Article 34 of the Charter of Fundamental Rights of the EU (following which 'the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources'), precludes differentiation between nationals and long-term residents regarding housing benefits on the basis that they are core benefits that Member States cannot limit. It also ruled that requesting from long-term residents from another Member State excessive and disproportionate charges for the delivery of a residence permit will likely create an obstacle to freedom of movement violates directive 2003/109. In this case, the Netherlands had established prices at least seven times higher than the amount to be paid by a national to obtain an identity card (CJEU, 2012, C-508/10).

Finally, the system of coordination of social security benefiting European citizens has been extended to third-country nationals. The system of recognition of professional qualifications that is unfortunately limited under directive 2005/36 to European citizens is nevertheless applicable to third-country nationals on the basis of the provision of equal treatment foreseen in several immigration instruments. However, this does not address directly the issue of first (initial) recognition but only of second recognition of third country degrees that third-country nationals are more likely to hold than Europeans.

17 Apart from the two instruments quoted below, see also article 14 of directive 2009/50 (Council of the European Union, 2009) on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

10.3.6 Limits to freedom of movement

The limits to freedom of movement within the area of freedom, security and justice are logically similar to the ones applicable in the internal market for European citizens. Third country nationals can of course not claim to work on the basis of EU law in the public administration of Member States. The corresponding provisions of immigration instruments have been adapted to the jurisprudence of the Court of Justice narrowing the notion of public administration. Article 11, §1, point a) of the directive 2003/109 on long-term residents limits access to economic activities that 'entail even occasional involvement in the exercise of public authority'. A similar provision is included in directive 2009/50 on the admission of highly skilled workers under Article 12, §3. The mobility of third-country nationals within the EU can also be limited for reasons of public policy, public security or public health.

The main issue that has been debated regarding limits to freedom of movement in the Schengen area is related to the possibility of reintroducing internal border controls[18]. This is possible for a temporary but renewable period of 30 days under Article 23 of the Schengen Borders Code in the case of a serious threat to public policy or internal security. This rule was put to the test in 2011 when Italy did not return, but on the contrary, temporarily legalized around 20 000 Tunisian nationals trying to enter illegally the EU[19]. Since France was mainly concerned as a probable destination country for these French-speaking migrants, it decided to temporarily reestablish controls at its internal borders with Italy.

Due to the political tensions created by these events, the Commission finally proposed to amend the Schengen Borders Code in order to enlarge the possibilities for temporarily reintroducing internal border controls (see European Commission, 2011*a*)[20]. The idea is to include evidence of serious deficiencies by one Member State in the control of external borders or return procedures that might have as a consequence

18 The Court of Justice has also ruled that the abolition of internal border controls is also valid for what some Member States consider as 'border areas', meaning a zone of 20 km starting from the border (CJEU, 2010, C-188/10).

19 These migrants were taking advantage of the relaxation of Tunisian controls upon departure that occurred due to the revolution in that country that launched the so-called Arab spring.

20 Note of the editors: In 2013 the proposal was approved by the European Parliament and by the Council of the European Union on the first reading. The new Regulation (EU) No 1051/2013 authorizes Member States, on an exceptional basis, to 'immediately reintroduce border control at internal borders, for a limited period of up to ten days'…'where a serious threat to public policy or internal security in a Member State requires immediate action to be taken (Art. 25(1)). In addition, 'in exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control as referred to in Article 19a, and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced in accordance with paragraph 2 of this Article for a period of up to six months' (Art. 26(1)). This period of time may be extended 'for a further period of up to six months if the exceptional circumstances persist' (ibid.).

for other Schengen states the arrival of flows of illegal migrants[21]. Even if this proposal is understandable in the context of the France-Italy dispute, where one Member State's legalization (instead of return) of illegals in the hope that they go to another Schengen State is a clear instance of bad faith, it appears that distrust might lead states on the wrong path. Incapacity to control part of the external borders must incentivize the EU and its Member States to help the deficient state(s) to improve external border controls in a spirit of burden sharing, rather than provoke them to reintroduce internal border controls, which can hardly be efficient. In fact, a positive instance of burden sharing materialized in relation to the situation on the Greek border with Turkey, which Greece was unable to control alone. The other Member States took the right decision by deciding to help Greece through the EU Frontex Agency in charge of the coordination of external border controls by Member States. Let us hope that they will act accordingly in case of a new crisis at the external borders instead of resorting to the alternative of reintroducing internal border controls.

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11

Two decades of CIS coexistence: the transformation of the visa-free movement

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11.1 Introduction

The creation of the Commonwealth of Independent States (CIS) in 1991 was primarily a political move designed to preserve, in one form or another, the web of economic, cultural and historical linkages in the former Soviet space. There is no doubt that the CIS, in its initial phase of activity, helped slow down the processes of disintegration and mitigate the negative consequences of the collapse of the Soviet Union. That the demarcation of the former Soviet republics was relatively peaceful was undoubtedly an achievement of the Commonwealth agreement.

The collapse of the socialist system at the end of the 1980s and beginning of the 1990s was accompanied by the emergence of new economic systems in these countries and changes in the European administrative and territorial division. Until 1989 Western Europe had to deal with the socialist bloc, consisting of Yugoslavia, the countries of Central Europe and the Union of Soviet Socialist Republics (USSR). With the collapse of the socialist system, 27 independent states (15 of them in the former USSR region) and at least five hitherto unrecognized countries (four of them also in the former USSR region) emerged onto the scene.

These relatively new entities have specific relationships, both among themselves and with the EU and other neighbouring countries. Some of them have formed various political and economic alliances, while others have joined the EU. Nevertheless, the socialist past and histories of these states determine to a large extent the direction of movement of their population. Political regimes and the countries' orientation regarding western or regional development influenced their openness to free population movement. For the Baltic States, EU membership has promoted new relations and opportunities for mobility. The Central Asian states, such as Turkmenistan, have for the most part become dictatorships and cut their relations with neighbouring CIS countries. Ethnic conflicts and tensions have also influenced the likelihood of population movement. The conflict situations between Russia and Georgia, Armenia and Azerbaijan, and Uzbekistan and Tajikistan have affected the opportunities for free movement between their citizens. The position of non-recognized states (South

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Ossetia, Nagorno Karabakh, Abkhazia and Transnistria) has also limited the free movement of their populations.

Nevertheless, the CIS[2] as a regional international organization has actively promoted the free movement of people. The CIS framework was supported by the powerful activities of the Russian Federation. Despite complications in the relations between the former Soviet republics, the CIS was quick to push the free movement of people onto the regional agenda. Further, it was a platform for the foundation of other regional organizations. Some other important regional organizations were established in the framework of the CIS, such as the Collective Security Treaty Organization (CSTO), which was created in 1992 for security and military cooperation. This organization was devised by Russia as a counterbalance to the North-Atlantic Treaty Organization (NATO) and also had tasks designed to combat illegal migration, trafficking, and conflict. The Customs Union was also established at that time, and was later transformed into the Eurasian Economic Community or EURASEC. In 1996 the Union of Belarus and Russia (URIB) was established. The citizens of both countries have equal rights of travel, residence, work and welfare despite possessing different passports, currencies and some of the other attributes associated with independent states. Some of the countries participate in several organizations and have established unions to showcase their interest in a western approach to development, for instance the Organization for Democracy and Economic Development, better known as GUAM after the first letters of its members: Georgia, Ukraine, Azerbaijan and Moldova. GUAM has not embarked on any initiatives concerning internal freedom of movement but it has unilaterally introduced a visa-free regime for citizens from countries of the Organisation for Economic Co-operation and Development (OECD) (Table 11.1).

More recently, Russia, along with Kazakhstan and Belarus, signed an Agreement on the Eurasian Economic Union on 29 May 2014. Armenia acceded to the Union on 9 October of the same year. The Eurasian Union is to be officially established on 1 January 2015 and will absorb EURASEC, the Eurasian Customs Union and the Eurasian Economic Space. It is hoped that the free movement of goods, services, labour and capital between the signatories – envisaged by the Eurasian Economic Space – will be progressively instituted from this date.

This chapter gives an overall vision of the migration processes of CIS countries in the context of the evolution of the free movement of their populations. It highlights the trends in migration flows, the contradictions in legal provisions, the complications associated with the countries' interactions, and discusses the potential future for these free movement schemes at a regional level.

2 See Table 11.1 on membership of CIS countries in different unions and international organizations

Table 11.1 The integration, unions and organisations of CIS countries in 2010

Country	CIS 1991	CSTO 1992	EURASEC 2000	Union of Russia and Belarus 1996	BSEC[1] 1992 (1998)	SCO[2] 1996–1997	GUAM 2001	Eurasian Customs Union 2010	Eurasian Economic Union 2014
Azerbaijan	X				X		X		
Armenia	X	X			X				X
Belarus	X	X	X	X				X	X
Georgia	(3)				X		X		
Kazakhstan	X	X	X			X		X	X
Kyrgyzstan	X	X	X			X			
Moldova	X				X		X		
Russia	X	X	X	X	X	X		X	X
Tajikistan	X	X	X			X			
Turkmenistan	X (5)								
Uzbekistan	X	X	(4)			X	(4)		
Ukraine	X				X		X		

1. Black Sea Economic Cooperation Organisation. The BSEC Charter was signed in 1998. With its entry into force in 1999 BSEC officially became a regional economic organisation.
2. Shanghai Cooperation Organisation
3. Georgia left the CIS after the Russian–Georgian war of August 2008. Its withdrawal came into effect on 18 August 2009.
4. On 12 December 2008, Uzbekistan asked for temporary suspended membership. It remains a suspended member of both GUAM and EURASEC to this day.
5. Turkmenistan has been an associated member since 2005.

Source: Molodikova 2008

11.2 Migration processes and legislation of the CIS in the 1990s after the collapse of socialism

11.2.1 Overview of migration processes: the creation of a visa-free movement for CIS countries

The fall of the Iron Curtain and the creation of a series of newly independent states was supported by the new national Constitutions of the former socialist countries of

the former Soviet Union (FSU)[3] and Central-Eastern Europe (CEE)[4]. They declared freedom of movement for their populations as one of the most important values. The opening of the borders of the former communist dominions led to the movement of millions of people across a territory covering one sixth of the world, both within the FSU and the former socialist system, and between them and their Western neighbours.

Support for freedom of movement was partly a consequence of the ideological shift in the region towards democratic values and freedoms. The uniqueness of the freedom of movement situation in the CIS in the 1990s was also related to the fact that protected borders did not exist for a large proportion of the former socialist region, which contained a population of about 300 million people[5]. In addition, the legal norms that would ordinarily have regulated the processes of residence, labour market access and so on were still underdeveloped. As a result, the new governments were not able to regulate migration processes for some time.

Furthermore, nation-building was complicated by ethnic conflict in many of the newly formed states and accompanied by the inability of new governments to control the movement of millions of people attempting to return to their historical motherlands. The unrecognized states that proclaimed their independence from the newly formed republics – Abkhazia and South Ossetia from Georgia; Nagorno Karabakh from Azerbaijan; Transnistria from Moldova – made the control of many regions and borders problematic.

The external borders of the CIS states expanded several times after the Soviet Union's dissolution, and its protection demanded extensive financial resources and special interstate agreements that did not exist. This is why the poor political, economic and technical opportunities of the newly independent states did not permit the organization of controls on the newly formed 'external' borders. One of the important steps in CIS cooperation in the field of border control and cross-border cooperation was the foundation of the Council of Commanders of Border Troops immediately after the creation of the CIS in the beginning of 1992[6].

Nevertheless, a huge number of common features preserved Russia's attractiveness for migrants after the dissolution of the USSR: kinship, a common language of communication (Russian), complementary labour markets, interconnected

3 The post-Soviet states, also commonly known as the former Soviet Union (FSU) or former Soviet republics are the 15 independent states that resulted from the dissolution of the Union of Soviet Socialist Republics in December 1991. The 15 FSU states are Armenia, Azerbaijan, Belarus, Georgia, Estonia, Latvia, Lithuania, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Russia, Ukraine and Uzbekistan.

4 Central and Eastern Europe encompass the following former socialist countries, which extend east from the border of Germany and south from the Baltic Sea to the border with Greece: Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia.

5 Note of the editors: In 1990 Eastern Europe had a population of 310 million people, of whom 52.6% were female (UN, 2013).

6 Tseli Soveta Kommandujuschih [Aims of the Council of Commanders] Taken from http://www.skpw.ru/

transportation systems, and similar educational systems. All of these factors played an important role in the preservation of the old Soviet migration system (Table 11.2). For this reason, the CIS agreement facilitated the 'civilized divorce' of the formerly united republics. Of course, this civilized divorce was also based on the economic interests of the less developed republics, who were keen to obtain economic support from the relatively more economically developed Russia. Indeed, all FSU republics received subsidized oil and gas from Russia until 2005.

Table 11.2 Visa relations between FSU countries in 2010

	RU	BEL	UKR	Mol	KAZ	Kyr	TJ	UZ	TU	AR	AZ	Ge	La	Es	Li
RU															
Bel															
Ukr															
Mol															
Kaz															
Kyr															
Taj															
Uz															
Tu															
Ar															
Az															
Ge															
Lat															
Es															
Li															

Russia and Belarus Union – the citizens both countries have equal right for residence, employment, social benefits provision

Russia – Baltic States – unilateral agreement for non –citizens from Baltic States to go to Russia visa free

The visa regime Russia visa free

EU member states visa-free movement

-GUAM union countries (Georgia, Ukraine, Moldova and Azerbaijan open unilaterally visa-free regime for OSCD countries

-Russia –Georgia unilateral visa introduced by Russia for Georgia

No diplomatic relations after Karabakh war

Source: Author's chart based on Nalichie bezvizovogo regima pri viezde v inostrannie gosudarstva dlia grazdan Rossiiskoi Federatsii, iavliayschihsia vladeltsami diplomaticheskih, slyzebnih I obschegrazdanskih pasportov po sostoianiy na. 01.09.2010. Retrieved from: http://gov.cap.ru/hierarhy.asp?page=./54733/1056083/1085696

11.2.2 Free movement policies, right of entry and residence

The CIS union is based on the Treaty of the Commonwealth of Independent States (CIS) which was signed on 8 December 1991. It defines the principles of the relations between the newly independent states and the conditions for solving a wide range of difficult problems caused by the collapse of the Soviet Union. According to this treaty, members are to cooperate to promote the free movement of their people, control borders and border areas, and fight against international crime, drugs, money laundering and terrorism (Molodikova 2008).

The CIS is an organization that is based on consensus, and any Member State has the right to veto any decision. The intention of the core documents relating to the creation of the CIS was to encourage a high level of future integration between states. Unfortunately however, during the formation of the Commonwealth, the idea of national statehood building was more important than interstate integration (Table 11.3). The CIS therefore lacks bodies with supranational powers, largely due to national differences (Rushailo 2006).

Table 11.3 Binding and divisive factors in the relations of CIS countries

Binding factors:	Divisive factors:
Common border and visa-free regime 10 CIS countries;	The disintegration processes within the CIS countries
The principal migration flows are movements within the CIS region (more than 80%)	Complicated historical legacies
Intra-regional migration often based on family and cultural ties and social network	Unequal start-up possibilities
Transportation and communication systems inherited from the Soviet period	Differences in border control

Binding factors:	Divisive factors:
Common former language of communication (Russian)	Differences in policies and geopolitical situations
Similar educational systems;	National policy promoting native language and culture
Various economic and political agreements and treaties between CIS countries	Differences in state policy (Russia- oriented or EU–oriented)
Historical memory	Political games to blame Russia for Soviet past
Visa-free regime	Fears of some countries about their sovereignty
Complementary demographic needs in labour markets' supply /demand needs	Competition of interests of some countries for cheap labour forces
Diaspora / minorities' relations	Different political interests of the national elite
Close location	Introduction of visa control with some countries
High labour demand for cheap labour force	Competition for cheap labour with other CIS (e.g. Kazakhstan) and Western countries

Nevertheless, Russia has played the role of an engine for population movement and acted as a metropole for FSU citizens after dissolution. It established a ten-year period (until 2002) for citizens of the former USSR to choose their residence and citizenship. The old Soviet passport remained valid in Russia until 2002 when a new passport for the Russian Federation was introduced. As a result, a considerable number of the former USSR population had two valid passports (national and FSU) and had the opportunity to move freely and take up residence in Russia.

In Russia the new Law on Citizenship was adopted in 1991. However, the 1981 Law on Foreigners remained unmodified until 2002, meaning that the Soviet version remained in effect even after dissolution, despite the fact that this version clearly did not match the situation that emerged after the disintegration of the USSR. According to the old law, all citizens of the FSU were not formally foreigners in Russia until 2002 if they kept their USSR passport. During the 1990s CIS countries signed numerous agreements at multilateral and bilateral levels (see Table 11.4).

In the initial stage of CIS development, maintaining the unity of migratory space was a deliberate strategy to reduce ethnic tensions. In the first half of the 1990s, no less than 5 million people changed their place of residence within the CIS, mainly because of ethnic conflicts and national discrimination (Mukomel 2005). The number of people with refugee status in Russia from 1992 to 2004 reached 1,606,469.

If a person did not claim to be a forced migrant[7] or refugee and was able to rent or purchase housing (there were no restrictions on such actions) or register at a relative

7 Note of the editors: Women and men have very different experiences when migrating. The large majority of successful Eastern and South-Eastern European migrants are men. Women on the other hand, make up 58% of victims of forced labour. Trafficking women for prostitution has become a major criminal enterprise in the region and is a growing problem. Trafficking takes advantage of the vulnerability of women and the gender inequalities in poor communities, especially rural areas. Therefore, most victims are rural women who leave the countryside in hope of a better life (IFAD, 2007).

or friend's accommodation as a citizen of the former USSR, such a person was not considered a foreigner, according to Russian law. Such people received pensions, studied and received medical care. Nevertheless, the legislative act which determined the opportunity of free movement in CIS countries was the Agreement on visa-free movement of citizens of the states of the Commonwealth of Independent States on territory of its participants. It asserted that 'citizens of the appointed countries that sign this agreement have the right to enter, move through and leave the territory of the appointed states without visas in the presence of the documents proving their identity or confirming citizenship'. It established the mutual recognition of a visa-free regime for the CIS members and was concluded in Bishkek on October 9th, 1992 (further - the Bishkek Agreement)[8].

It can be argued that rather than the agreement itself facilitating free movement, it was the migration situation of mass forced migration that pushed the CIS countries to sign the Agreement of the CIS countries On Assistance to Refugees and Forced Immigrants in 1994. The legal, multilateral provisions therein provided opportunities for millions of people in CIS countries to seek asylum. According to reports of the United Nations High Commissioner for Refugees (UNHCR), during that period, the CIS area was one of the main sources of forced migration and refugees in the world (UNHCR 1995). Russia was the main recipient of CIS forced migrants in the first five years that the CIS existed. Virtually all of the applicants for asylum in Russia during that period were guaranteed the refugee status or were considered a forced resettled person.

Table 11.4 Selected agreements on migration movements between CIS and EURASEC countries

Country	Agreement on protection of rights of Labour migrants 15 April 1994	CIS Agreement on combating of illegal migration 6 March 1998	Bilateral agreements of CIS about labour migrants activities	Bilateral agreements of CIS with not CIS countries on labour migrants activities	Decision On Agreement on unified system of registration of citizens of third countries on 3 July 2005	Readmission agreements EU-CIS countries 2008	Convention on legal status of labour migrants and members of their families signed but not ratified Nov, 2008	United Custom Area (signed 1 July 2010)
Azerbaijan	+	+			+			
Armenia	+	+	Russia, Ukraine		+		+	
Belarus	+	+	Russia, Kazakhstan, Moldova	Lithuania		+	+	+

8 Even twenty years after the disintegration, the demarcation process has not yet been finalized between many countries (in particular between Russia and Kazakhstan, Russia and Ukraine, Russia and China, Ukraine and Romania, Ukraine and Belarus and some others).

Country	Agreement on protection of rights of Labour migrants 15 April 1994	CIS Agreement on combating of illegal migration 6 March 1998	Bilateral agreements of CIS about labour migrants activities	Bilateral agreements of CIS with not CIS countries on labour migrants activities	Decision On Agreement on unified system of registration of citizens of third countries on 3 July 2005	Readmission agreements EU-CIS countries 2008	Convention on legal status of labour migrants and members of their families signed but not ratified Nov, 2008	United Custom Area (signed 1 July 2010)
Georgia	Not in force	No			+			
Kazakhstan	+	+	Belarus		+		+	+
Kirgizstan	+	+	Russia		+		+	
Moldova	+	+	Russia, Ukraine, Belarus	Poland, Hungary	+	+	+	
Russia	+	+	Armenia, Belarus, Moldova, Ukraine, Kyrgyzstan	Germany, Finland, Poland, Switzerland, China, Vietnam	+		+	+
Tajikistan	+	+					+	
Turkmenistan	No	No			+			
Uzbekistan	No	No			+		+	
Ukraine	+	+	Russia, Armenia, Belarus, Moldova	Poland, Latvia, Lithuania, Czech republic, Slovakia, Vietnam	+	+	+	
Sources: Molodikova 2008; Litvinenko 2007; CIS 2010.								

11.2.3 Labour migration policies of CIS countries in 1990s

At the beginning of the 1990s, the CIS countries signed a series of multilateral agreements concerning labour migration (see Table 11.4). One of the first agreements was signed in March 1992, four months after the creation of the CIS. The Agreement between the CIS countries 'about guarantees of the rights of the citizens of the CIS on the guaranteed pensions provision' partially facilitated the provision of pensions for

citizens of the CIS in instances of mass resettlement. In the same year, the CIS founded the Consultation Council on labour, migration and social protection. This involved representatives from different Ministries discussing these issues. Over the following years more agreements were signed, such as those About Labour Activity and Social Protection of Labour Migrant Workers (1993) and About Cooperation in the Field of Labour Migration and Social Protection of Migrant Workers (15 April 1994). The Joint Commission of the CIS on cooperation against illegal migration was organised on 16 April 1994, and on 29 October 1994 the Charter on provision of social rights by the CIS was signed (Table 11.4).

Bilateral agreements concerning cooperation in the sphere of labour migration and the social protection of migrants, as well as medical assistance, were passed within the CIS framework after 1992. In addition, bilateral, intergovernmental agreements between the CIS countries were concluded outside of the CIS framework. These were supplemented by inter-agency agreements that added detail to the intergovernmental agreements. These agreements allowed people who moved to Russia to live there with their former USSR passports and some address registration. Nevertheless the system of 'propiska'[9] persisted and the opportunities to obtain registration were sometimes subject to the good will of the local authorities.

The Bishkek agreements of 1992 have allowed the free movement of the population and have helped people during the transition period[10] to use their own capacities, given the weakness of social protection in the newly created states. A considerable number of people during that period were involved in temporary labour migration as a survival strategy and visa-free movement facilitated that process. This strategy helped them to bring up their children, support their families, and develop their own business, as well as reduce the negative effects of high unemployment in the 1990s.

In December 1994, members of the CIS signed the Agreement on Cooperation in the Field of Labour Security and Recognition of Professional Activities, as well as Agreements on Cooperation in the Field of Labour Migration and the protocol on amendments to the last appointed agreement, which was signed on 25 November 2005. The CIS Member States often had a mutual interest in establishing economic cooperation within the CIS system, as well as externally. Under the framework of CIS activities, about 60 commissions were founded, all aimed at finding common ground on

9 Propiska was both a residence permit and migration recording tool in the Russian Empire before 1917 and from 1930s in the Soviet Union. It was documented in local police (militia) registers and certified with a stamp in internal passports.

10 Note of the editors: According to IFAD (2007), the transition has resulted in lower standards of living for much of the population and a return to more traditional attitudes towards gender. There are large gender disparities in unemployment rates, earnings, health and gender roles. Women are often concentrated in low-paid professions or the informal sector, reproductive health services are less available and the burden of combining wage labour and taking care of the family has become heavier. Prenatal care and social services for working mothers have dropped. Women are less represented politically but conflict in countries such as Armenia and Azerbaijan has led to more households that are headed by women. This number is increasing throughout the region because of male emigration.

various issues. For instance, there were commissions on illegal migration, cooperation on the countries' transport systems, and collaboration on ecological issues.

The labour regulation and social security system agreements which were signed at the beginning of the 1990s did not include all of the CIS countries. In fact, the countries negotiated emergency health aid and pension systems. A common recognition of diplomas was also provided for partly by the Agreement on Cooperation in the Field of Labour Migration (1994). Nevertheless, it related mainly to diplomas issued before the dissolution of the USSR. The new diploma notification system is more complicated, with every country pursuing its own policy concerning this issue (Rushailo 2006).

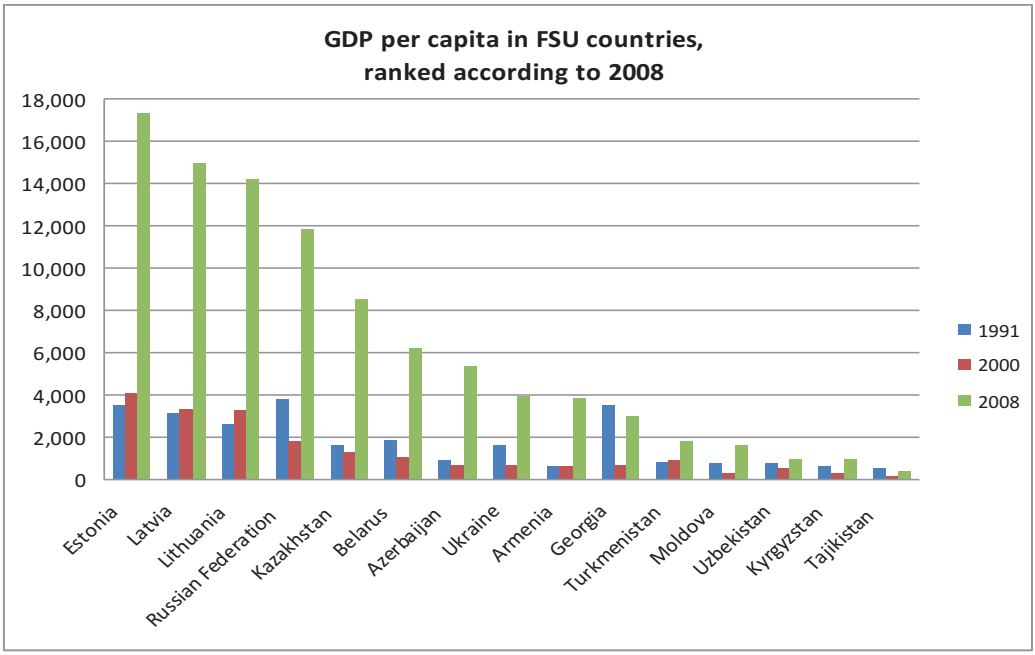
Russia was continuously the greatest labour market attracting CIS economic migrants. In the 1990s, temporary short-term labour and petty trade migration expanded rapidly, involving considerable population flows within CIS countries. Unfortunately, the multilateral agreements on visa-free movements promoted illegal labour activities because of the absence of proper border control, migration registration mechanisms and social security instruments. Hence the 1990s were characterized by the porousness and poor protection of the external borders of CIS countries (especially in the Central Asian region). This situation led to a rise in the transit of illegal migrants in a westward direction from the Asian and African regions.

The number of illegal migrants within the territories of the CIS countries varied according to different estimates and was considered to have been between 6 and 8 million people. They contributed to a significant segment of transnational organised crime. Of the total number of transit migrants in Russia, 60% went through Tajikistan, 35% through Turkmenistan, 15% through Uzbekistan and 10% through Kazakhstan (Labour Migration, 2005). Between 1996 and 2000, the number of illegal migrants arrested on the Russian border increased tenfold. To regain control of the situation, an agreement was signed on 6 March 1998 About Cooperation of the States-participants of the CIS in Preventing Irregular Migration (Analytical report, 2001; Rushailo 2006).

Economic activities were declared to be important binding factors for the CIS. For that reason, in 1995, a Customs Union between these countries was established. In late 2000 it was united with the United Economic Area to form the Eurasian Economic Community Common Economic Zone or EURASEC[11]. Ten years after the collapse of the Soviet Union, big differences could be observed between the CIS countries in terms of their economic situation, labour provisions, demographic situation, overall stability of their political regime, and opportunities for future development. Some of them had become more advanced in comparison to others and the gaps between them increased for the 10 years that followed (Graph 11.1).

11 Initial members of EURASEC are Belarus, Kazakhstan, Kyrgyzstan, Tajikistan and Russia with Uzbekistan joining later in 2005.

Graph 11.1 GDP per capita – US dollars in FSU countries (1991, 2000, 2008)



Source: Country specific data found in https://unstats.un.org/unsd/snaama/selbasicFast.asp

This was understandable, because all of these countries vary in geographical location, size, territory, population and also in terms of their level of social and economic development (Graph 11.1). Russia had the highest GDP index in CIS, and exceeded some of the other CIS countries by up to twelve times. At the same time, all of the CIS countries, including Russia, are below the standard of living and economic development of Western countries, and even the majority of countries of Central Europe (Molodikova 2008). The period of economic transition showed the different capacities of CIS countries in adapting to new realities. The worst situation was observed in the agricultural countries with the highest percentage of rural populations and a lack of natural resources, such as Kyrgyzstan and Tajikistan, followed by the South Caucasus and Moldova, which experienced the dissolution of their territory or armed conflict. Under these circumstances, Belarus, Kazakhstan and even Ukraine managed this better, using their advantage of either greater natural resources or that they were borderland transit locations between the EU and Russia. The wage difference and better living conditions stimulated population movement, mainly to Russia, which was one of the key attractions and binding factors of the CIS countries.

Nevertheless the disintegration processes was also observed among CIS countries, especially in the second half of the 1990s. This situation was partly the consequence of the economic and banking crisis in Russia in 1997, which strongly affected the economic situation in all CIS countries. Shocked by this crisis, they began to search

for new partners to cooperate with and for new forms of activity outside of the CIS community. Understanding that the economic crisis was reducing its influence on the CIS, Russia proposed the transformation of economic relations.

On 28 April 1998, the Interstate Council of Custom Union (which was later reshaped and renamed as EURASEC) made a statement 'About Ten Simple Steps Towards Ordinary People'. Only five CIS countries however were ready to follow this initiative. It proposed some steps to improve living conditions for the population of the Community of five countries, including the promotion of free movement and the liberalization of different forms of control over goods, services and capital in Belarus, Kazakhstan, Kyrgyzstan, Tajikistan and Russia. This union was created between the most developed and least developed countries in the CIS. For example, Kyrgyzstan and Tajikistan have no natural resources, but have very cheap labour resources. They are thus the most dependent countries. In contrast Ukraine, Azerbaijan, Georgia and Moldova did not join the union, because of their interest in moving closer towards the West in terms of their policy making and economic alliances. Uzbekistan and Tajikistan have extensive resources of gas and cautiously prefer to maintain good relations with the community while limiting their participation and trying to reduce Russian and Western involvement into their policy making. Turkmenistan even introduced visas for all CIS countries, while the other CIS countries share a free movement zone.

For the implementation of the proposed steps, in 1998 the Advisory Committee featuring the Heads of Member States accepted the Agreement on the Free and Equal Right of People to Cross the Borders of the Member States of the Customs Union, and on the Free Movement of Goods and Capital (ICE 2002). It sought to facilitate the organization of more liberal control at check-points on frontiers, and the creation of special 'corridors' in international airports was proposed, as and when necessary (FZ 1996, 2002).

Unfortunately, after the crisis, and in spite of Russian efforts, the CIS countries' previous multilateral agreements did not reflect any significant changes in the socio-economic situation and interstate interests which formed towards the end of the 1990s. The CIS countries tried to reduce their economic dependence on Russia's economic situation. As a result, they preferred to work in a framework of multiple bilateral agreements that gave them the opportunity to clarify their own positions with every signatory far more clearly, as well as giving them greater flexibility to develop economic activities outside of the CIS system.

For this reason, seven years after the conclusion of the Bishkek agreement on free movement, initiated by Russia, countries began to extricate themselves from the treaty. Turkmenistan took the first step and withdrew in 1999, followed by Uzbekistan in April 2000, and Kazakhstan and the Russian Federation in December 2000. They continued cooperation mainly via individual bilateral agreements (Table 11.4).

At the same time, several bilateral agreements on regulations of labour migration and the recruitment of labour forces were signed, including those signed by Russia with Armenia, Belarus, Azerbaijan, Georgia, Moldova, Ukraine and Kyrgyzstan. Similar agreements were signed between Russia and so-called 'far abroad' countries. Ukraine also signed similar agreements with other CIS countries. Belarus signed them with

Russia, Moldova, Lithuania and Kazakhstan, and Moldova also signed agreements with Russia, Ukraine, Belarus, Poland and Hungary (Table 11.3).

Some contradictions should also be mentioned concerning CIS and national state legislation which emerged during the first 10 years following the dissolution of the USSR. In spite of the formal priority of the international legal norms of the CIS under national legislation, in real life the national norms determined the national systems of entry, stay and residence opportunities for citizens of CIS countries. This was especially relevant to national systems of migrants' registration in the newly created states. The differences in the development of CIS countries supported the centrifugal tendency that has become, in essence, a continuation of the disintegration processes of the USSR up until the end of the 1990s.

11.2.4 Relations between the CIS countries and their neighbourhood in the 1990s: free population movement

The liberalisation of frontier regimes and visa-free entry after the collapse of the socialist regime happened for all of the countries within the former Socialist bloc, not only between CIS countries, but also between CIS and CEE countries. The external borders of some of the CIS countries with Poland, Romania, Slovakia, Bulgaria, China, Hungary, Mongolia and some Balkan states were transparent for migrants from the CIS countries (Zajonchkovskaya 2009, Molodikova and Duvell 2009). This was related to the rudimentary system of visa relations of the former socialist countries, when the Soviet agreements had not yet been annulled. This situation allowed the free movement of populations between CIS and CEE countries. During that time, to cross the borders it was enough to buy a so-called 'voucher' in a travel agency or have an invitation fax from the CEE destination country. Free movement between CIS and CEE countries was accompanied by the development of short-term petty trade migration. The majority of the population of the boundary regions of Ukraine, Moldova and Belarus in the 1990s travelled to Poland, Slovakia, Romania, Hungary and Russia for temporary and predominantly illegal work.

After the collapse of the socialist system, as a consequence of almost ten years of open borders between the CIS and Central and Eastern European countries, many of the citizens of the former USSR migrated through the region to Western Europe or settled in some of the CEE countries. They have created new diasporas in Central Europe and the West. These new diasporas became an important pull factor, drawing compatriots from the CIS countries westwards. As a result of this process, new Ukrainian diasporas emerged in Poland, Slovakia, the Czech Republic and Hungary, Russians settled in the Czech Republic, and Armenians in Poland.

At the same time, Chinese and Vietnamese diasporas have appeared in CIS and CEE countries (Tishkov et al. 2005). This was partly related to Soviet era official bilateral agreements on labour supply between USSR, former Czechoslovakia and Poland, Vietnam and China, according to socialist labour division and education programmes. The new waves of Chinese and Vietnamese migrants also appeared due to the visa-free regime that existed at the beginning of the 1990s between the CEE and

the CIS with China and Vietnam. They built the bridge of a transnational migration network. Overall, the socialist past of this huge region determined the free population movement during the 1990s.

11.3 Migration processes and policy in the 2000s: the shrinking of the visa-free area

11.3.1 Overview of migration processes in the 2000s

In the early 2000s, approximately 8-11 million people participated in labour migration in CIS countries. Russia remained the main destination for CIS labour migrants (Molodikova 2008)[12]. For the labour migrants from CIS countries, the difference between wages at home and wages in Russia was a significant motivating factor for migration. Overall Russian wages were ten times higher than, for example, Tajikistan[13]. But it should be emphasized that illegal migration was several times higher than legal labour migration according to data of Federal Migration Service of Russia (FMS 2008).

The 2000s added some new peculiarities to development as integration and disintegration processes between the CIS countries began to affect their relations. The personality of the new President of Russia, Vladimir Putin, played an important role in the revitalization of cooperation between CIS countries from 2000. He put considerable effort into the activities of the CIS in cooperation from the beginning of his presidency and proposed a new platform for cooperation due to a decreasing interest in CIS multilateral activities. Thus, in 2000, the Customs Union was modified into the Eurasian Economic Community or EURASEC. The new organization united the former Customs Union and the United Economic Area. The main goal of this modification was to create both a common market and a common economic area. The issues of migration and a common labour market were identified as priorities.

Only five countries (Belarus, Russia, Kazakhstan, Tajikistan and Kyrgyzstan) signed up to the EURASEC platform for a multilateral agreement on free movement and a visa-free regime, which was agreed on 30 November 2000. According to the conditions of this multilateral agreement, a time limit for visa-free movements was

12 Note of the editors: The current CIS countries hosted nearly 23.5 million migrants in 2013, of whom 52.5% were female. Russia still hosts the most migrants of any CIS country, with over 11 million in 2013, of whom 51% were female (UN, 2013).

13 Note of the editors: A study by the IOM (2010) on emigration from Tajikistan indicated that most Tajik migrants migrate to Russia, mainly for employment reasons, these migrants being predominantly married men. Most of them do not plan on returning home in the next years; although male migrants would much rather return than female migrants. The results of a returnee survey showed that 88% of the returnees were male. This might be due to the dominance of traditional gender roles in Tajikistan and the kind of jobs available in the host country. However, these gender roles can often change when the husband migrates and leaves his wife and children behind. In this case, the woman often gains more economic independency by joining the local labour force and becomes the head of the household. In spite of this increase in female power, gender stereotypes limiting women to domestic work and the education of children remain strong.

introduced (it must not exceed 90 days of constant stay in the country for citizens of Belarus, Kazakhstan, the Russian Federation, Tajikistan and Kyrgyzstan) (Kulmatov and Slastunina 2001).

In 2000, Vladimir Putin proposed some new forms of multi-level cooperation to support EURASEC. The new concept of 'matryoshka' or multi-level cooperation represented a revision of the relations between CIS countries (ICE 2002). In fact, the development of cooperation between some of the CIS countries had been developed in line with the EU model and free movement had become a significant part of this process. Once Putin considered EURASEC to be a more important organization than the CIS, the majority of activities were undertaken via the new EURASEC platform. In reality, however, the activities of the two initiatives often overlapped. For example, an important step towards the designation of the formation and functioning of a free trade zone as an absolute priority took place during the Yalta summit of the CIS in September 2003. Here the economic interests of every state were declared the lynchpin of CIS relations. Intensification of cooperation in the transport sector, the formation of a common CIS labour market[14], and the development of interregional and border cooperation were put forward as the future of economic cooperation in the CIS (Rushailo 2006).

At that time every CIS country already had its own agenda of political development, which led to a degree of alienation between some of the CIS countries. Ethnic conflict also played an important role in their relations. The Nagorno-Karabakh conflict made enemies of Armenia and Azerbaijan. Problems emerged concerning resource access between the Central Asian republics, such as Uzbekistan and Tajikistan. Russia and Georgia had their tensions in relations based on trade and terrorism. For this reason, some CIS Member States established new unions, such as the Organization for Democracy and Economic Development (GUUAM), which was initiated by Georgia, Ukraine, Uzbekistan, Azerbaijan and Moldova in 2004 as a counterbalance to Russia. The name was formed from the first letters of these countries as GUUAM (with the withdrawal of Uzbekistan it became GUAM)[15]. GUUAM introduced, on a unilateral basis, a visa-free regime for nationals from OECD countries. In 2000, there were two more organizations for regional cooperation in which CIS countries participated alongside other Member States: the Shanghai Cooperation Organisation[16] in 2001, and the Organization of the Black Sea Economic Cooperation (BSEC)[17] (Table 11.1). All of them, in one form or another, were involved in the process of migration management,

14 Note of the editors: Regarding access to the labour market, labour force participation of Eastern European women is gradually looking more like that of West European women, however there are some differences. For example, Eastern European women do not take as much part in part-time work. Remarkable is that the participation of young women in the labour market is significantly less than that of young men (UNIFEM, 2006).

15 Official website of GUAM https://guam-organization.org/

16 Official website of SCO http://www.sectsco.org

17 Official website of BSEC http://www.bsec-organization.org

or proposed the development of a common economic and labour space (Molodikova 2008).

The disintegration processes were also manifested in the introduction of a visa regime between some of the CIS countries. For example, Turkmenistan introduced a visa regime for all CIS countries and Russia introduced one unilaterally for Georgia from 5 December 2000. The first case can be explained by the development of a totalitarian regime in Turkmenistan, while the second case was, according to the official Russia position, punishment for Georgia's alleged support for Chechen terrorists. The implementation of the visa regime for Georgia was complicated by the existence of an agreement on a Russia-Belarus Union. According to this agreement there is no border between Russia and Belarus. In reality, the fact that Georgians have a visa regime with Russia and do not with Belarus has promoted the illegal migration of Georgians to Russia.

11.3.2 Restrictions in migration policy in CIS countries

Between 2001 and 2006, we can trace a new period of restrictions in migration policy for all CIS countries that was related to similar restrictions being enacted all over the world. A radical change in migration policy occurred after 11 September 2001 in the USA. From this point, increased attention was devoted to the fight against illegal migration, which was considered to lead to security threats, including acts of terrorism.

Russia adopted new laws 'On Citizenship' and 'On Foreigners' in 2002 which demonstrated the authorities' determination to pursue a tougher approach to migration policy. This attempt to fight illegal migration was reflected in the changes of Russian migration regulations and immediately affected labour migrants from CIS countries trying to enter Russian territory (Table 11.5). All of the unregistered migrants from the FSU became foreigners according to the new Russian laws; in addition, former USSR passports were no longer valid in Russia.

It was not only Russia that strengthened its migration regulation during this period. Ukraine re-organized its border guard service and reinforced control along its eastern frontier with Russia, while Uzbekistan introduced a visa regime and planted land-mines along its border with Tajikistan, Afghanistan and Kyrgyzstan. The latter cost lives and injured numerous people from both sides who wanted to avoid the high visa fees by attempting to cross the green border.

The fight against illegal migration has been the main aim of CIS countries' migration policies from the 2000s, and the majority of them have been united under this common goal. In this regard, the following institutions have been established by CIS countries: the Joint Commission on the Cooperation agreement of framework (2004), the CSTO Common Security Program of Actions, the Program of CIS cooperation in combating illegal migration for 2006-2008 and for 2009-2010, the Convention on transborder cooperation between CIS Member States (2008), and the Treaty on the interregional and transborder cooperation between CIS Member States. All these institutions provided the necessary legal framework for common actions against illegal migrants and sought to control population movement. A meeting with

the representatives of the Ministries of Internal Affairs and CIS countries' Migration Services in June 2006 elaborated on the main areas of cooperation in the following areas:

- The harmonization of national legislation to develop unified approaches in the migration sphere;
- The formation of data banks on foreign citizens and stateless persons;
- The acceleration of readmission agreements between the Commonwealth countries[18].

A new registration system, featuring a new Migration Card, was introduced by Russia in the same year, requiring migrants from CIS countries to register at the Ministry of Interior within three days of crossing the border. After three days, non-registered migrants were treated as illegal and could be fined by the police and even deported. Unfortunately only 7% of migrants were able to process documents within this allotted time. The changes made by Russia in the quota system for labour migrants from CIS and other countries in 2002 created even more limitations for employers because they had to apply for quotas one year in advance. These conditions were problematic because the demand for labour was often difficult to predict (Zaionchkovskaya and Mkrtchan 2008).

Table 11.5 Main migration flows between Russian CIS and other countries in 2007, 2008, 2009 and 2010

	2010	2009	2008	2008	2007	2007
	people	people	people	On 10000 citizens	people	On 10 000 citizens
Migration between Russia and CIS						
inflow	179 066	270594	269977	190	274157	193
outflow	22 163	21518	26114	18	31414	22
Migration increase (+),decrease(-)	+156 903	+249076	+243863	+17,2	+242743	+17,1
Between Russia and non CIS						
inflow	12590	9313	11638	8	12799	9
outflow	11415	10940	13394	9	15599	11
Migration increase (+),decrease(-)	+1175	-1627	-1756	-1	-2800	-2
Source: www.GKS.ru for 2008, 2009, and 2010.						

18 Currently only Russia, Ukraine and Moldova signed this agreement with the EU in 1997. It came into force in 2008.

11.3.3 Labour migration regulations trap of 2000s

Changes in Russian migration policy created a trap for labour migrants from the CIS. On the one hand, there were visa-free areas and freedom of movement between Russia and the majority of the CIS; on the other hand there was the virtual impossibility of official registration and employment. The corruption of the police has become a widespread reality. The FMS of Russia slowly realized the impossibility of registration within three days, and some improvements were made to the registration term from 2004, but only for citizens of Ukraine, Moldova and Tajikistan. This time the registration period was prolonged to 90 days, but this amendment did not significantly change the situation. About 75% of labour migrants did not have a work permit, and 50% did not have a legal residence permit, and the number of migrants from CIS countries without registration was recorded as between 5 and 10 million (Yastrebova 2008).

Since the middle of the 2000s, Russia has become less attractive to migrants from the CIS because of the restrictive policy of the Ministry of Interior regarding labour migration and the economic wars with various CIS states. Notable are the conflicts between Russia, Georgia and Moldova[19] over wine and agricultural production, and between Russia, Ukraine and Belarus, over energy prices.

CIS scholars argue that the restrictive migration policy of Russia from 2001 to 2006 increased the number of illegal migrants and reduced migration flows from CIS countries to Russia. As a consequence, movement of CIS labour migrants, especially from Ukraine, Moldova and Belarus in a Westward direction increased, and other poles of attraction for migrant labour emerged.

For example, Kazakhstan's dynamic economic development helped it become a recipient of labour migrants and it has emerged as Russia's competitor in attracting labour from Central Asia. Experts evaluated that the number of unregistered labour migrants in Kazakhstan was between 300,000 and 1 million at the beginning of the 2000s. Unfortunately, the restrictions in the registration of migrants in Kazakhstan were similar to those in Russia and fostered the criminalization of the labour market and the rise of a shadow economy (Labour Migration 2005; Bock and Olimova 2003).

19 Note of the editors: A study on Moldova by Vladicescu and Vremis (2012) pointed out that the socio-economic situations of Moldovan women and men are very different. Most women migrate because of financial shortcomings or to escape abuse or domestic violence. Remarkable is that female migrants, especially the ones migrating to EU countries, are more likely to find a new partner and may leave Moldova permanently behind or keep their families in Moldova just formally. The perception of female migrants by society, especially young women, is based on stereotypes, due to the fact that some Moldovan women work in the sex industry, mainly as victims of trafficking and exploitation. These suspicions of having provided sexual services can cause difficulties within society for women who have returned to Moldova. It can even lead to rejection by their family. On the other hand, Moldovan migrant women with children often suffer more when they are separated from their children than men. Husbands also often suffer, fearing that their wives will not return and struggling to educate their children. Women left at home by their migrating husbands however, take on a new role within the family and sometimes, society, as in Tajikistan (see IOM, 2010). That said, their husbands are able to control them severely with financial constraints, and may forbid them from seeking employment.

By the middle of the 2000s, there was an even greater division within the CIS according to national political preferences, economic capacity, and their leader's visions for their countries' development. Some of the CIS countries cooperated mainly on the basis of multilateral agreements around Russia (Kazakhstan, Belarus, Tajikistan and Kyrgyzstan). Others supported the line based on bilateral agreements, but at the same time they had formed own unions, such as GUAM (Ukraine, Azerbaijan, Moldova, Georgia). Some, such as Armenia, have always maintained good relations with Russia but have not participated in all of the activities. Uzbekistan and Turkmenistan prefer to be observers in many of the agreements, but nevertheless participate in some of the agreements, including the visa-free regimes on a bilateral basis. All the same, as described above, the common efforts on border control, trafficking[20], and illegal migration have united many of the CIS countries. Unfortunately, these activities have affected the space of the internal free movement area and reoriented a percentage of the labour migrants towards external migration out of the CIS. This tendency has exacerbated a demographic crisis, especially in Russia and Kazakhstan, and pushed these states to introduce liberalizing measures in migration policy from January 2007 in order to manage labour shortages.

Russia's new migration policy[21] on the relaxation of restrictions on registration and labour permissions, based on amendments to the Law on Foreigners, simplified the procedure of getting a work permit and raised the quota for economic migrants from FSU countries to as many as 6 million people[22]. More than 300,000 migrants were expected to come from visa system countries (Molodikova 2008).

This policy has been very successful. In 2007, the first year of the new policy's implementation, 7.5 million migrants passed through the registration process, and about 2.5 million migrants received a labour permit. The growth in fiscal revenue from the implementation of this liberal new policy reached 11 billion roubles (more than 0.5 billion US dollars) (FMS 2009). The situation for registering economic migrants also improved. In 2005 only 54 per cent of migrants had achieved registration; by 2008 this

20 Note of the editors: Human trafficking is a significant problem for both origin countries and host countries in the CIS region. Men, women and children from low-wage CIS countries are trafficked for both labour and sex exploitation, sometimes by deceit, sometimes with consent. To escape poverty and to provide for their families, people agree to over-exploitation and illegality. Often migrants are taken from Tajikistan, Kyrgyzstan, Moldova and Uzbekistan to work in construction or agriculture in Russia, with their seasonal earnings providing for their families left at home. However, their human rights are often violated and they are vulnerable to health risks (Ivakhnyuk, 2006).

21 Note of the editors: This new migration policy benefited all migrant workers but particularly women, since they were more vulnerable when permits were tied to one specific employer (OSCE, 2009).

22 Note of the editors: However, in that year there were 266,500 female migrants with a work permit. The number of female migrants with a work permit had tripled in 3 years' time, even though domestic employment contracts, the sector where female migrants concentrate, were insufficient. Women are less visible in statistics than men since they tend to participate in the 'shadow labour market': domestic work, commerce and caregiving. Notable is that even with a legal status, women were less protected than men in their labour rights and had less access to social services. Moreover, there was (and still is) a negative perception of female migrants in the society (Ivakhnyuk, 2009).

figure reached 85%. The net migration to Russia from every CIS country increased dramatically in 2007-2008 (Turukanova 2009).

In April 2007, the Inter-parliamentary Assembly of the EURASEC worked out the principles of a coherent social policy for the EURASEC and defined steps for its implementation in the fields of employment, social welfare, labour migration and social security funds, education, health and culture. In parallel, the summit of CIS Member States in Dushanbe supported the concept of future development of CIS countries and adopted the 'Declaration on Coordinated Migration policies'.

To help in the realization of this programme, the Council on Migration Policy was established in May 2008, under the auspices of the Integration Committee of the EURASEC. The same year, the Council of Heads of Federal Migration Services of CIS countries was established in Minsk. The council works as a platform for cooperation, not only in fighting illegal migration, but also to develop information exchange and assistance. In addition, it was planned that Russia, Kazakhstan and Belarus should complete the work on a Unified Customs Area that would come into force in July 2011. The agreement between Belarus, Russia and Kazakhstan was signed on 1 July 2010. In 2010 the Assembly of CIS countries adopted a framework law About Activities of Private Recruitment Agencies that has to help to facilitate recruitment of labour, provide some protection to labour migrants, and help them to find a suitable employer.

Another important document at the end of the 2000s that was signed but has not yet come into force is the Convention of the CIS on the Rights of Labour Migrants and their Families[23]. This was adopted to ensure a unified CIS labour market. The implementation of this Convention will be an important step for the future development of a more coordinated CIS migration policy in the field of labour migration, which has to include the plan of realization and implementation of the convention. This document is the basis for the common labour market, but its implementation demands a range of supplementary legal documents.

11.3.4 The economic crisis and visa-free movement

The global economic crisis has created new challenges for migration policy, security and the free movement of the population and labour force of CIS countries. The crisis has heightened the fears of host countries regarding the destiny of migrant workers who lose their jobs abroad, forcing them to return to their home countries. The crisis was one of the negative factors that again stimulated the rise of illegal migration for the CIS Member States. Undoubtedly, it created additional barriers for the free movement of people because some of the countries (such as Russia and Kazakhstan) reduced their

23 At the time of editing (December 2014) the Convention of the CIS on the Rights of Labour Migrants and their Families has been signed and ratified by: Kazakhstan; Belarus; Kyrgyzstan; Armenia; Azerbaijan and Ukraine. It has been signed but not ratified by: Russia; Tajikistan and Uzbekistan. It has not been signed by: Moldova; Georgia; and Turkmenistan. In Russia the convention has come under scrutiny in the Russian parliament for incompatibilities with national legislation relating to migrants' social security coverage.

quotas for labour migrants in 2009 and once again tightened their labour migration rules.

To address the crisis, an Emergency Council was created at the Summit of CIS countries in October 2010. More than 20 contracts in different spheres of the economy were signed. Bilateral agreements on labour migration between Russia, Tajikistan, Turkmenistan, and Kazakhstan, dealt with the recruitment of professional labour migrants. For example, the authorities in Moscow and some of the Siberian regions have opened recruitment agencies in some CIS countries and are even planning to establish training centres for potential labour migrants in sending CIS countries.

11.4 CIS and neighbouring CEE countries in the 2000s: shrinking or expanding of the free movement area?

11.4.1 Overview of migration processes

The countries of the former socialist system operated a liberal visa regime in the 1990s. The voucher or invitation system gave people the opportunity to move easily from one country to another. The situation changed considerably in the 2000s, because of the movement of the CEE countries towards EU accession and the mandatory harmonization of their legal norms with EU regulations.

As soon as the CEE countries started the preparation for their accession to the EU, they tightened their visa regimes with third countries and introduced visa systems with respect to CIS countries. But this occurred at a different time for every CIS country between 2000 and 2003. For example, Poland, the Baltic States, Slovakia, Hungary and Romania introduced visas for Russia and Belarus in 2000-2002, but only one year before accession for citizens from Ukraine. Romania introduced a visa for Moldova only in 2006.

The new requirement of the EU visa system negatively affected the relations of Hungarians, Romanians, Poles and Lithuanians with their co-ethnics in neighbouring countries, especially in border areas where many of them lived. The sensitive issue of separating co-ethnic communities, families and individuals emerges in this context between CIS and CEE countries. Such relations exist on the Hungarian-Ukrainian, Romanian-Ukrainian, and Romanian-Moldovan borderlands, on the Estonian-Russian border in the Narva-Ivangorod region, and on the Lithuanian-Belarusian border. Similarly, the Russian Kaliningrad region is separated from the main Russian territory by the Lithuanian and Polish borders.

In part to mitigate the negative effects of the new border controls, the EU proposed the European Neighbourhood Policy (ENP) in 2003. The policy was to create a 'circle of friends' that could act as a security zone in the Eastern border area of the EU (Ukraine, Moldova, Russia and Belarus). These countries (with the exception of Belarus) signed re-admission agreements with the EU in 2007, which came into force in 2008. A visa-free regime with the EU was initially promised as an incentive for them to conclude such agreements. However, this did not come to pass and only bilateral agreements on

the simplification of visa regimes – commonly known as visa facilitation agreements – were signed between the EU on one side and Russia, and Ukraine and Moldova on the other in 2006 and 2007 respectively. The EU has also signed visa facilitation and readmission agreements with Georgia (2009), Armenia (respectively 2012 and 2013) and Azerbaijan (2013 and 2014). Meanwhile, similar negotiations commenced between the EU and Belarus in January 2014.

Ultimately, the fact that the EU's readmission agreements have concentrated on the CIS countries has created fears and debates that the EU is using them as a reservoir for illegal migrants and asylum seekers. The research of some scholars indicate a decline in the intensity of migration flows to the Baltic States, Slovakia, Poland, Hungary and later Romania following the introduction of visas with their neighbouring CIS countries (Malinovska 2005; Molodikova and Watt 2009). The visa regime for peasants from Moldova or Romania for traditional seasonal work in Romania led to their migration to other countries. Migrants mainly went to Russia and to EU Mediterranean Member States.

The introduction of a visa system by all CEE countries against CIS countries (from 2001 to 2003) as a part of their accession to the EU increased the costs of migration and, as a consequence, the number of apprehended undocumented migrants from the CIS in Slovakia, Hungary, Romania and Poland rose after 2003. From that time illegal migrants from Ukraine, Moldova, Georgia and other CIS countries appeared at the top of CEE countries' statistics (Divinský 2008). The visa-free system in the 90s meant they had not previously been treated as illegal migrants in statistics.

11.4.2 Migration policy between the EU's new Member States and the CIS countries: ethnic or European priorities?

The EU visa policy and border barriers raised scepticism among citizens in the neighbouring CIS regarding the liberal democratic values declared by the EU. Who was more democratic? If the EU builds so many walls then surely they are afraid of losing their democracy. Is it a real democracy to cut historical ties and relations and to treat non-EU citizens as second class?

The EU's request to close the Eastern border launched more important discussions on the responsibilities towards the co-ethnic population in these countries. The EU's new Member States (NMS) have 'played the ethnic card' in an attempt to avoid rigid EU visa regulations for their co-ethnics abroad. In 2003, the new 'Status Law' was accepted by the Hungarian parliament. This gave Hungarians in non-accession countries the right to a special Card for Hungarians abroad (like a passport), which allowed frequent visits to Hungary (Molodikova and Nagy 2003). In fact a new form of ethnic visa-free regime was established in some of the EU countries against EU rules. This decision created a lot of noise and protest amongst Hungary's neighbours (Molodikova and Nagy 2003).

As a response to Schengen requests for strengthening the borders with neighbouring countries, the development of an ethnic special visa regime was proposed later by newer EU Member States (Poland and Romania) when, in the second part of

the 2000s, new steps in the development of a diaspora policy were taken by Hungary, Romania and Poland. Hungary introduced a modification to the law on citizenship that allowed simplification of naturalization and dual citizenship for their compatriots in neighbouring countries, and Romania, dreaming of unification with Moldova, adopted a new law in 2010 with more favourable conditions for citizenship acquisition for Romanian descendants from Moldova.

The Polish Parliament followed their neighbour's example by adopting a special act in 2007 on cards for ethnic Poles, which came into force in 2008. Ethnic Poles can now obtain a Pole's Card that enables them to acquire a free, multiple long-term visa and work without any labour permit, receive free education, and enjoy 50% reductions for train tickets (Molodikova 2008).

Russia also played the ethnic card with its Russian-speaking diaspora in the Baltic States. It introduced, in a unilateral way, the free movement opportunity to go to Russia for all residents of Latvia and Estonia with a passport of a 'non-citizen' in these countries. In addition, in recent years Russia has been developing various activities on the free movement of its citizens into different countries – perhaps as revenge for the EU's reluctance to lift its visa requirements. According to the Ministry of Foreign Affairs, Russia has established diplomatic relations with 188 countries[24]. Of these, 75 have signed bilateral or unilateral agreements with Russia that allow Russian citizens a liberal visa regime. Among these states ten are members of the CIS, Abkhazia, and South Ossetia. Additionally, there are some more 31 countries with a visa-free regime. With another 32 countries, Russia has a border, seasonal or tourist visa regime that allows its citizens relatively free movement.

Some EU countries (Finland) introduced the liberal visa regime for citizens residing in Russian regions on the Finnish border.

The EU visa policy pushed Russia and some other CIS countries to search for a visa-free regime for their citizens with other countries in the world, and compensate for the shrinking of free movement in their close neighbourhood with expansion of other world opportunities.

The needs of coexistence and economic development have pushed some CIS and EU countries to take steps towards the liberalisation of migration policy. They introduced the following measures:

- *A special 'little border traffic regime'* between Ukraine and Poland, Slovakia and Hungary (in 2007) and Romania and Moldova (in 2009) as a simplified visa regime for the 30-50 km border zone for the citizens of the EU and neighbouring countries.
- *Free movement unilateral agreements of GUAM for OECD countries* that allow the citizens of OECD countries to travel freely to GUAM countries but not vice versa;
- *Formal border crossing visa scheme* – the visa as a kind of entrance fee at the time of border crossing for some countries (for example, Turkey introduced

24 Official website of Ministry of Foreign Affairs http://www.mid.ru

this type of visa for the majority of CIS countries; Iran did the same for Azerbaijan);

- *EU regional liberal visa regime* – the liberal visa regime for some EU border regions (Finland introduced for citizens of St. Petersburg city or Poland for citizens of Kaliningrad oblast). Permanent inhabitants of these regions do not need to provide special invitations or tourist documents to apply for an annual multiple entry EU visa;
- *Seasonal visa-free lifting scheme* – a unilateral visa lifting scheme used by some countries during the tourist summer time (for example, Croatia introduced a tourist season visa free regime for Russia and Ukraine for the period from 1 May to 1 November);
- *A border regions tourist group visa-free regime* has been introduced between Russia and China in the border regions of both countries to simplify border crossing for small tourist groups;
- *A co-ethnic visa-free regime* – for the movement of ethnic compatriots from neighbouring or other countries to where they live.

Figures on international migration involving CIS countries are presented in Table 11.6.

Table 11.6 International migration (people) in 2007, 2008, 2009 and 2010

	2010			2009			2008			2007		
	inflow	outflow	Migration (+)(-)	inflow	outflow	Migration (+)(-)	inflow	outflow	Migration (+)(-)	inflow	outflow	Migration (+)(-)
International migration	191656	33578	+158078	279 907	32 458	+247 449	281615	39508	+242107	286956	47013	+239943
With CIS	179 066	22 163	+156 903	270 594	21 518	+249 076	269977	26114	+243863	273872	31329	+242543
With Belarus	4 894	2 899	+1 995	5 517	2 573	+2 944	5864	3954	+1910	6030	5302	+728
With Kazakhstan	27 862	7 329	+20 533	38 830	7 232	+31 598	39965	7483	+32482	40258	10211	+30047
With Moldova	11 814	617	+11 197	16 433	648	+15 785	15520	551	+14969	14090	629	+13461
With Ukraine	27 508	6 278	+21 230	45 920	5 737	+40 183	49065	8941	+40124	51492	10536	+40956
With S. Caucasus:	39 635	2 268	+37 367	46 081	2 742	+63 339	67353	2862	+64491	62314	2686	+59628
Azerbaijan	14 500	1 111	+13 389	22 874	1 130	+21 744	23331	1258	+22073	20968	1355	+19613
Armenia	19 890	698	+19 192	35 753	983	+34 770	35216	1032	+34184	30751	728	+30023
Georgia	5 245	459	+4 786	7 454	629	+6 825	8806	572	+8234	10595	603	+9992
Central Asia	65 472	2 274	+63 198	96 168	2 023	+94 145	92210	2323	+89887	99688	1965	+97723
Kyrgyzstan	20 901	641	+20 260	23 265	674	+22 591	24014	648	+23366	24731	668	+24063
Tajikistan	18 188	694	+17 494	27 028	610	+26 418	20718	637	+20081	17309	464	+16845
Turkmenistan	2 283	105	+2 178	3 336	62	+3 274	3962	90	+3872	4846	111	+4735
Uzbekistan	24 100	834	+23 266	42 539	677	+41 862	43516	948	+42568	52802	722	+52080
With other countries	12590	11415	+1175	9 313	10 940	-1 627	11638	13394	-1756	13084	15684	-2600
Source: www. GKS.ru 2008, 2009 and 2010 http://www.iacis.ru/html/index.php?id=22andstr=listandnid=1												

11.5 The future of free movement of population in the CIS countries: some conclusions

The Commonwealth of Independent States has just turned twenty-three. Despite this, the question 'Is there any future for the CIS?' remains relevant; indeed, there are perhaps more grounds for pessimism than for optimism. In the beginning of 1990s the main goals of the CIS were to mitigate the consequences of the disintegration of the USSR, to facilitate and provide a legal and institutional framework for dialogue between FSU countries, and to produce new opportunities for cooperation to support historical kinships between people. The lack of political will and the interests of individual states have prevented the CIS from evolving into a more influential organization, like the EU.

Nevertheless, the CIS was created as a regional organization that was designed to save, in one form or another, the system of economic, cultural and historical ties in the former Soviet space. The development of CIS migration policy on free population movement in the 1990s indicated the weaknesses in national legislations, border control, and capacity to protect porous external borders. The big positive impact of the CIS agreement on free population movement is that it slowed the disintegration process and mitigated the negative consequences of the collapse of the Soviet Union. It gave the peoples of the CIS room to manoeuvre for residence, labour activities, education and social service during the transition period and in fact mitigated the destructive effects of dissolution and conflicts in the post-Soviet space.

Future cooperation of the CIS should first of all entail changes in national legislation with a view to harmonizing the legislation of the CIS Member States. Common interests have united all CIS countries. The Council on Migration and Council of Heads of Federal Migration services of CIS countries (which includes more countries than EURASEC) and their cooperation is clear evidence of possible directions in their collaboration.

Labour migration is needed by many of the CIS countries for demographic reasons. Migrants need to get jobs to survive, and the stability in many CIS countries depends on that. One of the motivations for managing migration is to find a mechanism for legal circulation of migration. In this context, many expectations are related to the Convention on the Status of Labour Migrants[25] and Members of their Families (2008). It is not yet ratified by assigned Member States. The project of realization will need to include several provisions including such steps as:

- An agreement on the cooperation of CIS countries on health insurance of labour migrants and members of their families;
- An agreement on the cooperation of CIS countries on professional training of labour migrants in requested skills;
- A concept of recruitment strategies (including a position on licenses for private recruitment agencies);

25 From CIS Member States.

All these documents can facilitate opportunities for the promotion of a civilized free movement of labour.

Another important issue still waiting for a solution is the problem of non-recognized states. *De jure* they belong to some FSU republics, but *de facto* have cut off relations with these states, with most of them surviving independently for 20 years. Their status as non-recognized states does not allow them to act internationally, and as a consequence their populations have no right to participate officially in any international organization. In reality, the governments of other countries which represent the interests of such non-recognized countries usually issue the passports of their country to citizens of non-recognized states. This is the approach used by Armenia for people from Nagorno Karabakh, and by Russia for South Ossetia and Abkhazia; for Transnistria, passports are usually provided by Ukraine, Moldova or Russia, according to the person's choice.

Readmission agreements are also an important step in the future cooperation of CIS countries. At present however, these agreements do not work properly because there are no 'chains' linking destination countries with countries of transit and origin. Legislation and information cooperation should be the main focus of future development.

Future work should be undertaken to improve human rights protection for labour migrants from the CIS. The imperfections and contradictions in legislations of the CIS countries have created opportunities for the discrimination and abuse of migrants. The simplification of registrations and clear presentation of information in sending host countries can decrease the level of illegal migration while facilitating solutions for the labour market. The recognition of diplomas and qualifications is also problematic between CIS countries and needs common, unified legislation if the EURASEC and CIS countries want to reach their proposed goals.

The Strategy of Economic Development of the CIS to 2020 was adopted by the Heads of the CIS Member States on 14 November 2008, and indicated the intention of CIS leaders to create a common economic space based on free market relations, including the free movement of goods, service, capital and labour. The realization of these plans needs more political will and interests, a tall order given that even EURASEC, which is less heterogeneous than the CIS, has not yet achieved similar goals. Time will tell as to whether the Eurasian Economic Union can succeed where EURASEC and other regional organizations have failed.

Development within the CIS has deepened divides between countries according to their social and economic situation. Some countries are clearly migrant donors, others are recipients, and some are mixed in nature. But they mainly complement each other's labour market. They still need each other in their development, despite growing differences in their political, social and economic spheres and in their rising orientation towards cooperation outside the CIS and EURASEC systems. The division of free movement opportunities according to different unions (EU or EURASEC/Eurasian Economic Union or CIS) forms asymmetric relations and creates discrimination of migrants according to their ethnicity or nationality.

The enlargement of the EU in 2004 and in 2007 has reduced the visa-free space for CIS countries and has been detrimental to historical-ethnic relations between the new EU countries and some of the CIS countries. As a response to this, the EU NMS (Hungary, Poland and Romania) and Russia introduced some ethnic preferences for the simplification of the visa regime for their compatriots. This strategy has created inequalities in terms of the opportunities of their citizens to enter the EU, and is therefore damaging the cohesion of societies.

Do the CIS and EURASEC have opportunities to increase their membership? In many ways yes. Fluctuations in the number of Member States have occurred several times over the last 20 years, because some states have stepped out and participated instead as associated members (for example Turkmenistan, or Georgia, which has participated in some of the commission's work). Enlargement is theoretically possible with the involvement of outside countries from the close neighbourhood. For the last 20 years, only the governments of non-recognized states and the Former Yugoslavia have asked for membership. The Turkmenistan Kazan Summit in 2005 asked for associated membership. Mongolia participates in some of the work of the CIS, for instance as an observer in the Inter Parliamentary Assembly, and Afghanistan asked for membership of the CIS and is also an observer in the Inter Parliamentary Assembly CIS.

In December 2010, the UN General Assembly adopted a Resolution on the support of cooperation with three organizations that were founded by Russia: the Collective Security Treaty Organization, the Eurasian Economic Community and the Shanghai Cooperation Organisation, and promoted the strengthening of cooperation with them (see Table 11.1). In the current situation, EURASEC works more effectively compared to the CIS union because it is based on the economic benefits of all participants.

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Part V:

Perspectives from Asia and the Pacific

12

Free movement within the ASEAN

Sophie Nonnenmacher[1] [2]

12.1 Introduction

Free movement in the context of regional integration frameworks can take various forms. It can range from the movement of service providers to the full mobility of citizens. In general, the further advanced the integration, the more likely the depth of free movement provisions. In the context of the Association of Southeast Asian Nations (ASEAN), measures to increase labour mobility cannot be understood without reference to the political will at the regional level in setting up an ASEAN Economic Community.

Under the framework of ASEAN, most initiatives on free movement have focused on facilitating the movement of service providers with a view to expanding trade in services and deepening economic integration. A certain number of initiatives on skilled workers have also been taken to increase labour market attractiveness and competitiveness in a context of competition with large countries such as China and India for foreign direct investment (FDI). While the most stringent efforts have targeted skilled and highly skilled movements, a few steps (although limited) have been taken to address the issue of foreign workers protection and migration management (regardless of the skill level of the migrants), through measures aimed at facilitating travel, the adoption of a declaration on migrant workers' rights, efforts made at tackling transnational crime and human trafficking and smuggling, and attempts to increase cooperation on immigration matters generally.

After a brief introduction on labour mobility within the region and the ASEAN, this chapter reviews measures aimed at facilitating the movement of service providers under the ASEAN Framework Agreement on Services (AFAS). The fourth section focuses on the framework put in place under the ASEAN Economic Blueprint to facilitate the free movement of skilled labour and alleviate labour market asymmetries. The fifth section briefly discusses other initiatives undertaken under the ASEAN umbrella to regulate mobility and promote safer labour migration within the region.

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2 I would like to thank Ryszard Cholewinski (ILO) and my research assistants Kim Min Jung and Ahmed Abdi for their assistance in this work. The views in this paper are my own and do not necessarily constitute the views of IOM.

The last section examines the challenges and obstacles faced by ASEAN Member States in pursuing their free movement agenda.

12.2 Labour mobility and the ASEAN

12.2.1 Labour mobility

The Southeast Asia region has experienced an increase in cross-border labour movements in the past 30-40 years (IOM, 2008, p. 139). These movements are mainly associated with expanded intra-regional trade and investment, a surplus or shortage of workers, and widening gaps in living standards and wages among countries in the region resulting from different levels of economic growth. The region as a whole remains a region of net out-migration towards other regions of the world.

Labour movements in Southeast Asia have increased rapidly since the 1970s. It is estimated that the number of temporary labour migrants (both low-skilled and skilled workers) within the region was about 300,000-500,000 in the early 1970s and increased to about 500,000-1 million in the early 1980s[3]. In the first years of the 21st century, the number increased to reach three million temporary migrants within the region.

Interregional migration flows have also increased since the 1970s. Out-migration from Southeast Asian countries increased from 500,000-750,000 migrants in the early 1970s to 2.5-3 million in the early 2000s. In addition, in-migration from outside the region increased from 50,000-100,000 migrants in the early 1970s, to around 500,000-750,000 in the early 2000s[4].

The majority of labour flows within the region comprise low-skilled and semi-skilled workers (Manning and Bhatnagar, 2004*a*, p. 12). A high share of these flows is irregular. These movements are influenced by geographic proximity, wage differentials, the level of development of the labour market, and the political situation in the country of origin. The number of low-skilled workers is mainly concentrated in the agriculture and fisheries industries, domestic services, and construction. For example, Filipinos and Indonesians are prominent in the domestic service sector in Malaysia

3 Note of the editors: In 2013, the ASEAN countries hosted 9.5 million migrants, of whom 48.3% were female (UN, 2013). However, UN Women (2013) point out that unofficial figures indicate that a majority of temporary migrant workers are women, which means that the share of females in the actual international migrant stock is probably higher. Most of these female migrant workers are young, aged between 20 and 39, and poor.

4 For detailed statistical information, see Manning and Bhatnagar (2004*a*, p. 40, Table 3).

and Singapore; Indonesians are dominant in the construction sector in Malaysia (ibid., p. 13)[5].

There are two main flows of low-skilled workers that dominate intra-regional migration: one flow is from Indonesia to Malaysia and the other is from Myanmar to Thailand. In addition, two other major bilateral flows of low-skilled labourers dominate extra-regional migration, namely from the Philippines and Indonesia to the Middle East (ibid.).

The movement of skilled workers – professionals and businesses in particular[6] – is often associated with investment and trade, especially in the area of services (ibid.). Compared to low-skilled labour flows, movements of professional and skilled workers occur on a much smaller scale (IOM, 2008, p. 140) and mainly originate from outside of the region. For instance, Japan has a high proportion of skilled migrant workers in Malaysia, Thailand and the Philippines. In addition, Koreans, Taiwanese and Indians are prominent among foreign skilled workers in the region (ibid.). Skilled workers in Southeast Asia tend to be heavily engaged in tradable industries where foreign investment is prominent (Manning and Bhatnagar, 2004*a*, p. 14). The main occupations of foreign skilled workers are employees and managers in domestic and multinational firms, middle or high-level professional engineers, and employees in service industries (ibid.).

In a nutshell, countries within the ASEAN can be sorted into three broad groups with regard to labour mobility (Manning and Sidorenko, 2007, pp. 10-11):

Group I: high-income countries including Singapore and Brunei, and more developed countries including Malaysia and Thailand. These countries are the principal destination for migrant workers within and outside the region. However, each of them has adopted various approaches to managing labour immigration. Thailand, Singapore, Malaysia, and Brunei export their own skilled and professional workers to the other countries in the region as well (Manning and Bhatnagar, 2004*a*, p. 12).

Singapore's foreign workforce increased 170 per cent from 248,000 in 1990 to 670,000 in 2006. The majority of the foreign workers are low-skilled (IOM, 2008*a*, p. 444). There is an estimated 2.5 million regular and irregular foreign workers in Malaysia. By comparison, the stock of migrants in Thailand is estimated at 3.7 million persons in 2013, of whom half were female, although this figure would be much higher if foreign workers in irregular situations were included. The stock of migrants in Brunei is only estimated at 206,000 people in 2013, of whom 43.5% were female. In

5 Note of the editors: These are the sectors migrants in ASEAN usually end up in. Male migrants mostly work in agriculture, fishery and construction. Women often find employment as domestic workers, caregivers, retail assistants or in entertainment, but also in manufacturing and cottage industry jobs, such as fish processing. The fact that women often end up in these jobs and sectors that are considered 'feminized', is a main reason for the feminisation of migration in the ASEAN region, since there is high demand for domestic, hospital and entertainment workers. Many migrants also work in the informal sector; most of them are women (UN Women, 2013).

6 For the sake of simplicity, the paper uses the terms 'skilled migrant workers' to refer to: professional, skilled, higher-skilled and business migrants.

2013, Brunei had a total population of 418,000, of whom 49.3% were female. In other words, migrants account for half of the population of Brunei (UN, 2013).

Malaysia and Thailand also experienced out-migration to other countries in Southeast Asia and outside of the region. It is estimated that about 300,000 Malaysians were living abroad in 2006 (IOM, 2008, p. 56). Malaysian workers were deployed in Japan, Taiwan, Singapore, Australia, the United States, Canada, New Zealand and European countries. Since the 1970s, Thailand has encouraged the emigration of its nationals for work abroad, mainly to the Middle East (ibid., p. 94). In 2007, it was estimated that 161,917 Thai workers were deployed overseas (21 per cent in the Middle East and 67 per cent in other parts of Asia) (ibid., p. 95).

Group II: middle to low-income countries including the Philippines, Indonesia and Vietnam. These countries receive skilled workers from outside the region and are the major countries of origin for workers going to countries outside the region.

In 2011, the Philippines had a stock of 8.2 million nationals in foreign countries, mainly in the Middle East and in other Asian countries (ibid.). Vietnam has expanded its labour emigration programme with the result that over 70,000 workers go abroad annually[7], mainly to Malaysia and Taiwan, but also to Japan, South Korea and the Middle East. In 2006, two million Indonesians were working abroad, with 70 per cent in low-skilled employment (ibid.).

Group III: low-income countries including Cambodia, Laos and Myanmar. These are major source countries for low-skilled migrant workers within the region. Most migrating Cambodians go to Thailand to work; in 2005, there were 104,789 registered Cambodian migrants in Thailand representing about 13 per cent of the total number of legal migrant workers in the country. In 2007, almost 25,000 Cambodians were issued a work permit in Thailand, of which 37% were issued to women (IOM, 2008, pp. 13-14). Other Cambodian workers were also deployed to Malaysia and South Korea. The majority of Laotians also went to Thailand; the total number of Lao migrant workers registered in Thailand was about 20,000 in 2005, increasing to over 100,000 in 2007 (ibid., p. 50, figure 8). Laos also experienced out-migration of its skilled nationals; it is estimated that about 37 per cent of educated Laotians were living abroad in 2005 (ibid., p. 48; Smith and Ozden, 2005). As of 2004 approximately three million people have migrated from Myanmar to neighboring countries, mainly to Thailand (Asian Migrant Center, 2005), to work in sectors such as fishery processing, agribusiness, and construction, as well as in private households.

In-migration to Cambodia, Laos and Myanmar is on a relatively small scale compared to the other more developed countries in the region. The stock of foreigners in Cambodia was estimated at 304,000 in 2005, representing 2.2 per cent of the total population[8]. Laos also hosts migrant workers from other countries; the number of international migrant stock was 21,801 in 2013, of which 45.7% was female. This

7 Note of the editors: in general, Vietnam had 1.8 million emigrants in 2011, of whom 52.6% were female (OECD, 2013).

8 For detailed statistical data, see Table 3.1 on International Migration to ESCAP (2010) and United Nations (2013).

represents 0.3 per cent of the total population (UN, 203). In Myanmar, the total number of migrants had decreased from 134,000 in 1990 to 103,117 in 2013, of which 46.8% is female (ibid.). Most foreign residents living in Myanmar come from East Asian countries (about 59 per cent of total migrants) and from other countries in Southeast Asia (about 20 per cent of total migrants) (UN, 2013).

ASEAN countries have divergent approaches towards regulating labour migration:

Group I countries (Singapore, Brunei, Malaysia and Thailand) have relatively open regimes with regard to the movement of professionals and skilled workers but are more restrictive in respect of the admission of low-skilled workers (Manning and Sidorenko, 2007, p. 10; Manning and Bhatnagar, 2004*a*, p. 18).

Countries in Group II (the Philippines, Indonesia and Vietnam) have protective regimes with regard to skilled and professional workers (Manning and Sidorenko, 2007, p. 10). Among others in this group, the Philippines has a more open policy for admitting foreign skilled workers (Tullao and Cortez, 2006, section B), and also promotes overseas employment at all levels. As one of the major countries of origin for low-skilled workers, Indonesia used to promote the movement of its low-skilled nationals to the Middle East, East Asia, and other more developed countries in the Southeast Asia region (ibid.). However, this policy has changed since 1994, and now encourages more skilled labour emigration. Vietnam started to regulate and promote labour emigration in the 1990s, which resulted in rapid increases in the emigration of professionals and low-skilled workers. The government has also introduced policies relating to the entry of foreign workers, which have become more liberal since 2000 (ibid., section C).

Group III (Cambodia, Laos and Myanmar) comprises the major countries of origin of low-skilled workers and receives a relatively small number of professionals. Of the three, Cambodia is most open with regard to the entry of professionals, who are mainly associated with FDI (Manning and Sidorenko, 2007, p. 10). In addition, Cambodia recently started to encourage its nationals to work abroad, while Laos and Myanmar do not have policies promoting labour emigration.

12.2.2 ASEAN: From an informal association to a legal entity aiming at establishing an economic community

The objectives pursued in terms of free movement in the region have evolved together with the changes in the vision of ASEAN Member States relating to what could be achieved through the ASEAN regional grouping.

ASEAN was established in August 1967 with the signing of the ASEAN Declaration by Indonesia, Malaysia, the Philippines, Singapore and Thailand. The idea behind its creation was to promote peace and stability at the regional level, and support economic growth, social progress, and economic development[9]. Brunei Darussalam joined in 1984, Vietnam in 1995, Lao PDR and Myanmar in 1997, and Cambodia in

9 Bangkok Declaration (1967). The Bangkok Declaration is the founding document of ASEAN.

1999. Timor Leste is currently an observer, but it applied for membership of ASEAN in 2011. The country hopes to become a member of the organization by 2015, but its application is still under evaluation by ASEAN's Coordinating Council Working Group.

At its inception, the main focus of ASEAN was on security issues, establishing the legitimacy of newly created states after the Second World War in a context of inter-territorial disputes and tensions arising from the Cold War (UNDP Asia Pacific, 2010). This may have triggered the decision against the delegation of part of State sovereignty to a supranational authority (as is the case with the European Union – EU). Instead, it decided to favour an approach characterized by non-intervention in domestic affairs, consensual decision-making, a preference for non-binding instruments over legally binding ones, and a limited appetite to develop regional institutions as they may decrease the ability of Member States to act in accordance with their national interests[10].

At the end of the Cold War, ASEAN started to shift its agenda from security concerns to more emphasis on economic and trade considerations, and to the creation of a community which would be better able to compete with other regional blocs such as the EU. This turn was accelerated with the financial crisis hitting Asian countries in 1997.

In 1997, the ASEAN Vision 2020 was adopted. This document endorsed the idea of a shared vision of the ASEAN as a concert of Southeast Asian nations: outward looking; living in peace, stability and prosperity; and bonded together in partnership, in dynamic development and in a community of caring societies.

At the 9th ASEAN Summit in 2003, the ASEAN Leaders resolved that an ASEAN Community should be established. In 2007, the ASEAN leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Community and signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015.

The ASEAN Community is comprised of three pillars, namely the ASEAN Political-Security Community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community (See Annex 12.1, which provides an overview of the ASEAN institutional structure). Each pillar has its own Blueprint, and, together with the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan

10 The ASEAN Fundamental Principles, as contained in the Treaty of Amity and Cooperation in Southeast Asia of 1976, read as follows:

- Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
- The right of every State to lead its national existence free from external interference, subversion or coercion;
- Non-interference in the internal affairs of one another;
- Settlement of differences or disputes by peaceful manner;
- Renunciation of the threat or use of force; and
- Effective cooperation among themselves.

See also UNDP Asia Pacific (2010).

Phase II (2009-2015)[11], they constitute the Roadmap for an ASEAN Community 2009-2015. This roadmap includes all the important steps to be taken for the establishment of a community by 2015.

In support of this endeavour, ASEAN adopted the ASEAN Charter which entered into force in 2008 and completed the current ASEAN edifice by granting legal personality to the Association and reinforcing the regional institutional framework[12].

The ASEAN Community to be created is therefore more than an economic community as it includes a political and socio-cultural dimension. These three pillars are seen as interdependent for the realisation of a sustainable community. Free movement of labour is a principal consideration because of its economic dimension and is therefore mainly addressed in the ASEAN Economic Community (AEC) blueprint (with reference to free movement of skilled labour, the movement of service providers, and visa issuance). Some mobility issues are addressed to a limited extent in the ASEAN socio-cultural and political agenda. The blueprint for the socio-cultural pillar incorporates issues such as human resource development and the protection of migrant workers' rights. The political-security blueprint touches upon the issue of mobility by tackling transnational crime, including human trafficking and smuggling; by cooperating with other sectors in the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers; and by cooperating on border management (in particular on document fraud and stemming the flow of terrorists and criminals)[13]. However, none of these blueprints refer to general cooperation on immigration and consular matters as part of the requirement for the achievement of the objectives of the ASEAN Community[14].

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11 The objective of this framework is to narrow the development divide between ASEAN Member States and is mainly targeted at facilitating the integration of the new and less economically advanced ASEAN Member States, in particular Lao PDR, Myanmar and Cambodia.

12 This entailed institutional restructuring and the establishment of new organs to support the ASEAN's community-building process, which resulted in the creation of Community Councils and a Committee on Permanent Representatives. See the ASEAN institutional framework in Annex 12.1.

13 Note of the editors: According to UN Women (2013), migrant workers are regularly faced with complex and inaccessible legal migration schemes in many cross-border regions in ASEAN. They therefore tend to migrate through undocumented channels. Women have more difficulties than men in accessing safe, low-cost, legal migration channels because often they have less money and resources, and/or they lack reliable information on documented labour migration.

14 In 2000, the Directors General of Immigration Departments and Heads of Consular Divisions was recognized as the highest entity in charge of immigration matters under the ASEAN. It is established under the ASEAN Ministerial Meeting on Transnational Crime. That same year, an ASEAN plan of action for cooperation on immigration matters was adopted. The initiatives envisaged under the action plan are nonetheless limited and primarily aimed at improving national policy and capacity rather than starting designing a comprehensive regional immigration agenda. See section III for more information.

12.3 Free movement under the ASEAN Framework Agreement on Services (AFAS)

12.3.1 Trade in services and the ASEAN

Following agreement on tariff reduction commitments under the ASEAN Free Trade Area (AFTA), ASEAN decided to engage in liberalising trade in services. Integration in trade in services is seen as a key initiative for the construction of an ASEAN Economic Community (AEC).

The liberalisation of trade in services is expected to create a competitive environment that leads to more efficient service delivery within the ASEAN, and breaks new grounds for exporting services outside the region[15]. In 2007, services represented about 40 to 50 per cent of GDP in ASEAN countries[16]. The export of services to other countries of the world doubled from USD 68 billion in 2000 to USD 153.2 billion in 2007. Import of services has followed a similar pattern, doubling from USD 86.6 in 2000 to USD 176.3 billion in 2007. The main exporters of services (Singapore and Thailand) are at the same time the main importers of commercial services (ASEAN, 2009)[17].

The ASEAN Framework Agreement on Services (AFAS) was signed by the ASEAN economic ministers in 1995 and constitutes the enabling legal framework setting out the parameters for the liberalisation of services by ASEAN Member States[18]. The aim of AFAS is to improve the efficiency and competitiveness of ASEAN service suppliers by eliminating restrictions to trade in services, and progressively providing better market access and national treatment for service providers among ASEAN countries.

15 Through enhancing investment flows, technology flows and management of skills flows, building up human capital. In 2008, the services sector in the ASEAN benefited from 50 per cent of total ASEAN FDI flows (USD 33.5 billion). See ASEAN (2009).

16 The percentage of national GDP constituted by services ranges from 35% to 60% in the ASEAN economies. See *Global Times* (2013).

17 The share of export of services was in 2007 as follows: Singapore (45.7 %), Thailand (19.1%), Malaysia (19.1%), Indonesia (5.3%), Philippines (5.2%), Viet Nam (4.1%), Cambodia (0.9%), Brunei Darussalam (0.5%), Myanmar (0.2%), Lao PDR (0.2%). The main importers of commercial services were: Singapore (40.0%), Thailand (21.7%), Malaysia (15.5%), Indonesia (13.2%), Philippines (4.1%) Vietnam (4.0%), Brunei Darussalam (0.5%), Cambodia (0.4%), Myanmar (0.3%), Lao PDR (0.1%) (ASEAN, 2009).

18 The objectives of AFAS are: enhancing cooperation in services among ASEAN Members in order to improve the efficiency and competitiveness, diversify production capacity, and supply and distribution within and outside the ASEAN; eliminating substantially restrictions on trade in services among Member countries and; liberalizing trade in services by expanding the depth and scope of liberalization beyond those undertaken by ASEAN Member countries under the GATS with the aim of realizing a free trade area in services.

Clauses on labour mobility (Mode 4) are part of the AFAS as the provision of many services requires the physical proximity of consumers and service suppliers[19].

Besides pursuing trade liberalization and the integration of trade in services at the regional level, ASEAN as a group as well as individual Member States have actively engaged in trade relations and the signing of free trade agreements with partners from outside the ASEAN region[20]. Many of these initiatives set up general objectives on trade in services and do not mention the facilitation of labour or business mobility among their objectives (although some do):

- ASEAN has signed several bilateral Free Trade Agreements (FTA) on services with countries inside and outside Asia[21]. ASEAN Member States have engaged as well on many bilateral and plurilateral FTAs on services outside the region (see textbox at the end of this section for the ones including mobility provisions).
- The ASEAN Plus Three (APT) Cooperation between ASEAN, Japan and South Korea 'was established in 1997 when Asia was hit by economic crisis. The APT mechanism consists of the 10 ASEAN Member States plus China, Japan and Republic of Korea'[22] and the 'cooperation is now being pursued in 20 areas, covering political and security, transnational crime, economic, finance

19 The four modes of service delivery identified in the GATS and the AFAS are: Mode 1: cross border supply – services flow from the territory of one member into the territory of another member (e.g. banking services transmitted via the internet); Mode 2: Consumption abroad – where a service consumer moves to another Member's territory to obtain a service (e.g. patients); Mode 3: Commercial presence – refers to the situation where a service supplier of one Member establishes a territorial presence, including though ownership or lease of premises in another Member's territory to provide a service (e.g. domestic subsidiaries of a foreign IT company); Mode 4: movement of service providers – persons entering the territory of another Member State to supply a service (e.g. accountants).

20 Some initiatives are taken place at the intra-subregional level as well as with some countries or their provinces engaged in subregional economic collaboration which includes the facilitation of the movement of persons. They take place within three growth triangles:
- The Indonesia-Malaysia-Singapore Growth Triangle (IMS-GT) linking Singapore with the Indonesian provinces of Riau and West Sumatra, and the Malaysian state of Johor;
- The Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT) linking northern Sumatra in Indonesia with northern Malaysia and southern Thailand.
- The Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA) linking Brunei Darussalam with parts of eastern Indonesia, eastern Malaysia and the southern Philippines.

21 Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic of China (2007); Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of ASEAN and the Republic of Korea (2007). In 2007 ASEAN, Australia and New Zealand concluded the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area. This Agreement contains an additional chapter on Movement of Natural Persons. At the time of editing (December 2014), all the ASEAN countries save the Philippines have signed a free trade agreement for services and investments with India. India signed the agreement in September 2014. The Philippines is expected to sign soon; it is hoped that the agreement will be formally adopted in 2015.

22 Ministry of Foreign Affairs of Indonesia, http://www.kemlu.go.id/en/default.aspx

and monetary, agriculture and forestry, energy, minerals, tourism, health[23], labour, culture and arts, environment, science and technology, information and communication technology, social welfare, rural development and poverty eradication, disaster management, youth, women, and other tracks' (ASEAN, n.d.).

In addition to the Asian region, ASEAN has relations and interests in both the European Union and Latin America (see Figure 12.1):

- The East Asia Summit (EAS) 'is a forum for dialogue on broad strategic, political and economic issues of common interest and concern with the aim of promoting peace, stability and economic prosperity in East Asia'[24].
- The Asia-Europe Meeting (ASEM) 'is an informal process of dialogue and cooperation bringing together the 27 European Union Member States and the European Commission with 19 Asian countries and the ASEAN Secretariat. The ASEM dialogue addresses political, economic and cultural issues, with the objective of strengthening the relationship between (the) two regions, in a spirit of mutual respect and equal partnership' (ASEM, n.d.).
- The East Asia-Latin America Forum (EALAF) provides a broader platform for political, business, and other leaders to exchange views and to promote better understanding and political, economic and cultural cooperation between countries in the two regions.

Some ASEAN countries (Thailand, Philippines, Malaysia, Singapore, Brunei Darussalam, Indonesia and Vietnam) are also members of the Asia-Pacific Economic Cooperation (APEC).

> APEC was established in 1989 to further enhance economic growth and prosperity for the region and to strengthen the Asia-Pacific community. Since its inception, APEC has worked to reduce tariffs and other trade barriers across the Asia-Pacific region. APEC Member economies are committed to enhancing business mobility by exchanging information on regulatory regimes and streamlining immigration processes for business travellers and temporary residence of business people (APEC, n.d.).

The other Member countries of APEC are Canada, Chinese Taipei (Taiwan), Hong Kong (Province of China), United States, Russian Federation, Papua New

23 Note of the editors: Migrant workers are submitted to mandatory health testing to gain and maintain their documented status. Migrant female workers must undergo periodic pregnancy tests and risk immediate deportation if they test positive. This raises concerns about the sexual and reproductive health rights of women migrants. In Singapore for example, foreign domestic workers are tested every six months and must either have an abortion or leave the country if they are found to be pregnant (UN Women, 2013).

24 See ASEAN (n.d.).

Guinea, Mexico, Peru, Chile, Australia, New Zealand, Japan, Republic of Korea, and People's Republic of China.

There are so many overlapping FTAs in the region that the situation is often referred to as a 'noodle bowl'. From a positive side, this can be viewed as a tribute to ASEAN's commitment to maintaining links with the rest of the world, rather than attempting to build a fortress-like grouping. On the other hand, the engagement by ASEAN member countries with extraregional partners is sometimes seen as undermining the regional integration agenda as there is no common approach that is followed when negotiating trade agreements. As such, the interests of ASEAN as a group are not always taken into consideration, while the collective leverage of the ASEAN states in trade negotiations is undermined. 'ASEAN centrality', vaunted by the blueprint for the ASEAN Economic Community, is not yet a reality[25.]

FTAs in services and dialogue with extra-regional partners in which ASEAN as a grouping and ASEAN Member States are engaged often encompass issues related to mobility (see Box 12.1). They can relate to market access (entry of service providers)[26], or more generally promote human resource development, cooperation on higher education and recognition of qualifications, or envisage streamlining of procedures for the travel of business people and investors[27]. Ultimately though, the presence of mobility-related provisions can affect the effectiveness of ASEAN regional efforts in facilitating movement of ASEAN professionals through accrued competition from non-ASEAN sources of labour. When provisions offered by an ASEAN Member State to external partners are more favourable or equivalent to the rules applied to ASEAN nationals, with no preferences given to ASEAN professionals, this sends the wrong signal in terms of a willingness to achieve a more integrated regional labour and trade market. On the other hand, these agreements can help develop human resources and enable the ASEAN country party to the agreement to tap new markets for skilled workers outside the region (leaving room for professionals from other ASEAN countries to fill the gaps due to professional out-migration). A careful assessment of the impact of these agreements on regional free movement would need to be made.

25 The principle of ASEAN centrality was introduced in the AEC blueprint. It implies that Member countries should take into consideration ASEAN interests in formulation of external economic relations, including bilateral FTAs.

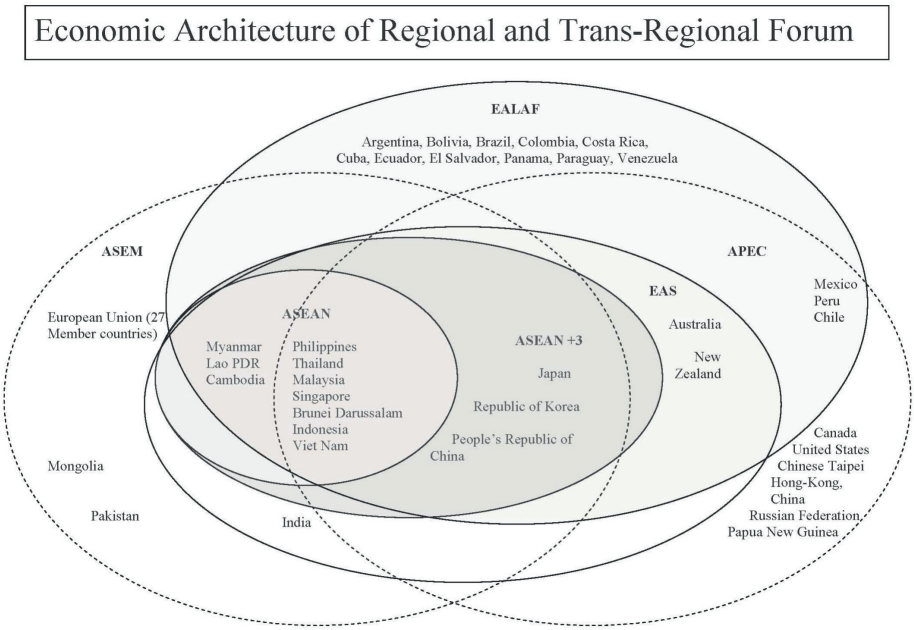
26 For instance, the US-Singapore FTA states that 'a party shall not, as a condition for temporary entry, require prior approval procedures, petitions, labor certification tests, or other procedures of similar effect, or impose or maintain any numerical restriction to temporary entry.

27 See APEC (n.d.).

Box 12.1 Free trade agreements between ASEAN Member Countries and extra regional partners including provisions on movement of natural persons:

- Brunei Darussalam – Japan, *Economic Partnership Agreement*, 31 July 2008;
- EFTA – Singapore, *Free Trade Agreement between the EFTA States and Singapore*, 14 January 2003. EFTA Member States are Iceland, Liechtenstein, Norway, and Switzerland;
- India – Singapore, *Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore*, 3 May 2007;
- Japan – Indonesia, *Economic Partnership Agreement,* 27 June 2008;
- Japan – Malaysia, *Economic Partnership Agreement*, 12 July 2006;
- Japan – Philippines, *Agreement between Japan and the Republic of Philippines for an Economic Partnership*, 11 December 2008;
- Japan – Singapore, *Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership*, 8 November 2002;
- Japan – Thailand, *Agreement between Japan and the Kingdom of Thailand for an Economic Partnership*, 25 October 2007;
- Jordan – Singapore, *Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore on the Establishment of the Free Trade Area*, 7 July 2006;
- New Zealand – Singapore, *Agreement between New Zealand and Singapore on a Closer Economic Partnership*, 4 September 2001;
- Panama – Singapore, *Free Trade Agreement*, 4 April 2007;
- Singapore – Australia, *Free Trade Agreement*, 25 September 2003;
- Thailand – Australia, *Free Trade Agreement*, 27 December 2004;
- Thailand – New Zealand, *Closer Economic Partnership Agreement*, 1 December 2005;
- United States of America – Singapore, *Free Trade Agreement*, 17 December 2003;
- United States of America – Viet Nam, *Agreement between the United States of America and the Socialist Republic of Viet Nam on Trade Relations,* 13 July 2000.

Figure 12.1 Economic architecture of regional and trans-regional forum



12.3.2 AFAS and the GATS: similarities and differences

The regional framework for liberalising trade in services and the movement of service providers (AFAS) is based on the General Agreement in Trade in Services (GATS) of the World Trade Organization. This can be explained by the prominence of the GATS at the time ASEAN adopted AFAS, which was just one year after the establishment of the WTO and the GATS.

AFAS mirrors the GATS through the identification of four modes of delivery, a sectoral approach, and the adoption of a positive list[28]. The fourth mode (Mode 4) relates to the movement of service providers and is defined under the GATS as the supply of a service 'by a service supplier of one Member, through the natural presence of a Member in the territory of any other Member'. It is generally understood that this definition encompasses independent service providers, the self-employed and foreign individuals employed by foreign companies established in the territory of a WTO Member State. It seems to exclude foreign individuals employed by domestic companies[29]. The movements of service providers are meant to be temporary movements and exclude entry into the local labour market.

28 This means that only the sectors specifically scheduled by a country are subject to the removal or reduction of barriers. A country can opt out of sectors they do not wish to liberalize.

29 Even though the latter has been debated by experts such as Alan Winters (2008).

AFAS adopts a 'GATS plus' approach, meaning that it aims to bind its signatories to go beyond their commitments under GATS. ASEAN Member States are therefore invited to schedule commitments under AFAS that go beyond their GATS commitments or offer new service sectors or sub sectors that have not been scheduled under the GATS.

Several rounds of negotiations have been performed to achieve the objective of AFAS, which resulted in the conclusion of eight packages of commitments under the AFAS, including detailed commitments from each ASEAN country in each agreed economic (sub-)sector and mode of supply[30]. In addition, there have also been four additional packages of commitments in financial services signed by the ASEAN Finance Ministers (the second, third, fourth, and fifth Packages of Commitments of Financial Services under the AFAS) and five additional packages of commitments in air transport signed by the ASEAN Transport Ministers (the fourth, fifth, sixth, seventh and eighth Packages of Commitments on Air Transport Services under the AFAS).

The ASEAN Economic Ministries agreed in the AEC Blueprint that by 2015 the liberalisation of all service sectors should be achieved, with the caveat that this should be pursued with flexibility[31].

Under AFAS, a certain number of original elements have been introduced into the negotiation framework to facilitate progress:

- ASEAN decided to focus on priority sectors. As an outcome of the 2003 Bali Summit, ASEAN Economic Ministers identified 11 priority sectors among which four have a substantial service component: air transport, healthcare, e–asean (telecommunication and IT services), and tourism[32], with the objective of removing substantially all restrictions on trade in services in these priority sectors in 2010 and in a fifth priority sector, logistics, by 2015 (ASEAN, 2008)[33].

30 In 2003, ASEAN Economic Ministers (AEM) signed the Protocol to Amend the ASEAN Framework Agreement on Services. It provides the possibility for Member States to apply a 'ASEAN minus X' formula; this is specifically for those countries ready to liberalize a certain service sector without having to extend the concessions to non-participating countries.

31 The AEC blueprint refers to an overall flexibility of 15%. According to Menon (2014), trade liberalisation in services still has a way to go; the number of services covered by ASEAN's Mutual Recognition Agreements needs to be expanded 'and agreements need to be implemented in ways that improve mobility for skilled labor'.

32 At the 2003 meeting of AEM. See also the 2004 Framework Agreement for the Integration of Priority Sectors, and the 2006 amendment to this framework. In total 11 sectors (12 if logistics is included) have been identified to foster economic integration; the other sectors are not related to trade in services.

33 While the GATS covers 12 sectors, it was decided at the beginning of the negotiations on AFAS to target only six of these twelve sectors: business services, construction, healthcare, maritime transport, telecommunications and tourism (under AFAS, transport is split between maritime transport and air transport with the latter negotiated under a separate negotiation framework). It is only with the Hanoi Plan of Action in 1998 that ASEAN Member countries where encouraged to expand the scope of negotiations beyond the 7 priority sectors, identified at the Fifth ASEAN Summit and cover all services sectors.

- In 2007, ASEAN leaders adopted the ASEAN Economic Blueprint, which sets up targets for the achievement of free flow of services by 2015 (with flexibility). (See Annex 12.2). In the first four rounds, liberalisation of the services sector was undertaken based on the parameters agreed for each respective round. Liberalisation thresholds for subsequent rounds of negotiations are based on the ASEAN Economic Community (AEC) Blueprint.
- In terms of institutional mechanisms, services are negotiated under the auspices of different bodies, with line ministries taking the lead on finance and transport negotiations and the remaining services negotiated under the lead of the ASEAN Economic Ministers[34.]

Different parameters for liberalisation have been set up for each round of negotiation to encourage wider and deeper integration. Following the signing of AFAS, ASEAN Member States were requested to immediately embark on negotiations to achieve the objectives of AFAS. ASEAN started with a three-year cycle of rounds of services negotiations:

First Round (1996-1998)[35]

During the first round ASEAN adopted the GATS-style 'Request and Offer Approach' for its services liberalisation. The process was initiated with an exchange of information among ASEAN Member States on each other's GATS commitments and services trade regime. This resulted in the First and Second Packages of AFAS Commitments. (See Annex 12.3)

Second Round (1999- 2001)

ASEAN adopted a Common Sub-Sector Approach in this round. A particular sector would be identified as a common sub-sector when four or more Member States had made commitments in that sub-sector under the GATS and/or under previous AFAS packages. Under this approach, Member States were requested to schedule commitments in the identified common sub-sectors. These concessions were then extended to other ASEAN Member States. The idea was to promote scheduling in

34 Six services sectors (construction, business services, transport, telecommunication and IT services, healthcare, logistics and tourism are negotiated under the auspices of the Coordinating Committee on Services (CCS), which reports to the ASEAN Economic Ministers through the Senior Economic Officials Meeting (SEOM) with each service having its own dedicated working group. In addition, there is a caucus on education services. The liberalization of investment, air transport and financial services is undertaken outside the CCS: the Coordinating Committee on Investment (CCI) reports to the ASEAN Economic Ministers - ASEAN Investment Area Council (AEM-AIA Council), and through the SEOM; the Air Transport Sectoral Negotiation (ATSN) of the Air Transport Working Group (ATWG) reports to the ASEAN Transport Ministers (ATM) through the Senior Transport Officials' Meeting (STOM); and the Working committee on ASEAN Financial Service Liberalization under AFAS (WC-FL/AFAS) reports to the ASEAN Finance Ministers Meeting (AFMM) through the ASEAN Finance and Central Bank Deputies Meeting (AFDM).

35 ASEAN Integration in Services, ASEAN Secretariat, 2009.

sectors perceived less sensitive to liberalisation. This round of negotiations resulted in the Third Package of AFAS Commitments.

Third Round (2002-2004)

During the third round ASEAN adopted a 'Modified Common Sub-Sector Approach'. The approach is basically the same as the Common Sub-Sector Approach discussed above except that the threshold was modified to include sub-sectors where three or more Member States had made commitments under the GATS and/or previous AFAS packages, instead of four or more Member States. In this way the number of sub-sectors to be liberalised was increased.

In addition to this approach, ASEAN also started negotiations based on an 'ASEAN Minus X Formula'. Under this approach, two or more Member States may proceed to liberalise an agreed services sector/sub-sector and extend the concessions to the participating Member States. Others may join at a later stage or whenever they are ready to participate. This approach aims to expand and deepen negotiations in all sub-sectors among Member countries who are willing to do so. It allows less economically advanced countries to liberalize less widely and deeply than the more advanced economies. The third round resulted in the Fourth Package of AFAS Commitments.

Fourth Round (2005-2007)

The fourth round of AFAS negotiations required Member States to schedule a number of sub-sectors from an agreed list of sub-sectors based on certain threshold levels, consisting of: (a) Scheduling 'None' for Modes 1 and 2 commitments (i.e. there were to be no limitations on market access and national treatment in these two modes). In those sub-sectors where a Member State is not able to schedule such a commitment, justifiable reasons have to be provided; and (b) Scheduling Mode 3 foreign equity participation targets at 49 per cent for the priority services sub-sectors, 51 per cent for the construction sub-sectors, and 30 per cent for the other services sectors. The fourth round of negotiations produced the Fifth and Sixth Packages of AFAS Commitments.

Fifth Round (2007- 2009)

For the fifth round and subsequent rounds up to 2015, ASEAN Member States agreed to schedule liberalisation commitments based on the targets and timelines outlined in the AEC Blueprint (see Annex 12.1). For the fifth round, the thresholds include:

- Liberalising an additional 10 new sub-sectors (making a total of 65 sub-sectors, based on the W/120 classification.
- No restrictions for Modes 1 and 2, but with exceptions due to bona fide regulatory reasons (such as public safety) which are subject to agreement by all Member States on a case-by-case basis. Allowing for foreign (ASEAN) equity participation of no less than 51 per cent for the priority services sectors and the construction sub-sectors and 49 per cent for the logistics and other services sub-sectors. The fifth round of negotiations resulted in the Seventh Package of AFAS Commitments.

Sixth Round (2010 -)

Just as for the fifth round, for the sixth round ASEAN Member States agreed to schedule liberalisation commitments based on the targets and timelines outlined in the AEC Blueprint (see Annex 12.3). For the sixth round, the thresholds include:

- Liberalising an additional 7 new sub-sectors.
- Removal of 'substantially all restrictions on trade in services for all other services sectors (than those covered by previous rounds) by 2015' and removal of other Mode 3 market access limitations by 2015 (ASEAN, 2008).
- The Eighth Package of AFAS Commitments was agreed upon early in the sixth round, in 2010.

12.3.3 AFAS and Mode 4

Despite the establishment of parameters to facilitate liberalisation, AFAS does not go substantially beyond the GATS commitments. It is therefore not providing much impetus to liberalise service trade within ASEAN. This assessment is even more accurate in relation to Mode 4. The prevailing view is that the commitments of ASEAN countries for Mode 4 under AFAS have been conservative on the whole and have followed the general pattern of Mode 4 commitments made by ASEAN Member countries under the GATS in the WTO (ESCAP, 2010, p. 24; ESCAP, 2009)[36]. There has not been a significant enhancement of AFAS commitments in fulfillment of 'the GATS plus' objectives with regard to Mode 4.

The general trend has been to privilege skilled labour[37] and in particular intra-corporate transferees at the level of directors, managers, supervisors, specialists, experts/advisors, and/or business visitors.

Most of the commitments have been inscribed in the horizontal commitment sections. Definitions are provided for each category of natural persons. In many cases, limitations are envisaged and take the form of limitations on market access[38], through limitations on the type and number of foreign workers and economic sectors in which the foreigner is allowed to work; the length of stay; requirements of compliance with regulations; conditions relating to recruitment, including through an economic needs test; and requirements for a transfer of knowledge (training or creation of employment for the local workforce) or for a transfer of technology through a local understudy.

Many countries envisage national treatment limitations requiring that sectors and the practice of professions are only open to citizens of the country or involve residency requirements.

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36 Cambodia and Viet Nam are new Members of the WTO, they joined in 2004 and 2007 respectively and Lao PDR is not yet a WTO Member.

37 In the GATS and AFAS, there is no threshold to the skill level of persons to be covered by the agreements – skilled workers as well as low-skilled workers can be included in the commitments. However, AFAS commitments like GATS Mode 4 commitments are focusing on skilled and highly skilled workers.

38 Market Access Limitations are defined in Article XVI of the GATS.

Sometimes limitations scheduled under Mode 3 involve limitations on natural persons for conducting cross-border service delivery, including those relating to the number of persons allowed to enter. The more common limitations include:

- A maximum number or share of foreign professionals/experts/partners in each company.
- A minimum amount of paid-in equity capital, a minimum number of direct employees, and/or a minimum percentage of output that has to be exported, in order to allow for Mode 4 entry.
- Residency, local language, and/or other National Treatment limitations (ASEAN Secretariat, 2008).

Regional trade agreements are perceived as offering a facilitating environment for negotiations due to the smaller number of countries involved, and therefore an easier setting for identifying shared interests. However, Mode 4 liberalisation undertaken at the regional level under AFAS is subject to the same pitfalls as Mode 4 under the GATS. It is perceived as the most sensitive mode and countries are reluctant to give up their sovereign right to decide who may enter and provide services in their countries[39]. Nonetheless, the lack of progress to date on Mode 4 cannot be understood in isolation from the perception ASEAN Member States have regarding the benefits that can be accrued by the realisation of all the objectives of AFAS and the liberalisation of trade in services as a whole (see the Section below on challenges and obstacles).

In order to facilitate progress under Mode 4, the AEC foresees the setting up of the parameters of liberalisation for Mode 4 for each round by 2009, and scheduling commitments according to the agreed parameters[40]. However, these parameters are still under negotiation and have not yet been adopted. In the meantime, where Mode 4 movements are constrained by the regulation on foreign equity participation, Mode 4 liberalisation may already benefit from some of the parameters adopted under Mode 3. Indeed, the ASEAN Member States aimed to allow for ASEAN equity participation of no less than 70 per cent in 2010 for the four priority sectors, in 2013 for logistic services, and by 2015 for the other sectors.

The current situation faced by services providers is one of different treatment depending on nationality. Preferential treatment is not necessarily oriented towards service suppliers from the region but directed towards main trading partners, which are from developed countries and other countries. For instance, business visitors from the former six ASEAN Member States benefit from partial visa exemption arrangements in Malaysia for a month, while citizens from countries such as the United States and France enjoy visa-free business visits for up to 90 days.

In general, service providers from the newer ASEAN Member States, which are also less economically developed (Mynamar, Lao PDR, Cambodia, Vietnam), enjoy less preferential treatment than those from the former six ASEAN Member States.

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39 For more on the progress made and difficulties encountered at the global level under the GATS, see Nonnenmacher (2008, pp. 359-361).

40 Parameters for liberalization of Modes 1, 2 and 3 have already been identified and included in the Seventh Package of AFAS Commitments. See Annex 12.2 on AEC Blueprint.

Overall in the region, business people and entrepreneurs benefit from easier immigration requirements than professional and technical service providers, the latter being regulated by the same regime governing other migrant workers seeking employment in these occupations.

There are important differences in visa and work permit arrangements and related costs among ASEAN countries. In addition, National Treatment limitations – with certain occupations reserved for nationals – vary markedly among ASEAN Members. For instance, accounting and auditing in Thailand are reserved to nationals, while in Singapore, foreign accounting service provision is encouraged.

Several suggestions have been put forward to make progress. The ASEAN Secretariat is proposing that the modalities for Mode 4 liberalisation, deliberated at the WTO level, are adapted to the ASEAN context and adopted by ASEAN member countries. Among others, the suggestions include:

- Expansion of Commitments under Mode 4 for Intra-Corporate Transferees and Business Visitors: where commitments can take the form of: (i) a longer visa period without the need for annual visa renewal; and (ii) specific sector commitments rather than horizontal commitments.
- Expansion of Commitments in categories delinked from Mode 3: expansion of the scope of commitments by covering a wider range of service provider categories and occupations, and delinking them from commercial presence to include categories such as Contractual Service Suppliers (CSS) and Independent Service Providers (ISP).
- Phasing out restrictions affecting natural persons, such as
  - Restrictions on the duration of stay;
  - Pre-employment conditions and other requirements;
  - Economic needs tests (including labour market and management needs tests);
  - Quantitative restrictions through numerical quotas;
  - Burdensome requirements for work permits; and
  - Residency and citizenship requirements.

while also, in parallel, agreeing on a list or types of restrictions that can be maintained.

- Adoption of standard terminology for service supplier categories within ASEAN for categories such as Intra-Corporate Transferees, Business Visitors, and Contractual Service Suppliers.
- Alignment of visa/work permit categories, procedures and requirements for various service supplier categories, standardising procedures for the application and processing of visas and work permits for ASEAN nationals and timelines for issuance of visas/permits, or perhaps an ASEAN Pass that would facilitate the movement of ASEAN service suppliers.

In addition, some trade experts[41] have suggested:

- Adapting immigration regulations to recognise the specificity of Mode 4 service providers as they do not seek employment;
- Putting in place certain regional standards for regulating and facilitating regional Mode 4 service suppliers or for minimising the differences between the approaches adopted by individual ASEAN Member States;
- Visa exemptions for business visits to be applied to all ASEAN Member States (not only older Members) and be upgraded to ensure that they reach at minimum the level enjoyed by non-ASEAN Member countries;
- Reviewing National Treatment and the list of occupations reserved for national workers with a view to reducing the number of protected occupations over a period of time (Manning and Bhatnagar, 2004, p. 36);
- Identifying sectors where significant intra-ASEAN movements are taking place such as paramedical personnel, seafarers, business executives, construction workers and domestic helpers, and encouraging ASEAN Member States to expand their commitments in these sectors (i.e. maritime transport services, business services, etc.) (ibid.);
- Extending commitments to low and semi-skilled workers, in particular domestic and construction workers, which would benefit the less-developed ASEAN countries and recognise the continuous need for these categories of workers in the most advanced countries. This could be done by resorting to the 'ASEAN minus X formula', involving first the ASEAN-6 countries (i.e. the older Member States), and then be extended later to the other Member countries (Manning and Bhatnagar, 2004, p. 36)[42].

Coordination between ministries on Mode 4 among ASEAN countries varies. Negotiating teams for AFAS are generally led by the Ministry of Trade at the national level. However, Mode 4 also involves labour and immigration implications. There would be a need for a greater involvement of labour ministries to fully take into consideration the potential implications of liberalisation for labour markets and review the institutional framework for the approval of work permits and other administrative requirements for service providers. Immigration departments need to be involved too in order to address the challenges in regulating movement and ensure that an efficient system is in place to deal with the visa applications of service providers.

At the regional level, AFAS negotiations are pursued under the lead of the national Economics Ministries. This raises the issue of inter-ministerial coordination at the regional level. In 1995, the Bangkok Summit Declaration referred to the need to simplify immigration procedures in view of the efforts towards regional integration. It

41 See, for instance, Wongboonsinm (2009).

42 Note of the editors: For female migrants there are two predominant occupations: domestic worker and sex worker. Women in these professions are often denied labour and social protection because these occupations mostly take place in the informal economy. Their wages are often very low and they sometimes lack access to justice and legal systems. Other than that, they also face exploitation, and sexual and gender-based violence (UN Women, 2013).

established consultative meetings between ASEAN Directors-General of Immigration Departments and Heads of Consular Affairs Divisions of the ASEAN Ministries of Foreign Affairs (DGICM). The involvement of DGCIM in AFAS discussions could be further explored.

12.3.4 Mutual Recognition Agreements (MRA)43

Another pillar of ASEAN's attempt to facilitate the movement of professionals is the adoption of MRAs. Opportunities for professionals from ASEAN countries to practise in another ASEAN country are generally conditional on meeting certain qualification requirements. The set of qualifications to comply with often varies from one country to another. Therefore, even when foreign professionals face no market or national treatment limitations, they can be impeded from tapping opportunities abroad because they are unable to have their qualifications recognized. The objectives of MRAs are to set up accreditation procedures and mechanisms assessing equivalency taking into account differences in training curricula, experiences and licensing requirements among countries.

The AFAS recognizes the importance of MRAs in service negotiations. Its Article V states that:

> Each Member State may recognize the education or experience obtained, requirements met, or licenses or certifications granted in another Member State, for the purpose of licensing or certification of service providers. Such recognition may be based upon an agreement with the Member State concerned or may be accorded autonomously.

At their 7th Summit in 2001, the ASEAN Heads of State mandated the start of negotiations on MRAs. Nonetheless, it took the ASEAN Coordinating Committee on Services two years to established working groups on MRAs.

Other ASEAN policy documents adopted subsequently on economic integration reaffirmed the importance of MRAs. The decision of the Bali Concord II, adopted in 2003, set up a timeframe calling for the completion of MRAs for qualifications in major professional services by 2008 to facilitate free movement of professionals/skilled labour/talents within ASEAN. The 2008 timeline is mentioned again in the 2004 ASEAN Framework Agreement for the Integration of the Priority Sectors (Article V) and in the 2007 AEC Blueprint for MRAs which were already under negotiation at that time (i.e. architectural and accountancy services, surveying qualifications, medical practitioners). In addition, the AEC called for the completion of a MRA on dental services by 2009.

The ASEAN did manage to meet some of these expectations and timelines with the conclusion of eight MRAs to date: a MRA on engineering services (signed by the

43 See Nonnenmacher, 2007.

AEM in 2005); a MRA on architectural services (2006); a framework MRA for the mutual recognition of surveying qualifications (2006); a MRA on nursing services (2006); a MRA on medical practitioners (2008); a MRA on dental practitioners (2008); and a framework MRA on accountancy services (2008). The latest MRA to have been signed is the MRA on tourism professionals (2009).

However, there is a need to make a distinction among the MRAs that have been adopted as they are of two different types: MRAs per se and framework MRAs. The MRA per se includes measures to facilitate mobility, while the framework MRA is an agreement aimed at providing the enabling framework of broad principles for further bilateral and multilateral negotiations among ASEAN Member States. Taking this distinction into account, only six MRAs per se have been signed since the adoption of the AFAS almost twenty years ago.

The MRAs generally encompass seven elements:

- The overall objectives of the MRA;
- A section on definitions including, among others, definitions of the categories of professionals taken into consideration;
- A section on recognition and eligibility of foreign practitioners[44] ;
- A section on recognition mechanisms which identify the role of the national regulatory authority (the body vested by the government in each ASEAN Member State with the authority to regulate and control practitioners and their practices[45]), which eventually foresees the establishment of an ASEAN coordinating body to facilitate the implementation of the MRA (e.g. ASEAN Joint Coordinating Committee on Dental Practitioners);
- A section on mutual exemptions, which introduces the possibility to 'enter into arrangements which would confer exemption from further assessment by the national regulatory authority'. However, it is specified that such arrangements have to be concluded with the involvement and consent of the Host Country regulatory authority;

44 Criteria for recognition are in general: education (diplomas recognized by both the host and origin country); registration and licensing (the practitioner has to be registered with the relevant national body, and in addition the relevant professional regulatory authority has to assess and license the practitioner stating that he or she is technically, morally and legally qualified to practice); experience (e.g. 5 years of experience in the country of origin is required for dental practitioners); continuing professional education; professional conduct (ethics) (e.g. for dental practitioners, the MRA states that the practitioner 'has been certified by the PDRA of the Country of Origin as not having violated any professional or ethical standards, local and international, in relation to the practice of dentistry in the Country of Origin and in other countries as far as the Professional Dental Regulatory Authority is aware'.

45 The role assigned to the host country professional regulatory authority is 'to evaluate the qualifications and experiences of the foreign national; to impose any other requirements or assessment for registration where applicable; to grant recognition and register the eligible foreigner; to monitor and assess the compliance of the registered foreigner; to take necessary action in case the foreigner failed to practice in accordance with the professional and ethical code of conduct of the host country'. See, for example, the MRA on dental practitioners.

- A section comprising dispute settlement provisions, referring to the provisions of the ASEAN Protocol on the Enhanced Dispute Settlement Mechanism, signed at Vientiane, Lao PDR on 29 November 2004, which applies to disputes concerning the interpretation, implementation, and/or application of any of the provisions. However the preferred way of settling disputes is through dialogue as mentioned explicitly in certain MRAs, for example: '[the Parties to the MRA] at all times endeavour to agree on the interpretation and application of this MRA and shall make every attempt through communication, dialogue, consultation and cooperation to arrive at a mutually satisfactory resolution of any matter that might affect the implementation of this MRA';
- A section comprising capacity building and technical assistance provisions.

While MRAs are binding treaties between governments and influence the commitments and role of professional regulatory authorities, they leave considerable scope in the hand of the national authority as they stipulate that the MRA 'shall not reduce, eliminate, or modify the rights, power and authority of each ASEAN Member State, its (…) relevant authority to regulate and control (…) practitioners and the practice (..)'[46].

ASEAN Member countries were slow in concluding regional MRAs. This is due in part to a protectionist approach of certain Member States and professional lobbies which did not wish to see their national professionals face increased competition. Some countries see limited advantages to cooperation as they themselves have limited human resources or quality labour to send abroad who could tap opportunities in other ASEAN Member States.

Difficulties have sometimes arisen because certain sectors or subsectors of professional services have not reached an agreed-upon definition at the ASEAN level on the scope and responsibilities of the practitioner. The adoption of a common classification of professions would therefore be an important and progressive step.

There is an uneven level of development of certain professional and regulatory frameworks within ASEAN, which renders the establishment of equivalence or the identification of a mechanism for recognition an arduous task and raises the question of Member States' capacity for implementation. Therefore, assistance should be provided in particular to the new ASEAN Member States to upgrade their standards relating to the professional and technical skills of their workforce under MRAs (technical assistance section), but also under the Initiative of ASEAN Integration (IAI) (cf. AEC Section II Article 7), which is aimed at accelerating the integration of new Members into the regional market and narrowing the economic development gap between Member countries. This is important not only because it will facilitate the adoption of MRAs in the future, but also because it allows for the transfer of skills from foreigners to the national workforce in a more effective way than requesting foreign companies to train the local workforce as a condition to be authorized to do business.

46 See for instance Article 5 on the MRAs on dental and medical practitioners.

Another limitation is that MRAs are limited in their application to movement of service providers and are not applicable to labour migrants in general. Reference in the agreements is made to ASEAN trade frameworks and initiatives, and the movement of professionals is linked to that context. MRAs exclude foreign (non-ASEAN) service providers established in ASEAN countries as they require practitioners to hold the nationality of an ASEAN Member State.

The AEC Blueprint refers to the identification and development of MRAs for other professional services by 2012, to be completed by 2015. However, at this stage, the focus seems to be more on implementation of the MRAs that have already been signed and to see first what concrete advantages they offer to professionals[47].

12.4 AEC free flow of skilled labour (A5)

There is an increased competition at the global level to attract financial flows and human capital. Foreign direct investment is directed towards locations which provide for a good investment climate but also offer the necessary supply of quality, skilled labour needed by different businesses. In this regard, free movement of skilled labour can play a critical role, allowing skills to be available in line with demand by increasing the availability of skills in the workforce in terms of size and quality of the labour pool. Countries of origin can benefit too, both from remittances and from the skills their workers can transfer to other nationals upon their return. The gains and losses of skilled mobility may nonetheless be unevenly shared between origin and host countries, with much depending on the labour market situation in the host country and the conditions under which migrants migrate[48].

ASEAN governments have opted to support reducing the barriers to the movement of professional and skilled workers as a first and less controversial move towards greater intra-regional labour market integration. The free flow of skilled workers is a less threatening item to put on a regional agenda for the principal ASEAN destination countries as the numbers at stake are limited compared to the much larger pool of less-skilled workers in the region, and the contribution of skilled workers to recipient countries is generally assessed positively. Indeed, it is seen to increase productivity of labour and the quality of the labour force for the benefit of local employers, while also making a location more attractive to foreign investors and providing workers with more options. In turn, greater investment generally leads to the creation of more jobs and career paths, increased investment in education and human resources, and better working conditions.

47 Indeed, at the time of editing (December 2014), the most recent MRA to have been signed is the one from 2009 concerning tourism professionals.

48 Namely, whether there is a situation of labour surplus and shortage, whether migration is temporary or permanent, or whether it occurs through legal channels or is irregular, etc. Increased mobility of skilled migrants at the regional level also triggers the fear of more competition between the skilled labour of the different countries concerned, together with temptations to lower standards in worker protection.

Free flow of skilled labour within ASEAN may contribute to the development of ASEAN human resources and to the creation of a regional pool of talent as a partial alternative to bringing in skilled workers from other regions of the world[49]. Such an outcome would be in line with the direction foreseen by the Vientiane Action Programme to 'work closely between and among ourselves to generate our own indigenous resources'.

The realization of a free flow of skilled labour within ASEAN is a key element of the AEC Blueprint. The scope of 'free skilled labour' is broader than the facilitation of the movement of service providers as it allows 'for managed mobility or facilitated entry for the movement of natural persons engaged in trade in goods, and investments in addition to trade in services' (ASEAN, 2008, Art. 33). In the AEC Blueprint, this question constitutes a separate section[50] from the section on free flow of services. The action envisaged for ASEAN is to 'facilitate the issuance of visas and employment passes for ASEAN professionals and skilled labour who are engaged in cross border trade and investment related activities' (ibid.).

The AEC Blueprint further stipulates that with the aim of facilitating the free flow of services by 2015, ASEAN is also working towards standardisation and harmonisation. In order to achieve this objective, AEC identified the following three actions:

- Enhance cooperation among ASEAN University Network (AUN)[51] members to increase mobility for both students and staff within the region;
- Develop core competencies and qualifications for job/occupational and training skills required in the priority service sectors by 2009 and in other service sectors between 2010 and 2015; and
- Strengthen the research capabilities of each ASEAN Member country in terms of promoting skills, job placements, and developing labour market information networks among ASEAN Member countries (ibid., Art. 34).

The ASEAN approach to labour migration management is limited in two ways: first, because it only applies to skilled workers; and, second, because it is only applicable to skilled workers engaged in cross-border trade. This means that under ASEAN the movement of middle- and low-skilled labour remains in the exclusive hands of individual Member States.

Skilled labour is not defined in the ASEAN context, which, depending on the interpretation of each ASEAN Member country (i.e. whether this is narrow or liberal) may create further limitations. In order to support the free movement of skilled labour a definition is required to ensure that all ASEAN member countries share the same understanding of what skilled migration involves.

The free movement of skilled labour approach is mainly based on education policy (over market access), including the recognition of diploma equivalences. There

49 Quality of skills is not the only criterion for hiring professionals; knowledge of other markets and experience abroad are also other criteria.

50 Section A5 whereas trade in services is covered under section A2.

51 A network comprising 22 leading universities in the ASEAN, http://www.aunsec.org/.

is a provision to facilitate the obtaining of visas and employment passes, although this seems to be more about actions to assist skilled workers to meet the requirements of current national visa and employment pass policies, rather than modifying the requirements themselves towards a more liberal and common regional format. Indeed, the AEC Blueprint stipulates that this objective should be pursued 'in accordance with the prevailing regulations of the receiving country' (ibid., Art. 33). Measures could take the form of complementary programmes relating to labour, education and MRAs.

Free flow of skilled labour may result in a greater outflow to the most attractive economy within the region. However, such movements may still occur even in the absence of an enabling regional framework, as some individual countries within the region have already in place favourable immigration frameworks for the admission and residence of skilled workers. In addition, skilled migrants have also the option to emigrate to other regions of the world where immigration regulations favour such movements and where there are attractive wages.

12.4.1 Facilitation of business travel

Economic integration of the ASEAN implies increased business ties between countries and a greater need to undertake business travel. There are therefore calls to introduce an efficient system for facilitating regular business travel.

The 2004 ASEAN Framework Agreement for the Integration of Priority Sectors foresees in Article 12 on the movement of business persons, experts, professionals, skilled labour and talents, that:

> Member states shall, taking into consideration their respective domestic laws and regulations: a) develop an ASEAN agreement to facilitate the movement of business persons, including the adoption of an ASEAN travel card by December 2005; b) develop an ASEAN agreement to facilitate the movement of experts, skilled labour and talents by 31 December 2005.

These objectives seem so far to have delivered few results. An ASEAN travel card has yet to be adopted[52]. Such a card exists nonetheless under APEC. The APEC business travel card (ABTC) allows pre-cleared business travellers facilitated short-term entry to participating Member economies. The ABTC removes the need to individually apply for visas or entry permits, and allows multiple entries into participating economies during the three-year period of the card's validity. Card holders also benefit from faster immigration processing on arrival via access to fast-track entry and exit through special APEC lanes at major airports[53]. The participating countries are: Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam.

52 Note of the editors: This in spite of calls by the ASEAN Business Advisory Council to introduce such a card before 2015 (Begawan, 2013).

53 See APEC (2010) "APEC Business Travel Card," Asia Pacific Economic Cooperation. https://www.apec.org/About-Us/About-APEC/Business-Resources/APEC-Business-Travel-Card.aspx

However, new ASEAN members (Lao PDR, Cambodia and Myanmar) are not APEC participating countries and therefore cannot benefit from this scheme. The idea of an ASEAN travel card comes back regularly under discussions.

The regional agenda on skilled migration is a good start. It is rooted in the idea of creating a consensus on what mobility issues raised at the regional level would benefit the ASEAN community as a whole. The approach however remains narrow in its scope and implementation. Stronger commitments to encourage the development of quality professional human resources in the region and their availability would be required to ensure that in the future all ASEAN countries' employers and businesses are in a position to satisfy their skills needs and in so doing can benefit from expertise available within the region. In order to achieve this objective a possible approach could be the adoption of an 'ASEAN preference' for skilled workers (over professionals from other regions), in a similar vein to the one existing in the European Union[54]. In order to allow for a truly regional skilled agenda - favourable to former and recent ASEAN Member States alike – the facilitation of business travel for Burmese, Lao and Cambodian nationals would need to constitute a priority.

12.5 Other ASEAN initiatives related to mobility

A certain number of initiatives related to mobility are tackled under the two other pillars of the ASEAN, the political-security community and the socio-cultural community. These initiatives do not involve preferential entry and market access for ASEAN nationals but deal with broader migration management issues, including combating irregular migration and promoting migrant workers' rights.

12.5.1 The ASEAN Political–Security Community

Under the ASEAN Political-Security Community, mobility issues are mainly considered in the context of regional efforts to combat transnational crime. Irregular immigration, including human smuggling and trafficking[55], is often associated with transnational crime and therefore an element of the larger problem of corporate agencies that operate systematically outside the purview of law. Nonetheless, despite

54 The European Community preference applies to all workers regardless of their skill level. It is defined as follows: 'Member States will consider requests for admission to their territories for the purpose of employment only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower resident on a permanent basis in that Member State and already forming part of that Member State's regular labour market' (Commission of the European Communities, 2005).

55 Note of the editors: Sex and labour trafficking are not uncommon in the region; migrant women and girls are particularly at risk. Sex workers, for example, cannot be legally recruited and are therefore often undocumented young migrant women and girls, who move to escape childhood marriages or to contribute to the family income. The sex industry is characterized by long working hours, violence and unsafe sex. Sometimes woman who migrate to find a job as a domestic worker are forced into sex work when they arrive, or when they escape abusive employment situations (UN Women, 2013).

this close association made between mobility issues and transnational crime matters, the ASEAN agenda on immigration matters is broader as it is linked as well to the objective of setting up an economic community with freer movement of labour.

ASEAN collaboration on immigration matters

The 5th ASEAN Summit in 1995 in Bangkok identified immigration as an area where cooperation could be further strengthened in support of ASEAN economic cooperation[56]. The ASEAN Heads of Government and State decided that ASEAN Heads of Immigration would meet in consultative meetings to focus on the simplification of immigration procedures with a view to further strengthening economic cooperation.

In 2000, the 4th Meeting of the ASEAN Directors-General of Immigration Departments and Heads of Consular Affairs Divisions of the ASEAN Ministries of Foreign Affairs (DGICM) approved and adopted the institutional framework for ASEAN cooperation on immigration matters, which made the DGICM responsible for immigration matters as the highest policymaking body on ASEAN cooperation on immigration matters. The DGICM is established under the ASEAN Political-Security Community and more specifically under the ASEAN Meeting on Transnational Crime (AMMTC)[57]. The DGICM which comprises Directors-General representatives of ASEAN Member countries, meets at least once a year and reports to the ASEAN Summit through the ASEAN Ministerial Meeting (AMM) and the ASEAN Standing Committee (ASC).

During the same meeting, DGICM adopted an ASEAN Plan of Action for Cooperation on Immigration Matters. The objective of the Plan of Action is to forge and strengthen immigration cooperation with a view to establishing an effective network to promote the modernisation of immigration facilities, systems and operations; to upgrade human resource capabilities and the capacities of immigration officials to support the economic aspirations of ASEAN; and to support in combating transnational crime, especially in trafficking in persons.

The Plan of Action further aims to enhance and streamline region-wide immigration procedures to facilitate intra-ASEAN commerce, tourism and travel. In this endeavour it aims to contribute to regional efforts in the implementation of the ASEAN Free Trade Area and the ASEAN Investment Area and support ASEAN's fight against transnational crime, including human trafficking.

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56 The Bangkok Summit Declaration states: 'ASEAN shall focus on promoting sustainable tourism development, preservation of cultural and environmental resources, the provision of transportation and other infrastructure, simplification of immigration procedures and human resource development'. The order seems to indicate that immigration was regarded as a more important issue than human resource development, although it is still towards the end of the list.

57 See ASEAN (2007), Annex 12.1 on ASEAN Political-Security Community.

The Plan of Action also lays out several specific objectives and measures to achieve these objectives. These are *inter alia*[58]: to develop a strong network among immigration authorities in ASEAN to promote and facilitate economic cooperation and combat transnational crime, especially trafficking in persons; to strengthen regional capacities and capabilities through effective networking and cooperation to facilitate intra-ASEAN economic cooperation, especially in the areas of intra-ASEAN commerce, tourism and travel; and to foster cooperation between Member countries regarding the movement of labour, both skilled and low-skilled.

A certain number of actions have been identified. Some of these remain rather vague, while others are more concrete. In order to 'Promote and Facilitate ASEAN Initiatives', it is envisaged to: 'support the implementation of the ASEAN Investment Area (AIA) by facilitating the freer movement of skilled labour and professionals across borders'; as well as to 'promote intra-ASEAN business and tourism amongst ASEAN nationals through the implementation of visa-exemption travel within the ASEAN Member Countries'; and to 'further develop, promote and establish the use of smart cards for convenient movement within ASEAN boundaries' (ASEAN, 2000, Section II, b) objectives 1,3,4).

The Plan of Action also considers collaboration on legal matters and 'work towards the harmonization of relevant national policies on immigration matters among ASEAN Member Countries'.

In addition to market access, national treatment and domestic regulations, a certain number of immigration pre-requisites may deter entry. These may include drug tests, police and security clearance, document verification, and medical checks. Moreover, immigration rules governing duration of stay, renewability of visas, visa costs and processing periods, and adverse practices (i.e. corruption) can negatively impact labour mobility. Facilitating and streamlining immigration procedures would be a key element in the ASEAN region to facilitate mobility. It is difficult to assess what concrete results have come out of this Plan of Action. ASEAN Member countries also

58 The other specific objectives of the Plan of Action are to foster regional cooperation aimed at modernizing immigration systems, operations, facilities and human resource development; upgrade human resource development capabilities through training for immigration officials towards the evolution of common ASEAN procedures and practices; and collaborate with other immigration authorities, ASEAN Dialogue Partners, the relevant UN agencies, regional and international organizations.

participate in regional consultative processes (RCPs) on migration[59], which facilitate intra-ASEAN travel but which do not apply to business visits[60]. A great deal more has to still be done given the considerable diversity among ASEAN countries on immigration and visa policies, administrative structure and capacity.

Transnational crime within ASEAN – Human trafficking and smuggling

Human trafficking and smuggling are two crimes which are perceived to undermine the sovereign right of the state to decide who to admit into their territory. These crimes also raise serious concerns in terms of human rights, and obviously breach national legislations governing labour and sexual exploitation. These crimes are related to labour mobility in the sense that they are often carried out with a view to meet labour demand in destination countries, and involve people trying to escape economic difficulties and increase their financial resources.

ASEAN has addressed the issue of trafficking in persons in key policy documents since placing the crime on its agenda in the early 1990s. Reference to trafficking is made in the 1997 ASEAN Vision in relation to transnational crime and as an issue to address at the regional level (ASEAN, 1997)[61].

The ASEAN Ministers of Interior and Home Affairs adopted the ASEAN Declaration on Transnational Crime in December 1997 and, in 1999, the ASEAN

59 The Inter-governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC) was established in 1996 to provide a forum for the discussion of issues relating to population movements and to promote cooperation in the Asia-Pacific Region. The APC is a non-binding forum focusing on 'Population movements; their nature, causes and consequences; data collection and information-sharing; prevention and preparedness; reintegration and its sustainability; comprehensive and durable solutions to refugee situations; trafficking in women and children; illegal immigrants/ workers; people-smuggling and irregular migration; emergency response and contingency planning'. See https://www.iom.int/apc. APC Member countries include all the ASEAN countries. The other members are Australia, Fiji, Kiribati, Micronesia, Nauru, New Caledonia, Papua New Guinea, Solomon Islands, Samoa, Timor Leste (Pacific subregional grouping), People's Republic of China, Bangladesh, Bhutan, Nepal, Pakistan, Sri Lanka (South Asia subregional grouping), Afghanistan, Hong Kong SAR, India, Japan, Republic of Korea, Macau SAR, Mongolia. New Zealand was an APC Member Country until 2003.
The Bali Process brings participants together to work on practical measures to help combat people smuggling, trafficking in persons and related transnational crimes in the Asia-Pacific region and beyond. It was initiated at the 'Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime', held in Bali in February 2002. All 10 ASEAN Member States are members of the Bali Process. Indonesia has a prominent role as co-chair and Thailand is a 'country coordinator›' leading follow-up activities on Regional and International Cooperation on Policy Issues and Law Enforcement. The Bali Process has 43 members in total.

60 The ASEAN Framework Agreement on Visa Exemption encourages Member States to exempt citizens of ASEAN countries from visa requirements for a duration of 14 days when entry is requested for the purpose of a temporary visit (but not for other purposes).

61 According to the document, 'we envision the evolution in Southeast Asia of agreed rules of behaviour and cooperative measures to deal with problems that can be met only on a regional scale, including (…), trafficking in women and children, and other transnational crimes'.

Plan of Action to Combat Transnational Crime was created in order to implement the Declaration by strengthening regional commitments and capacities to fight transnational crime. An institutional framework was incorporated into the Plan of Action, including the establishment of a senior officials meeting to help the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) better direct and coordinate regional efforts in dealing with transnational crime. The framework included the idea of strengthening institutional linkages with the various ASEAN mechanisms involved in combating transnational crime, particularly the ASEAN Finance Ministers Meeting, the ASEAN Finance Officials Meeting, the ASEAN Senior Officials on Drug Matters (ASOD), Directors-General and Heads of Consular Divisions of the Ministries of Foreign Affairs (DGICM), and the ASEAN Chief of National Police (ASEANAPOL). The ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) identified trafficking as a priority area for action in 2004. ASEANAPOL identified trafficking as a priority for cross-border and regional cooperation in the same year.

Key developments have been: the adoption of a declaration on trafficking in persons that identifies the need for a strong, victim-centred criminal justice response by the ASEAN Ministers in 2004; detailed guidelines for criminal justice practitioners; and support measures for building stronger and more effective regional and international cooperation in the area of trafficking in persons.

SOMTC established an Ad-hoc Working Group on Trafficking in Persons in 2006[62]. The link between trafficking and labour migration is made in the work plan of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. The work plan calls for cooperation between the ASEAN Committee on Migrant Workers and SOMTC[63].

The ASEAN Political-Security Blueprint identifies three migration management objectives that should be addressed and requires further cooperation in order to support the regional fight against transnational crime. These are:

- Further strengthen criminal justice responses to trafficking in persons, bearing in mind the need to protect victims of trafficking in accordance with the ASEAN Declaration Against Trafficking in Persons, particularly Women and Children, and where applicable, other relevant international conventions and protocols on trafficking in persons;
- Enhance cooperation to combat people-smuggling;
- Strengthen cooperation in the field of border management to jointly address matters of common concern, including forgeries of identification and travel documents, by enhancing the use of relevant technologies to effectively stem the flow of terrorists and criminals.

62 The six Governments of the Greater Mekong Subregion (Cambodia, China, Lao PDR, Myanmar, Thailand and Viet Nam) are members of the COMMIT Process, which was initiated in 2004 to create a sustained and effective system of cross-border cooperation and collaboration to combat human trafficking.

63 See Work Plan Trust 3: regional cooperation to fight human trafficking in ASEAN.

Promotion and protection of rights

The ASEAN Political Blueprint, in its section on the Promotion and Protection of Human Rights (A.1.5), refers to (iii) 'cooperate closely with efforts of sectoral bodies in the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers, and establish an ASEAN human rights body'[64]. This body, known as the ASEAN Intergovernmental Commission on Human Rights (AICHR), was endorsed on 20 July 2009 by ASEAN's Foreign Ministers in Phuket, Thailand. This is the first human rights mechanism established under ASEAN.

The mandate of the AICHR is mainly 'to promote and protect human rights and fundamental rights of the peoples of ASEAN' (ASEAN, 2007, Art. 1.1)[65]. The ASEAN AICHR convened its first meeting in April 2010. During this meeting, it was decided that the two areas of focus for its five-year work plan would be migration, and business and human rights[66].

The development of an instrument on the protection and promotion of the rights of migrant workers is still under discussion. Difficulties in making progress have occurred with the emergence of a cleavage between ASEAN destination and sending countries and the sharing of roles and responsibilities between these two groups in order to ensure a better protection of migrant workers' rights in the region. While sending countries are pushing for a legally binding instrument[67], the perception of some destination countries is that they are being asked to take on too much responsibility. (See next section on migrant workers protection).

64 Article 14 of the ASEAN Charter (ASEAN, 2007) provides for the creation of a human rights body.

65 A particular assignment of the AICHR is to 'develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights'.

66 Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights, http://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf.

67 While the nature of such instrument has not been specified in any document calling for its development, given that a declaration on migrants' rights already exist, it may seem that another soft law instrument would make little sense. See also next section on protection of migrant workers' rights. Note of the editors: Wah (2014) has identified some obstacles to the conclusion of a 'hard', legally binding instrument: while sending countries are pushing for such an agreement, 'other mostly receiving countries are bargaining for non-legally binding guidelines. There are also fundamental differences in drafting process of the content, like the definition and scope of migrant workers, which has already resulted in four years of deadlock'.

12.5.2 ASEAN socio cultural pillar: migrant workers protection[68]

The ASEAN leaders signed an ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (hereinafter referred to as the 'Declaration') on 13 January 2007 during the 12th ASEAN Summit held in Cebu, the Philippines. This Declaration expressed for the first time in the region the consensus that protecting the rights of migrant workers was essential. While affirming the sovereignty of states in determining their own migration policy, the Declaration identifies obligations for countries of origin and destination and for ASEAN to protect migrant workers. Interestingly, reference to policies supporting 'movements' is only made in the section covering sending countries (Article 13)[69]; there is nothing in the Declaration covering the issue of legal channels and immigration procedures. After the adoption of the Declaration, in the same year, an ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers was established, which reports to the Senior Labour Officials Meeting (SLOM).

The aim of the Declaration is to fill gaps in the protection of migrant workers and to ensure a better governance of migration in the ASEAN region. The Declaration does not give rise to binding legal obligations. However, it stipulates in Article 22 that the relevant ASEAN bodies should 'develop an ASEAN instrument on the protection and promotion of the rights of migrant workers consistent with ASEAN's vision of a caring and sharing Community'. While it does not refer specifically to the legal status that should be provided to such an instrument, the fact that the Declaration itself is already a 'soft law' tool suggests that this instrument may take the form of a legally binding arrangement[70].

The Socio-cultural Blueprint refers to migrant workers principally under section C on social justice and rights**.** Another reference is to be found under section B2 on the 'Social safety net', which relates to protection from the negative impacts of integration and globalization and calls to 'Strengthen ASEAN cooperation in protecting female migrant workers' (ASEAN, 2009a, Action X).

The protection and promotion of the rights of migrant workers falls within the objectives of ASEAN in terms of 'promoting social justice and mainstreaming people's rights into its policies and all spheres of life, including the rights and welfare

68 See also the Regional Consultative Process on Overseas Employment and Contractual Labour for Countries of Origin in Asia (Colombo Process), which was established in 2003 and comprised the principal Asian labour-sending countries – ASEAN members are Indonesia, Philippines, Thailand and Vietnam. The aim of the Colombo Process is to provide a forum for Asian labour-sending countries to share experiences, lessons learned and best practices on overseas employment. For more information, see http://www.colomboprocess.org/.

69 Article 13 reads: 'Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin.'

70 See footnote 61.

of disadvantaged, vulnerable and marginalized groups such as women, children, the elderly, persons with disabilities and migrant workers'[71].

More specifically, ASEAN aims to 'Ensure fair and comprehensive migration policies and adequate protection for all migrant workers in accordance with the laws, regulations and policies of respective ASEAN Member States as well as implement the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers'[72].

In order to fulfil this objective a certain number of actions have been identified:

- Operationalise the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers under the auspices of the SLOM to implement the provisions of the Declaration and work towards the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers;
- Institutionalise and convene on a regular basis the ASEAN Forum on Migrant Labour[73] as a platform for broad-based discussions on migrant labour issues under the auspices of the Committee, which reports to the SLOM;
- Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers. Provide migrant workers, who may be victims of discrimination, abuse, exploitation, and violence, with adequate access to the legal and judicial system of the receiving states;
- Intensify efforts to protect fundamental human rights, promote the welfare and uphold human dignity of migrant workers by, *inter alia*, facilitating the exercise of consular functions by consular or diplomatic authorities of states of origin when a migrant worker is arrested, held in prison or custody, or

71 See ASEAN (2009*a*, Article 26).
Note of the editors: ASEAN recognized that woman are a vulnerable group and has committed to take action by signing the ASEAN-UNIFEM Framework for Cooperation in June 2006. In 2010, UNIFEM and ASEAN met to discuss issues relating to gender equality and the empowerment of women in ASEAN. UNIFEM was satisfied with the progress the region had made since 2006 and confirmed that they would continue to work closely together, also as part of the ASEAN Commission on the Protection of Women and Children (ASEAN, 2010). In 2012 this commission erected the "ACW Work Plan 2012-2016", with which they committed to, among other things, make efforts to eliminate violence against women (VAW) and violence against children (VAC). During their 7th Meeting on 22-24 July 2013 in Kuala Lumpur, they finalized the drafts of their declarations concerning both issues. These 'reflect the collective efforts of ASEAN to intensify and strengthen policy, legal frameworks and institutional capacity to counter VAW and VAC' (ASEAN, 2013).

72 See ASEAN (2009a, section C2 Protection and promotion of the rights of migrant workers, Article 28).

73 Note of the editors: This action is on its way to being implemented, though the ASEAN Forum on Migrant Labour (AFML) is only lightly institutionalized. Most recently, the 7th AFML was held on 20-21 November 2014 in Nai Pyi Taw, Myanmar. The overall theme of the 7th AFML was 'Towards the ASEAN Community by 2015 with enhanced measures to protect and promote the rights of migrant workers'. For more information see http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/documents/meetingdocument/wcms_327470.pdf.

detained in any other manner, under the laws and regulation of the receiving state and in accordance with the Vienna Convention on Consular Relations;
- Facilitate data-sharing on matters related to migrant workers for the purpose of enhancing policies and programmes concerning migrant workers in both sending and receiving states;
- Strengthen policies and procedures in the sending state to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad, as well as repatriation and reintegration to the countries of origin;
- Facilitate access to resources and remedies through information, training and education, access to justice and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfil the requirements under applicable laws, regulations, and policies of said state, bilateral agreements and multilateral treaties;
- Establish and promote legal practices of the sending state to regulate the recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation, and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies; and promote capacity building by sharing information, best practices as well as opportunities and challenges in relation to the protection and promotion of migrant workers' rights and welfare.

The actions identified underscore the main problems faced by migrant workers (absence of legal contracts and access to remedies, as well as discrimination)[74]. One cannot escape noticing that here again (similar to the Declaration) the issue of the rights of irregular migrants is not expressly covered in the Blueprint. The most direct reference concerns access to consular services when arrested. There is however no direct reference to admission policies of destination countries in contrast with several calls for better policy and practices in sending countries. The main question is how to move this agenda forward and what mechanisms would be needed to implement these actions concretely as well as monitor progress achieved. A lot of dialogues and fora on labour migration have been developed, but given that little change in labour migration and policy has occurred, the situation of migrant workers in the region has remained largely unchanged.

74 Note of the editors: Other problems faced by migrant workers relate to leaving the family at home. Women often bear a lot of guilt in leaving their children behind and it also proves problematic for the stability of the family and the welfare of the children. That said, studies in South Asia and Southeast Asia have found that, while left-behind families have some difficulties and adjustments at first when the man migrates, all in all, families cope well. Women initially feel burdened, but many of them also acknowledge that they enjoy discovering strengths and talents (Asis, 2003).

12.6 Conclusion: Challenges, obstacles and opportunities

This paper has reviewed the different initiatives taken under ASEAN in order to facilitate and manage mobility. Free movement efforts can only be understood in the wider context of setting up an economic, political-security and socio-cultural community. While security and stability remain important considerations, the potential economic gains to be derived from the establishment of a community nowadays seem key to pursuing that objective. Most of the efforts made to liberalise labour flows are linked to ASEAN's trade agenda. The 2015 deadline for the establishment of an ASEAN Community is imminent. However, accomplishments on free movement at the ASEAN level and its impact on regional flows have been limited. The reasons are varied and should be examined in the context of little progress made to date in integrating trade in services at the regional level.

Liberalising trade in services in the ASEAN is not simple. International trade in services is a relatively new development as compared to trade in goods and it is inherently different from the latter because it is intangible and governed by complex rules and regulations.

Lack of progress in regional efforts to liberalise trade can be further explained, at least in part, by the fact that ASEAN economic integration has followed an approach of 'open regionalism', explained by the fact that its Member countries' most important economic partners lie outside the region. This situation is reflected by the proliferation of free trade agreements with countries outside the region, and by the inclusion of measures and actions related to deepening integration in the global economy as part of the Blueprint (section D, AECB). For ASEAN governments to perceive AFAS as a priority, it would require faith on their part in the gains to be had from privileging an ASEAN approach, and in the positive impact of a reduction in regional service barriers on their trade in services balance.

Within the region, national service sectors are at different levels of development and the international service trade volumes of ASEAN Member countries vary significantly. More generally, there are wide disparities in income and other human development dimensions among ASEAN Member countries, which contribute to differences in interests and priorities.

Some of the difficulties in making progress on the trade agenda, and more generally on the regional agenda, seem to be due to limited institutional capacity. The development of an integrated executive, legislative, and judicial system to enhance decision-making, and enforcement of ASEAN rules would be necessary. Currently, decisions are taken on the basis of consultation and consensus[75], and dispute settlement mechanisms remain rather weak as Member countries are encouraged to resolve their disputes through dialogue and consensus. The development of supranational institutions, such as in the European Union, is unlikely as this would be perceived

75 See ASEAN Charter (ASEAN, 2007), Article 20.1: 'as a basic principle, decision making in ASEAN shall be based on consultation and consensus'.

as too great a departure from the fundamental principal upon which the ASEAN has been built, that of mutual, sovereign non-interference. However, this could be done by adapting and expanding existing institutions. For a regional grouping with ambitious objectives, the ASEAN Secretariat is very small, comprising of only 200 persons with an annual budget of approximately USD 9 million[76]. To be able not only to promote, but also to coordinate actions and policies of Member States, and monitor and enforce the implementation of the AECB, it would be necessary to strengthen the ASEAN Secretariat (ESCAP, 2010; ESCAP, 2009).

More specifically on the subject of free movement, the regional agenda focuses on facilitating skilled labour movement associated with cross-border trade. The less developed economies with limited numbers of skilled workers among their workforces would benefit from an approach targeting middle- and low-skilled workers for which they have a surplus and thus a comparative advantage. However, the ASEAN approach of moving first in the area of professional manpower has its own rational. It has facilitated a consensus between all the member countries in this undertaking, with the main destination countries feeling less threatened about the potential social costs and detrimental effects on their domestic workforce.

The freer flow of skilled labour and greater labour market integration seem both necessary to the creation of a single market and complementary to other freedoms such as freedom of investment, liberalisation of trade in goods and production growth. Further liberalisation of skilled labour would benefit the region as it would allow domestic economies to benefit from a cheaper pool, greater range, and improved quality of skilled labour. In addition, domestic skills may be improved through the presence of skilled migrant workers and return migration.

Efforts to liberalise movement of skilled workers in the region have mainly targeted service providers and progress has mainly been achieved regarding cooperation on education and the recognition of diplomas and qualifications. However, the impact of the regional framework on skilled labour movement remains marginal. The stage of development of the regional framework, and its limited effect in practice, does not correspond with the reality of labour mobility in the region. Movement of service providers and other skilled workers does occur. It follows labour market demand and is governed by national laws. Such a national approach is nevertheless not optimal since: it offers ASEAN member countries neither guarantees nor predictability (national legislations can be revised unilaterally at any time); national policies hardly promote preferential treatment for ASEAN labour; and such policies are set up according to national interest instead of being driven by the idea of supporting a regional vision on mobility to benefit all Member States.

To develop an efficient regional framework where a much larger number of professional services and labour migrants are recruited from across the region on the

76 Note of the editors: By 2013 the annual budget of the ASEAN Secretariat had increased to 18 million USD (Salim, 2014).

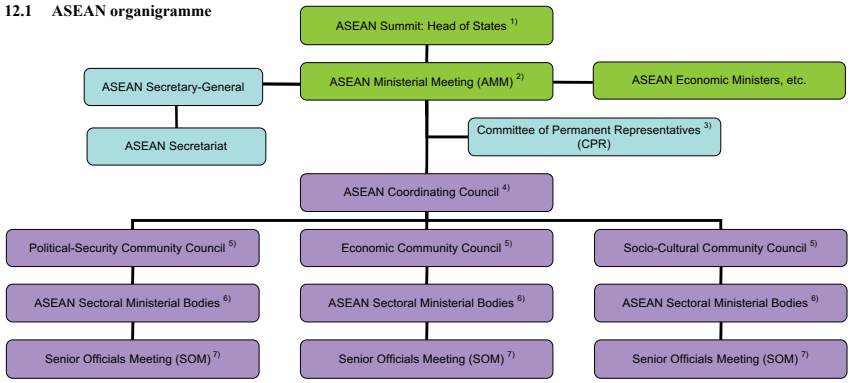
basis of regional – rather than national – policy, it would require stronger commitments to the regional skilled labour movement agenda by the member countries.

A certain number of steps could be taken:

- Broaden the scope of the regional skilled labour agenda by covering all skilled migration and not only skilled movement associated with trade.
- A broader coverage of GATS mode 4 commitments including occupations of interest for less developed countries or alternatively link mode 4 negotiation with negotiations on trade in goods in a manner that permits these countries to find an interest in further liberalisation of skilled movement.
- A strong commitment by Member countries to implement the parameters for further liberalisation of obstacles to national treatment and to the movement of natural persons (which are still under discussion.)
- A regional vision on labour mobility could be developed, integrating labour market and human resource development considerations while taking into consideration future skill needs according to economic and trade requirements. Such a vision would need to be supported by a regional information system on skilled migration with data on skills supply and demand, stock, inflow, and outflow of skilled migrants. Meanwhile, facilitating entry and securing preferential visa arrangements for ASEAN professionals would be key, further strengthening the regional capacity to manage migration. Such an approach would also contribute to ensuring an adequate protection of migrant rights and preventing irregular migration.

12.7 Annexes

Annex 12.1 ASEAN organigramme



[1] **ASEAN Summit** involves the Heads of State and meets biannually. It is a decision-making body.
[2] **ASEAN Ministerial Meeting (AMM)** is comprised of ASEAN Foreign Ministers. It holds a meeting annually and is a decision-making body. Other Ministers (e.g. in Economics and Labour) hold annual meetings.
[3] **Committee of Permanent Representatives (CPR).** Each ASEAN Member State appoints a permanent representative to ASEAN with the rank of Ambassador based in Jakarta. The task of the Committee of Permanent Representatives, is supporting the work of the ASEAN Community Councils and coordinating with ASEAN National Secretariats and other ASEAN Sectoral Ministerial Bodies.
[4] **ASEAN Coordinating Council** is comprised of ASEAN Foreign Ministers and meets at least twice a year. It is a coordinating and implementation body.
[5] Each **Community Council** – chaired by the appropriate Minister – meets at least twice a year. It is a coordinating and implementation body.
[6] **ASEAN Sectoral Ministerial Body** is comprised of the relevant ministers of specific sectors and implements agreements and decisions from the ASEAN Summit. Each Sectoral Ministerial Body has its relevant senior officials and subsidiary bodies that assist its work.
[7] **ASEAN Senior Officials Meeting (SOM)** involves the senior civil servants of the relevant ministries and meets throughout the year on an *ad hoc* basis.

Annex 12.2 AEC Blueprint

Following the adoption of the AEC Blueprint in 2007, the subsequent rounds of negotiations under AFAS will be based on the parameters and timelines as outlined in this Blueprint.

The Blueprint contains the following actions on the liberalisation of trade in services:

- Remove substantially all restrictions on trade in services for 4 priority services sectors, air transport, e-ASEAN, healthcare and tourism, by 2010 and the fifth priority services sector, logistics services, by 2013;
- Remove substantially all restrictions on trade in services for all other services sectors by 2015;
- Undertake liberalisation through consecutive rounds of every two years until 2015, i.e. 2008, 2010, 2012, 2014 and 2015;
- Target to schedule minimum numbers of new sub-sectors for each round: 10 subsectors in 2008, 15 in 2010, 20 in 2012, 20 in 2014 and 7 in 2015, based on GATS W/120 universe of classification;
- Schedule packages of commitments for every round according to the following parameters:

  - No restrictions for Modes 1 and 2, with exceptions due to bona fide regulatory reasons (such as public safety) which are subject to agreement by all Member States on a case-by-case basis;
  - Allow for foreign (ASEAN) equity participation of no less than 51% by 2008, and 70% by 2010 for the 4 priority service sectors; no less than 49% by 2008, 51% by 2010, and 70% by 2013 for logistics services; and no less than 49% by 2008, 51% by 2010, and 70% by 2015 for other services sectors; and
  - Progressively remove other Mode 3 market access limitations by 2015.
- Set the parameters of liberalisation for national treatment limitations, Mode 4 and limitations in the horizontal commitments for each round by 2009;
- Schedule commitments according to agreed parameters for national treatment limitations, Mode 4 and limitations in the horizontal commitments set in 2009;
- Complete the compilation of an inventory of barriers to services by August 2008;
- Allow for overall flexibilities[77] which cover the subsectors totally excluded from liberalisation and the subsectors in which not all the agreed parameters of liberalisation of the modes of supply are met, in scheduling liberalization commitments. The scheduling of liberalisation commitments in each round shall be accorded with the following flexibilities:
  - Possibility of catching up in the next round if a Member State is not able to meet the parameters of commitments set for the previous round;
  - Allowing for substitution of subsectors that have been agreed to be liberalised in a round but for which a Member State is not able to make commitments, with subsectors outside of the agreed subsectors; and
  - Liberalization through the ASEAN Minus X formula.
- Complete mutual recognition arrangements (MRAs) currently under negotiation (i.e. architectural services, accountancy services, surveying qualifications, medical practitioners by 2008, and dental practitioners by 2009);
- Implement the MRAs expeditiously according to the provisions of each respective MRA;
- Identify and develop MRAs for other professional services by 2012, to be completed by 2015; and
- Strengthen human resource development and capacity building in the area of services. (…)

Source: ASEAN integration in services, ASEAN Secretariat 2009.

77 The 15% figure for overall flexibility mentioned in the Blueprint has been approved by the AEM 2009.

Annex 12.3 ASEAN economic policies related to services

1997: ASEAN Vision 2020
The Heads of States/Governments of ASEAN Member States adopted the ASEAN Vision 2020 (http://asean.org/?static_post=asean-vision-2020) during their Second Informal Summit held on 15 December 1997 in Kuala Lumpur, Malaysia. The Vision 2020 states the determination of ASEAN to, amongst others:

- Create a stable, prosperous and highly competitive ASEAN Economic Region in which there is a free flow of goods, services and investment, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities.
- Accelerate liberalisation of trade in services.
- Accelerate free flow of professional and other services in the region.

1998: Hanoi Plan of Action
The Sixth ASEAN Summit held on 16 December 1998 in Ha Noi, Viet Nam, adopted the Ha Noi Plan of Action (HPA) as the first in a series of plans of action building up to the realisation of the goals of the Vision 2020. The HPA has a six year timeframe covering the period from 1999 to 2004.

During this Summit, the ASEAN Heads of States/Governments also issued the Statement on Bold Measures (http://asean.org/?static_post=statement-on-bold-measures-6th-asean-summit-hanoi-16-december-1998), aiming to regain business confidence, enhance economic recovery and promote growth after the economic and financial crisis.

1999: Parameters to Guide Services Liberalization
In response to the decision of the Sixth ASEAN Summit calling for a new round of negotiations in services, the ASEAN Economic Ministers (AEM) at their 31st Meeting held on 30 September 1999 in Singapore, endorsed the following set of parameters to guide liberalisation in trade in services:

- In the short-term, the target will be for all Member States to make commitments in common subsectors. A common service sector/subsector is defined as a service sector/subsector in which four or more ASEAN Member States have made commitments under the GATS or previous AFAS packages.
- In the long-term, the target will be to achieve free flow of services in all services sectors and all modes of supply.

2001-2002: Roadmap for Integration of ASEAN
The 7th ASEAN Summit held on 5 November 2001 in Bandar Seri Begawan, Brunei Darussalam agreed on the need for a Roadmap for Integration of ASEAN (RIA) charting the milestones along the way including specific steps and timetables.

The following 34th AEM held on 12 September 2002 in Bandar Seri Begawan, Brunei Darussalam, endorsed a set of RIA. In the area of trade in services, a number of action plans was laid out, including:

- Develop and adopt alternative approaches to liberalization
- Endeavour to put the regulatory frameworks in place
- Remove all impediments to facilitate free flow of trade in services in the region
- Conclude Mutual Recognition Arrangements (MRAs) for professional services

2002-2003: ASEAN Minus X Formula and the Protocol to Amend AFAS

With a desire to expedite liberalization of trade in services within ASEAN, the AEM during their Retreat on 6 July 2002 in Genting Highlands, Malaysia called for a '10 Minus X Principle' to be applied in services negotiation. Under this principle (subsequently renamed as the 'ASEAN Minus X Formula'), two or more Member States may proceed with the agreed services sector liberalization without having to extend the concessions to non-participating Member States. Others may join at a later stage or whenever ready.

At the 34th AEM Meeting held subsequently on 12 September 2002 in Bandar Seri Begawan, Brunei Darussalam, the Ministers endorsed a set of parameters to guide the implementation of this ASEAN Minus X Formula. To enable the application of this formula, the 35th AEM Meeting held on 2 September 2003 in Phnom Penh, Cambodia signed the Protocol to Amend the ASEAN Framework Agreement on Services (http://asean.org/wp-content/uploads/images/archive/AFAS_Amendment_Protocol.pdf).

2003: Bali Concord II and Recommendations of the High Level Task Force on ASEAN Economic Integration

The Special Informal AEM Meeting held on 12-13 July 2003 in Jakarta, Indonesia, identified 11 sectors for priority integration. Out of these 11 sectors, four are related to services, namely: tourism, e-ASEAN, air travel and healthcare.

At the 9th ASEAN Summit held on 7 October 2003 in Bali, Indonesia, ASEAN Heads of States/Governments signed the Bali Concord (http://asean.org/declaration-of-asean-concord-ii-bali-concord-ii-3/) and declared the establishment of an ASEAN Community, which comprises the political, economic and security communities. The ASEAN Economic Community (AEC) will be the realization of the end-goal of economic integration as outlined in the ASEAN Vision 2020. To achieve AEC, the Summit adopted the Recommendations of the High Level Task Force on ASEAN Economic Integration (HLTF).[78]

The HLTF outlined a number of measures for trade in services, including:

78 Recommendations are contained in the Declaration of the Bali Concord II.

- Set clear targets and schedules of liberalisation towards achieving free flow of trade in services earlier than 2020, with accelerated liberalisation of priority sectors by 2010.
- Accelerate liberalisation in specific sectors earlier than the end-date through the application of ASEAN Minus X Formula.
- Complete Mutual Recognition Arrangements (MRAs) for major professional services by 2008.

2004: Vientiane Action Programme and ASEAN Framework Agreement for the Integration of Priority Sectors

The 10th ASEAN Summit held on 29 November 2004 in Vientiane, Lao PDR noted the Assessment Report on the Implementation of the Ha Noi Plan of Action (HPA) and signed the Vientiane Action Programme (VAP), a six-year plan which is the successor of the HPA to realize the end goal of the ASEAN Vision and the Declaration of ASEAN Concord II.

To further deepen regional economic integration, the ASEAN Heads of States/Governments also signed the ASEAN Framework Agreement for the Integration of Priority Sectors. This agreement lists out measures to be implemented, with clear timelines, by Member States in respect of the priority sectors.

2005: Logistics Services and End-Date of Services Liberalization

The 37th AEM Meeting held on 28 September 2005 in Vientiane, Lao PDR identified logistics services as the 12th priority sector for integration in ASEAN.

The 11th ASEAN Summit held on 12 December 2005 in Kuala Lumpur, Malaysia endorsed the decision of AEM to accelerate the liberalisation of trade in services not covered in the Priority Integration Sectors by 2015, subject to agreed flexibilities.

2007: ASEAN Economic Community Blueprint and Logistics Roadmap

The 12th ASEAN Summit held on 13 January 2007 in Cebu, Philippines agreed to accelerate the establishment of ASEAN Community to 2015 in the three pillars of the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community.

Subsequently, the 13th ASEAN Summit held on 20 November 2007 in Singapore adopted the ASEAN Economic Community (AEC) Blueprint (ASEAN, 2008), which each ASEAN Member State shall abide by and implement the AEC by 2015.

The 39th AEM Meeting held on 24 August 2007 in Manila, Philippines signed the ASEAN Sectoral Integration Protocol for Logistic Services Sector (http://asean.org/?static_post=asean-sectoral-integration-protocol-for-the-logistics-services-sector), which includes the Roadmap for Integration of Logistics Services Sector.[79] The roadmap calls for substantial liberalisation of trade in logistics services by 2013.

79 AEM also signed the Protocol to Amend Article 3 of the Framework (Amendment) Agreement for the Integration of Priority Sectors (http://agreement.asean.org/media/download/20140119114205.pdf) in order to incorporate logistics services as a new priority integration sector.

2009: Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015)

On 1 March 2009, the ASEAN Leaders at the 14th ASEAN Summit signed the Roadmap for an ASEAN Community (2009-2015), a new initiative to ensure the timely implementation of the three ASEAN Community Blueprints (the ASEAN Political-Security Community Blueprint, the ASEAN Economic Community Blueprint, and the ASEAN Socio-Cultural Community Blueprint) as well as the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan 2 (2009-2015).

The Roadmap would replace the Vientiane Action Programme (VAP), and would be implemented as well as monitored by the ASEAN Sectoral Ministerial Bodies and the Secretary-General of ASEAN, supported by the Committee of Permanent Representatives.

The progress of implementation of these three Roadmaps would be regularly presented to ASEAN Leaders through the respective ASEAN Community Councils.

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13

Migration agreements and regional integration in the Pacific

Graeme Hugo[80] /
Richard Bedford[81]

13.1 Introduction

The growing acknowledgement that migration has the potential to deliver positive development dividends is encouraging practitioners and researchers to focus on two issues. Firstly, what types of policy intervention facilitate and encourage these positive outcomes and secondly, what barriers exist to achieving development impacts and how can they be removed or at least diluted? These questions are particularly salient in the Pacific region for a number of reasons, some of which include the following (Bedford and Hugo, 2012):

- Of all the world regions, the Pacific has the highest per capita level of international mobility amongst its resident populations – especially those in Polynesia and Micronesia – and its regional economy is the most dependent on remittances.
- Of all the world regions it will experience the most rapid growth in terms of population in the high mobility groups – those between 15 and 34 years old – over the next two decades, and there is limited capacity to absorb them into the workforces of national economies.
- The Pacific has become a focus of the global debate on climate change induced migration because of the vulnerability of low atoll island groups like Kiribati, the Marshall Islands, Tokelau and Tuvalu to inundation if sea levels rise.
- The relatively small populations of most Pacific nations mean that migration has the potential to have a greater impact on their demography, economy and social structure, as well as influence the political stability of the region.

International migration does not provide a 'magic bullet' solution to poverty in the low-income countries of the Pacific; this will only be overcome by good

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governance, appropriate and effective development strategies and sound social and equity policies. However migration can play a role in facilitating the path to improving the lives of those most in need. The Pacific has some of the world's most significant origin countries in relation to the numbers left behind in home countries such as Cook Islands, Niue, Fiji, Samoa and Tonga. The origin countries vary in the extent to which they have attempted to lever this migration and the resultant diaspora overseas in order to gain benefits for development. However, in general, there has been a failure to maximize potential positive outcomes for development at national, regional and local levels.

Until quite recently there has been a limited dialogue on migration between pairs of origin/destination island countries in the Pacific region, or between countries in specific subregions, such as Melanesia, Micronesia and Polynesia. The regional governance of migration remains weak in its earliest stages. In fact, until a decade ago, there were only two regional fora where migration issues were occasionally discussed: the annual conferences of the South Pacific Commission (now the Secretariat of the Pacific Community) and, more importantly, the annual meetings of the Pacific Forum. These meetings did not produce any coherent regional migration policies and institutions within the Pacific region. Coherence in international migration and development policy requires not only integration and harmonization relating to migration and development activity and policy within nations, but also between nations; especially pairs of origin/destination countries.

For migration and development polices to be effective there needs to be international cooperation at three levels – bilateral, regional and multilateral. It has become commonplace in the burgeoning number of international meetings on international migration and development policy to conclude with a consensus on the need for such cooperation. However, the cases where such admirable intentions have become translated into operational activities on the ground remain very few in number. This is certainly the case for the Pacific. This chapter examines the main institutions and mechanisms that have the potential to facilitate positive development outcomes from migration that currently exist in the Pacific region.

13.2 The context

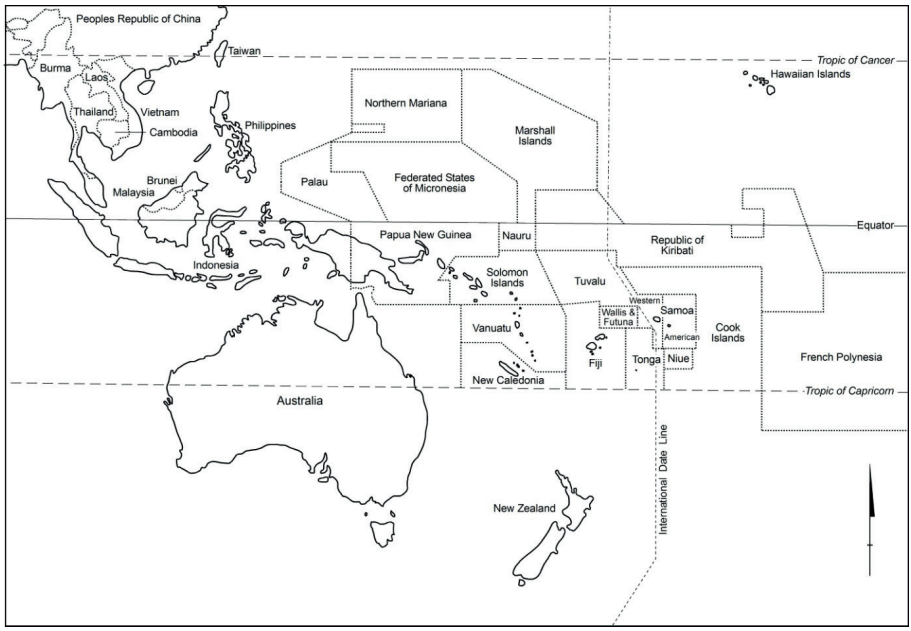
Figure 13.1 identifies the 22 island states and territories[82] that are scattered across the vast area of the Pacific Basin and comprise what is usually known as the Pacific region. While there is variation between Pacific countries, many have limited resource endowments, low levels of education and rapidly growing youth populations. In the early 1980s Bertram and Watters (1985) introduced the 'MIRAB' concept to describe several of the smaller Pacific Island economies. They characterized these economies as being heavily dependent upon:

82 The UN in its identification of major global regions includes the high income countries of Australia and New Zealand in the Oceania region but for many analyses they are excluded.

- Migration
- Remittances
- Aid, development assistance
- Bureaucracy

This model, which is not always received favourably in the region, points to the centrality of migration in the economies of several of the smaller Pacific states and territories. The original MIRAB model was applied to the Cook Islands, Niue, Kiribati, Tokelau and Tuvalu. It has also been applied to other larger countries including Samoa, Tonga and the Federal States of Micronesia (Bertram, 2006). The demand for remittance income from employment off-shore is a very significant driver of international migration in the region.

Figure 13.1 Pacific island countries



In the mid-1990s, economists Appleyard and Stahl (1995) classified Pacific Island nations according to the extent to which their economies were reliant upon remittances from migrants working overseas (Table 13.1). The countries in the region were grouped into three categories: 'fully furnished', 'partly furnished' and 'unfurnished'. The 'fully furnished' were considered to have sufficient potential to not be reliant on migration and remittances. Included here are the larger Melanesian nations with rapidly growing youth populations. They identified two nations – Tonga and Western Samoa – as being 'partly furnished' because they were reliant on remittances but had the potential to achieve sustainable higher domestic output if development assistance and remittances

were appropriately harnessed. The remaining smaller nations were classified as 'unfurnished' because the resource constraints in the small high islands and atolls meant that there were limited opportunities for major commercial development besides, perhaps, tourism.

Table 13.1 Classification of Pacific island countries by resource endowments and migration

Fully furnished	
Fiji PNG Salomon Islands Vanuatu	Have sufficient resources for sustained development with appropriate development policies (1995). In 2005 reconsidered that PSV in need of short term safety valve migration as an adjunct to development and to ease secondary problems. In Fiji declining job opportunities necessitate migration.
Partly furnished	
Tonga Western Samoa	MIRAB economies but have potential to achieve sustainable higher level of domestic output if aid and remittances properly harnessed.
Unfurnished	
Tuvalu Kiribati Tokelau Niue Cook Islands	Migration is essential because of resource constraints and environmental change.

Source: Appleyard and Stahl, 1995; Stahl and Appleyard, 2007.

A decade later, Stahl and Appleyard (2007) revisited their earlier study and reassessed the situation in Pacific Island countries and territories (PICTs). As is indicated in Table 13.1, they found that they needed to reassess the status of the 'fully furnished' Melanesian countries because they were now considered to be in need of short-term migration as a safety valve to resource development strategies to ease the problems associated with the growth in their youth populations. In Fiji, too, the political situation following successive military coups has been a factor in declining job opportunities.

Several of the small island countries in Appleyard and Stahl's 'unfurnished' classification are also those with the highest risk of climate change effects; especially sea-level rise and storm surge. A combination of economic and environmental vulnerabilities, coupled with projected ongoing population growth, has created conditions which favour the search for employment opportunities overseas.

There are substantial variations between the different parts of the Pacific, both in terms of their demographic situation and the patterns of migration they have experienced.

Melanesia: Melanesia comprises the large Pacific countries of Papua New Guinea, Solomon Islands, Vanuatu, Fiji and New Caledonia. Table 13.2 shows that Melanesia has 88.7 per cent of the 10.5 million people in the Pacific, of which 49 per cent were female. It also has 97 per cent of the region's land area. The three western Melanesian countries, Papua New Guinea, Solomon Islands and Vanuatu, have the most rapidly growing populations in the region and will experience very significant increase in their youth population over the next two decades (Bedford and Hugo, 2012). These three countries have limited outlets for migration, New Caledonia's indigenous Kanak population has tended not to move off-shore, however Fiji has a substantial diaspora in Australia, New Zealand, Canada and the United States, especially of Fiji-Indians, but also increasingly of indigenous Melanesian Fijians. Fijian emigration has accelerated since the initial military coups in 1987.

Table 13.2 Pacific island countries: population and GDP per capita, 2013

	Population 2013 ('000)	% female	% Aged 15-34	% female	% Growth pa 2005-10	2013 GDP per Capita US$
Melanesia	9, 273	49.0	34.4	48.8	2.24	
Fiji	881	49.0	34.0	48.6	0.91	4,572
New Caledonia	256	49.6	30.5	49.1	1.66	na
Papua New Guinea	7,321	49.0	34.7	48.7	2.39	2,088
Solomon Islands	561	49.2	33.8	49.9	2.75	1,954
Vanuatu	253	49.4	34.4	49.7	2.56	3,303
Micronesia	508	49.4	32.8	49.1	0.64	
Guam	165	49.1	31.0	48.9	1.31	na
Kiribati	102	50.0	37.3	49.6	1.59	1,651
Marshall Islands	53	49.1	na	na	0.76	3,325
Micronesia (Fed. States of)	104	49.0	39.4	47.5	0.30	3,235
Nauru	10	50.0	na	na	0.28	na
Northern Mariana Islands	54	50.0	na	na	-2.00	na
Palau	21	47.6	na	na	0.56	11,810
Polynesia	674	49.1	32.3	48.8	0.83	
American Samoa	55	49.1	na	na	1.68	na
Cook Islands	21	47.6	na	na	0.90	na
French Polynesia	277	48.7	33.6	49.0	1.22	na
Niue	1	na	na	na	-2.73	na
Samoa	190	47.9	31.1	47.7	0.31	3,647
Tokelau	1	na	na	na	-1.27	na

	Population 2013 ('000)	% female	% Aged 15-34	% female	% Growth pa 2005-10	2013 GDP per Capita US$
Tonga	105	50.5	32.4	49.1	0.61	4,427
Tuvalu	10	50.0	na	na	0.27	3,861
Wallis and Futuna Islands	13	53.8	na	na	-0.97	na
Total Pacific	10,455	49.0	na	na	2.05	
Australia	23,343	50.2	28.0	49.0	1.76	67,468
New Zealand	4,506	50.1	27.3	49.6	1.11	41,556
Source: United Nations Trends in International Migrant Stock: The 2013 Revision; World Bank, World Development Indicators online data; US Census Bureau International Data Base						

Micronesia: Amongst the several island countries on or north of the equator, Kiribati and Nauru have strong links to Australia and New Zealand, but only small diaspora in countries on the Pacific Rim. The remainder of Micronesia is linked to the United States through a legacy of Trust Territory status under the United Nations as well as a significant American military presence. Sizeable populations of Micronesians live in the United States, and all except the I-Kiribati and Nauruans are eligible to reside in that country under current political arrangements. Micronesia's populations have variable rates of growth, largely as a result of the differential impact of international migration, but generally they are not increasing as fast as those in western Melanesia.

Polynesia: Several countries in the eastern Pacific have very strong links to New Zealand, including three where their indigenous populations are NZ citizens by right. There are also very strong links, through American Samoa, with the United States and sizeable Samoan and Tongan populations can be found in that country. French Polynesia remains a colony of France, along with Wallis and Futuna, and there is considerable mobility between these two countries and New Caledonia, France's colony in Melanesia.

In most countries in the region the numerical changes in populations will be larger between 2010 and 2030 than they were between 1990 and 2010, but nevertheless be smaller than the latter between 2030 and 2050. However, in all Melanesian countries, except New Caledonia, the numerical increases between 2030 and 2050 are projected to be larger than those between 1990 and 2010 (Bedford and Hugo, 2012).

The World Bank (2006) has drawn particular attention to the rapid growth of the youth population in the Pacific, especially in Melanesia, and cites a number of potential negative consequences:

- A lack of capacity in Pacific labour markets to absorb these burgeoning numbers of young workers.
- A particular lack of formal sector jobs to absorb educated young people.
- The increasing concentration of these young people in coastal cities and towns.
- The potential for large groups of un- and underemployed young people in cities has been associated with unrest, especially where these young people

feel disenfranchised. The rapid growth of the youthful population in most Pacific countries is a major issue when considering the political, social and economic future of the region.

- Low average levels of education among the population[83], limiting the proportion possessing the skills needed in contemporary overseas labour markets.

13.3 Regional fora for discussions of migration

There is general agreement that in the new 'age of migration' governments cannot aspire to stop migration flows but they are best advised to develop effective management of that mobility which maximizes national interest while preserving the integrity of borders and human rights. As already noted effective management of migration is very much dependent on international cooperation. Such cooperation has led to the development of regional economic blocs, such as NAFTA and the EU, which have facilitated regional flows of investment, trade, finance and, in the case of the EU, people who are citizens of European countries. Initiatives like the Schengen Agreement, which was designed to free up cross-border flows of people, have been rare however.

The major regional organizations in the Pacific have been the South Pacific Commission (now the Secretariat of the Pacific Community) and the Pacific Islands Forum[84]. The Secretariat of the Pacific Community (SPC) is a regional technical development agency that works in partnership with its members[85], other organizations and donors to deliver priority to member countries, technical assistance that will contribute to the development of their economies, societies and environments. The Secretariat's predecessor, the South Pacific Commission, was established in 1947 and is the oldest regional organization in the Pacific. Its technical programme includes three broad areas – land, sea and people – and there are specific activities related to population change carried out by demography and statistics officers in Noumea who, amongst other activities, collect data on, and analyse, migration patterns. The SPC is a technical, not political, organization and provides information that informs the regional discourse on migration rather than developing policies addressing migration issues. The SPC's governing body, the Conference of the Pacific Community, is held every two years and votes on decisions relating to its technical programme.

The Pacific Islands Forum was founded in 1971 and is the key regional level political organization in the Pacific. Its members include the 16 independent and

83 Note of the editors: In Fiji for example, the total female enrolment in tertiary education, regardless of age, expressed as a percentage of the number of girls who had left secondary school in the five previous years, was only 18%. For men, this was 15%. (WEF, 2013).

84 Note of the editors: In August 2012 the 43rd Pacific Islands Forum took place in Rarotonga, Cook Islands. There the Pacific Islands Forum Leaders agreed to the 2012 Gender Equality Declaration, in which they committed themselves to support women's political representation, enact legislation that protects women from domestic violence, and support more female participation in the labour force and women as entrepreneurs (PIFS, 2012).

85 The 22 Pacific Island countries and territories plus Australia, France, New Zealand and USA.

self-governing states[86] and a number of associate members. There has been a strong focus on political, regional trade and economic issues on the Forum's agenda and in its annual meetings of political leaders. Over the past decade good governance, security, climate change and migration have become more important issues for the Forum. Since 1989, the Forum has held Post Forum Dialogues with Key Dialogue Partners[87] on a ministerial level.

The Forum has formulated a number of major resolutions since 1971 across a range of areas. Of particular significance from a migration perspective was the Pacific Agreement on Closer Economic Relations (PACER), which relates to regional economic cooperation between the Forum members including Australia and New Zealand and became operational in 2002 when seven members ratified it. In addition, the Pacific Island Countries Trade Agreement – a Free Trade Agreement initially between the 14 Forum Island Countries – entered into force in 2003 when six members ratified it. In 2005 the leaders endorsed the Pacific Plan to strengthen regional cooperation and integration in areas where the region could gain most. Central to the plan are a number of initiatives related to economic growth, sustainable development, good governance and security (Pacific Islands Forum Secretariat, 2007).

It was argued by the United Nations in 2002 (p. 12) that 'the adoption of the General Agreement on Trade in Services (GATS) during the latest rounds of the General Agreement on Tariffs and Trade (1993) provides a general framework for trade-related temporary movements of people based on government to government agreements'. So far, no such agreement has yet been agreed upon as GATS contains no clear specific rules regarding the movement of labour. However, a number of developed countries, including the EU as a whole, have taken steps towards the formulation of agreements. However, so far the 153 WTO members[88] have made limited commitments in the area of the temporary movement of people based mainly on a member's need for skilled migration for a limited period of time. For example, Australia has committed to opening up its market to the presence of skilled executives, senior managers, and inter-corporate transferees for periods of up to four years consistent with its own economic needs[89]. However, commitments of this kind have been limited to date and considerable scope lies ahead for increased commitments for the movement, not just of skilled, but also semi-skilled and unskilled labour. A number of high income countries, including the European Union as a whole entity, have taken steps towards the formulation of temporary migration agreements based on GATS rules and guidelines. Hence there are some promising signs of recognition of the structural nature of non-permanent

86 Australia, Cook Islands, Fiji (suspended in 2009), Micronesia, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

87 These are: Canada, China, EU, France, India, Indonesia, Italy, Republic of Korea, Malaysia, Philippines, Thailand, UK and USA.

88 WTO Pacific members include Fiji, Papua New Guinea, Samoa, Solomon Islands and Tonga while Vanuatu is in the process of recession.

89 From Australia's GATS commitments and schedules with the WTO.

migration and its long-term significance and importance in many developed countries, as well as some developing countries.

Many of the recent Bilateral Free Trade Agreements (FTAs) contain provisions for the temporary 'movement of natural persons' consistent with the GATS. Global support for the liberalization of services trade has prompted the need to secure the free mobility of professional workers and service suppliers. However in the Pacific region the extent to which FTAs have been used to facilitate international labour migration has been very limited and discussions continue about how PICTA might address greater mobility among Pacific Island countries themselves.

The original PACER agreement, signed in 2001, is an umbrella agreement between members of the Pacific Forum which provides a framework for the development of trade cooperation between island countries, Australia and New Zealand, and beyond. The PACER framework sees a step-by-step process of trade liberalization in the region beginning with a free trade agreement for the trade of goods between Pacific Island countries which will later be extended to the trading of services. Part of PACER involves a 'Regional Trade Facilitation' programme to improve the capacity and preparedness for Pacific economies to trade and to create an independent body to provide advice and support in negotiation for Pacific countries. Australia and New Zealand have been strong in their encouragement and support of the PICTs to facilitate a free trade zone in the Pacific region and further integrate their economies into a regional market (Australian Fair Trade and Investment Network [AFTINET], n.d.).

Part of the original PACER agreement was to foreshadow in 2011 the beginning of negotiations between the PICTs on the one hand, and Australia and New Zealand on the other, to develop between all the Pacific Forum countries (including Australia and New Zealand) a reciprocal free trade agreement (FTA). However, the negotiations were brought forward and initiated in 2009[90]. Once the negotiating process had been triggered, Australia and New Zealand pressed for speedier negotiations to accelerate progress on increased trade in goods and services, however the PICTs requested more time for national consultations, development and consultation (AFTINET, n.d.). The hesitancy of the PICTs is largely based on the fact that tariffs on imported goods are at present crucial sources of government funds to supply services. A Pacific Islands Forum Secretariat report found that tariff reductions proposed under PACER Plus would mean that Vanuatu and Tonga could lose up to 17 per cent of annual government revenue, while Samoa and Kiribati stand to lose 14 per cent (Nathan Associates, 2007). On the other hand a report on the potential implication of PACER Plus for PICs notes that tariff revenue cuts will be phased in gradually over 10-15 years, allowing those PICS most affected to implement more efficient consumption taxes to replace lost

90 The actual commencement of negotiations was triggered when FIJI and PNG signed an interim agreement with the EU on trade in goods. Under PACER, if any trade agreement was negotiated with a developed country other than Australia or New Zealand, it would automatically trigger the negotiation of a reciprocal economic and trade agreement between Forum Island Countries, Australia and New Zealand. The negotiations commenced in earnest in 2011 and continue until present and are referred to as PACER Plus negotiations.

government revenue (Institute for International Trade, 2008, 85). It also notes that for 10 of the PICs the impact would be minimal and points out that a key aim of tariff cuts is to make goods cheaper for low income consumers in the Pacific.

The PICTs were until recently engaged in negotiations with the European Union to develop an Economic Partnership Agreement (EPA). These negotiations were to be concluded in 2007 but capacity constraints and other trade related issues stalled progress for a long time[91].

From the perspective of the present paper it is Mode 4 of GATS, which deals with the 'movement of natural persons', which is of interest. As in most FTAs there has been limited consideration of Mode 4 in the Pacific discussions so far. However, increasingly the governments of PICTs are 'demanding that any PACER Plus agreement should include a provision for increased labour market access to Australia and New Zealand[92], particularly for low and unskilled Pacific workers'. They are also 'welcoming an increase in the labour mobility of professionals, managers and business entrepreneurs from Australia and New Zealand to assist in building the capacity of the Pacific Forum Island countries which could also enhance their trade competitiveness' (Pacific Institute for Public Policy, 2008, 3).

PICTA has commenced actual trading in six of the Forum countries and negotiation is occurring within it about the temporary movement of people with specified qualifications. It is expected that the final PICTA agreement will have a specific list of skilled and semi-skilled professions and people with approved relevant qualifications who could move freely between the PICTA countries (Pacific Institute for Public Policy, 2008, 7).

One of the important developments within the Pacific Forum has been the development of the Melanesian Spearhead Group (MSG) comprising the four Melanesian states of Fiji, Papua New Guinea, Solomon Islands and Vanuatu, as well as the FLNKS (Le Front de libération nationale kanak et socialiste) of New Caledonia. The MSG was established in 1983 and was formalized under international law in 2007. It has a Secretariat based in Port Vila, Vanuatu. The MSG established a Trade Agreement in 1993 between Papua New Guinea, Solomon Islands and Vanuatu, and Fiji was added in 1998.

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91 Note of the editors: The 1 October 2014 deadline for the signing of the EPAs has passed. At the time of editing (December 2014) an EU-Pacific interim EPA signed in 2009 with Fiji and Papua New Guinea is undergoing implementation. In view of the moribund state of negotiations of the comprehensive EU-Pacific EPA, the Commission has stated that it is 'ready to explore the possibility to widen the membership and deepen the content of the existing EU-Pacific interim EPA' (European Commission, July 2014).

92 Note of the editors: Of the working Tongan migrants in New Zealand between 2002 and 2004, men usually worked in factories and construction or as carpenters and technicians. Typical jobs for female Tongan migrants were as cleaners, sales assistants and grocery packers. Pacific Island male migrants had almost the same employment rate as Pacific Islanders born in New Zealand, however Pacific Island female migrants had a significant lower employment rate than their New Zealand born counterparts. On the other hand, Pacific females were better represented in white collar occupations than Pacific males (Stahl and Appleyard, 2007).

In September 2012 the MSG Skills Movement Scheme came into force. The Scheme allows at least 400 people from each MSG country to work in other MSG countries. For example, if Fiji were to have a surplus in primary-school teachers while other MSG countries were to have shortages, then there could be a flow of teachers from Fiji into other MSG countries. The scheme is also facilitating the sourcing of skilled workers for Papua New Guinea's expanding mining sector (Valemei, 2012). The MSG's Skills Movement Scheme is intended to be a model for the temporary movement of people that could be extended across the Pacific (Valemei, 2012)[93].

Housed with the Forum Secretariat at its headquarters in Fiji is another regional initiative, the Pacific Immigration Directors' Conference (PIDC), which brings together senior immigration officials from across the region for meetings about matters of common interest. The PIDC's vision, as stated on its website (www.pidcsec.org/) is:

> for immigration authorities to be mutually working together to manage the Pacific gateways, and thereby contributing to the regional objectives of security, economic growth, sustainable development and good governance.

The PIDC is a full member of the Pacific Regional Immigration Intelligence Meeting (PACRIM), an organization of Pacific rim intelligence agencies which are collectively responsible for monitoring more than half of the international travel in the world (PIDC, 2012). The Secretariat of the PIDC engages with border control stakeholders such as the Oceanic Customs Organization (OCO), the Pacific Islands Chiefs of Police (PICP), the Forum Regional Security Committee (FRSC) and its various working groups, the Pacific Law Officer's Network (PILON), and a new entrant in the immigration sector in the region, the Brussels-based African Caribbean and Pacific (ACP) Group of Countries. Through engagement with the latter, the PIDC Secretariat extended its work on irregular migration in the region by conducting a multi-country study jointly with the ACP in 2012 (PIDC, 2012).

In a very useful review of border management in the Pacific region, Moriarty (2008, pp. 249-50) observes:

> The Forum Secretariat's Law Enforcement Unit provides the Forum's Regional Security Committee and the Secretariat with an overview on regional security issues, as well as providing a small pool of advisers on security issues who are available to all FICs. The separate regional bodies that bring together police chiefs, customs and immigration officials respectively, are staffed by small secretariats. They promote the exchange of information and experiences, and coordinate, where appropriate, regional approaches to common problems (such as training programmes) in their respective areas of expertise.

93 The MSG Skills Movement Scheme is supported by a page on the MSG's website, which lists vacancies in each of the participating states of the MSG. See http://www.msgsec.info/index.php/skills--movement-scheme/msg-skills-movement-scheme.

There is quite a complex mix of collaborative ventures that bring officials together regularly to address issues related to security, borders and crime within the region. While few of these address migration directly, there is a regional network of agencies and committees that provides an infrastructure for deeper collaboration and cooperation in the future. We return to another recent development with specific reference to the movement of labour to work in agricultural industries in New Zealand and Australia. This is ultimately paving the way for more coordination in migration policies in the region. First, however, a brief review of the engagement Pacific states have with organizations beyond the region that address the cross-border flows of people.

13.4 Engagement in organizations beyond the Pacific

In addition to being engaged in exclusively Pacific organizations there has been some involvement in wider Asia-Pacific fora. In fact, the United Nations have no separate regional organization for the region – the Economic and Social Commission for Asia and the Pacific (ESCAP) includes it with all of Asia, and the Pacific is a subregion within UNESCO's Asia-Pacific region as well. The Pacific has only a minuscule 0.24 per cent of ESCAP's population and is distinctively different in many ways.

The largest Pacific nation, Papua New Guinea, is a member of APEC (Asia-Pacific Economic Cooperation Organization) which includes the largest of the Pacific Rim countries[94]. The major goal of APEC has been to reduce barriers and liberalize flows of capital and goods between economies of the region. There has, however, been little discussion of, and success in, facilitating flows of the other major factors of production – people. Nevertheless, since 2000 there has been an increasing discussion of migration in APEC, although this may have been dampened by the Global Financial Crisis. There have been some measures to facilitate the mobility of professionals and business people. These initiatives include:

- The APEC Business Travel Card Scheme which simplifies the entry of cardholders into the participating members (with special lanes at airport immigration control), and reduces the time and costs for applying for entry visas and permits.
- APEC has also agreed on a service standard for processing applications for, and extensions of, temporary residence permits for executives, managers and specialists transferred within their companies to other APEC economies.
- The APEC Advanced Passenger Information (API) systems enable all passengers to be processed in advance of arrival in destination economies by instituting the check at the point of checking in to board aircrafts and sea vessels at the point of origin.

94 Japan, Russia, Republic of Korea, China, Hong Kong China, Chinese Taipei, Thailand, Indonesia, Mexico, Australia, New Zealand, Canada, Chile, United States, Singapore, Vietnam, Peru, Philippines, Brunei and Malaysia.

- APEC has also initiated Mutual Recognition Arrangements (MRA) for certain occupations and skills to facilitate international and regional labour mobility.

In addition, several of the larger Pacific countries have engaged in other Asia-Pacific regional initiatives on migration. One of the most inclusive and significant has been the Ministerial Conferences on People Smuggling, Trafficking in Persons and Related Transnational Crime (MCPSTPRTC), convened by the Foreign Ministers of Indonesia and Australia in Bali on 26-28 February 2002 and 28-30 April 2003. This has come to be referred to as the 'Bali Process', which is intended to complement and strengthen bilateral and regional cooperation in this area[95]. The initial meeting involved almost all countries of the region as well as a number of observer countries and organizations reflecting the increasing significance of this issue in the region as well as globally. Agreement was reached about the nature and importance of the problem, and the principles for combating it, within which is the necessity of bilateral and multilateral cooperation. The Ministers agreed that they would work towards:

- Developing more effective information and intelligence sharing arrangements within the region.
- Improving cooperation between law enforcement agencies.
- Enhancing cooperation on border and visa systems.
- Increasing public awareness of the facts of smuggling and trafficking operations.
- Enhancing the effectiveness of return as a strategy to deter illegal migration through the conclusion of appropriate arrangements.
- Cooperating in verifying and identifying the nationality of illegal migrants in a timely way.

95 In addition to Indonesia and Australia: Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Democratic Republic of Korea, Fiji, France, India, Iran, Japan, Jordan, Kiribati, Laos, Malaysia, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Pakistan, Palau, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Syria, Thailand, Turkey, UNTAET East Timor, Vanuatu, Vietnam, IOM and UNHCR.

- Improving technical capacity in the region to respond to the challenges posed by people smuggling, trafficking in persons, including women and children and other forms of illegal migration[96].

The Ministers established a follow-up mechanism to implement the recommendations of the Regional Conference and coordinate action that the region could undertake to combat the problems. In particular, the conference set up two *ad hoc* groups of experts:

- Group I coordinated by New Zealand, with a mandate to promote regional and international cooperation.
- Group II coordinated by Thailand, with a mandate to assist States to strengthen policy making, legislative arrangements and law enforcement practices.

There is also regional cooperation on refugees through the intergovernmental Asia Pacific Consultations on Refugees, Displaced Persons and Migrants (APC), which has been in existence since 1996. This is an informed consultative arrangement between countries in the Asia Pacific region. It is a non-decision making body and membership is voluntary and aims to promote dialogue and explore opportunities for greater regional cooperation on matters pertaining to population movements including refugees, displaced persons and migrants. There is an annual plenary consultation as well as subregional and expert meetings. Most Asian and several Pacific Island nations are participants[97].

Perhaps the most important benefit of the involvement of Pacific Island countries in larger regional initiatives, such as the Bali Process, is that they are providing an opportunity for dialogue between origin and destination countries on migration issues (Hugo, 2004). Bringing key immigration officials together in a non-threatening

96 Note of the editors: Tabureguci (2012) points out that recent analysis has revealed that the Pacific islands region is vulnerable to Trafficking in Persons (TIP). In 2012, as the latest state to do so in the region, the Federated States of Micronesia (FSM) joined the other Pacific countries to enact laws that tackle TIP. FSM women have been recruited to the US with promises of well paid jobs and have been forced into prostitution upon arrival. FSM women and children have also been prostituted to crew members on Asian fishing vessels in Micronesia's territorial waters. By way of comparison, Palau is a destination country for involuntary prostitutes from the FSM and other countries in the Asia-Pacific region, as well as for forced labourers from the Philippines, China and Bangladesh. Lindley and Beacroft (2011) add that due to high maritime activity, and the prevalence of the agricultural industry and tourism, the region is more vulnerable to trafficking. These industries demand high amounts of labour and exploitative work environments are not uncommon. Women are also more prone to trafficking because of their status within society. Pacific Island cultures are often patriarchal societies, where men dominate social institutions, decision-making, ideas and practices in the public and private spheres and where the superiority of men and inferiority of women is internalized (Griffen, 2006). This disempowers women and girls, increasing their vulnerability to unchecked violence (Lindley and Beacroft, 2011).

97 Participant countries: Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Burma, Cambodia, China, East Timor, Fiji, Hong Kong SAR, India, Indonesia, Japan, Kiribati, Republic of Korea, Laos, Malaysia, Micronesia, Mongolia, Nauru, Nepal, New Caledonia, New Zealand, Pakistan, Papua New Guinea, the Philippines, Samoa, Singapore, Solomon Islands, Sri Lanka, Thailand and Vietnam.

atmosphere to discuss issues of mutual interest can build up further mutual interests and confidence which can be the basis for more detailed later engagement.

13.5 Formal linkages with pacific RIM destinations

One of the features of regional organizations in the Pacific over the last decade has been the increasing incidence of Pacific leaders requesting greater access for their workers to labour markets in the high-income countries of the Pacific Rim; either individually or through one of the regional institutions. There is some variation between PICTs in their access to the Rim nations and also differences in policy between the destinations.

As Opeskin and MacDermott (2010, p. 2) have pointed out: 'Colonialism has left a complex legacy of legal and political associations in the Pacific'. Colonial powers partitioned the Pacific, forming the basis for contemporary nation state boundaries as well as shaping external linkages. Accordingly, each Pacific state and territory has political associations of various types with former administering powers and in some cases this includes some immigration rights.

Several PICTs have constitutional links to the United States. American Samoa is an 'unincorporated territory' of the US so its citizens are American 'nationals' and have free access to the US. The Federated States of Micronesia, Palau and Marshall Islands citizens have the right to enter, reside, study and work in the US without a visa under a 'compact of free association'. Guam is a US territory so its nationals are US citizens. Citizens of the Northern Mariana Islands are automatically US citizens. All of these groups have ready access to the US although some have to apply as immigrants if they wish to become citizens or permanent residents (Hayes, 2010, 29).

Like the United States, France has adopted a generous attitude towards the citizenship and migration of the indigenous peoples of PICTs with which they had colonial associations. Opeskin and MacDermott (2010, p. 3) explain:

> Under the 1946 Constitution of the French Republic, all inhabitants of French overseas territories were granted French citizenship, with the concomitant right to move freely among the territories, and between the territories and metropolitan France (de Deckker, 1994). In practice there has been very little migration from French Pacific territories to France. On the contrary, there has been significant net migration to New Caledonia including both 'Métros' from France and Polynesians from Wallis and Futuna, who have largely outgrown the islands' limited resources.

New Zealand has fostered special relationships which have an immigration dimension with a number of Polynesian countries (Bedford et al., 2007; Opeskin and MacDermott, 2010). The indigenous populations of its colonies (Cook Islands, Niue, Tokelau) were granted New Zealand citizenship in the late 1940s, although permission to travel to New Zealand still had to be obtained from the New Zealand administration in the islands until the Cook Islands and Niue became self-governing in the 1970s. Travel between the islands and New Zealand was by an

irregular inter-island shipping service until the construction of airports that could handle regular passenger flights in the 1970s.

Samoans resident in what was then called Western Samoa, while under New Zealand administration as a mandated territory since 1918, did not qualify for New Zealand citizenship in 1947 – a point that was to be challenged in court cases that went as far as the Privy Council in the early 1980s (Macdonald, 1986). As part of the Treaty of Friendship signed on the occasion of their independence in 1962, Samoa was granted an annual quota for permanent migrants to New Zealand and by the late 1960s this was set at around 1,100 people per annum. In the 1970s, temporary work schemes with Fiji, Samoa and Tonga were introduced to regularize the flows of workers that had been entering New Zealand for seasonal and other low-skilled work from these countries since the 1950s. These schemes were extended to I-Kiribati and Tuvaluans in the late 1980s. There was also a short-lived experiment with visa-waiver entry for short-term visitors from selected Pacific countries in the mid-1980s – a privilege which only I-Kiribati and Tuvaluans retained until 2002 (Bedford, 2008).

In 2002 the extant temporary work permit schemes with Pacific countries and the visa waiver privileges that applied to I-Kiribati and Tuvaluans were withdrawn, and the Pacific Access Category was introduced. This allowed for small annual quotas of residents to be selected via a balloting process in Fiji, Tonga, Kiribati and Tuvalu (Fiji's participation in the scheme was suspended in 2006 after a military coup). In 2000 a process for regularizing residence in New Zealand of long-term overstayers who had regular work and who had not breached the law in other ways (aside from overstaying their visitors or temporary work permits) was introduced and several thousand people born in Pacific countries took advantage of this process to transition to legal permanent residence. In 2006 a new temporary work programme that prioritized Pacific labour, the Recognized Seasonal Employer (RSE) work policy, was trialled and introduced formally in April 2007. We discuss the RSE scheme in greater detail later.

The other countries which have had a significant colonial presence in the Pacific, Australia and the United Kingdom, have virtually no special migration relationships. As Opeskin and MacDermott (2010, p. 3) have explained:

> The approach of New Zealand, the United States and France stands in contrast to the United Kingdom and Australia, which generally gave no automatic citizenship or rights of migration to Pacific populations over which they had exercised colonial authority. For the United Kingdom, citizenship was a political impossibility: not only were its Pacific possessions numerous (including Fiji, Kiribati, Solomon Islands, Tonga, Tuvalu and Vanuatu), but its situation was replicated in colonies in Africa, the Caribbean and the Indian subcontinent. These pragmatic concerns were also true of Australia's relations with Papua New Guinea, which was both proximate and highly populous: at independence in 1975, Papua New Guinea's population was 2.9 million, Australia's 13.6 million, of whom 49.8% were female.

Australia is a major longstanding immigration nation with almost half of its contemporary population of 23.3 million being a first or second generation immigrant. It has a highly planned and controlled immigration policy, a major cornerstone of which is that the selection of immigrants is not on the basis of their country of birth, race, religion or creed. All people, of all countries, have access to the skill, family, and refugee elements of the immigration programme provided they meet the requirements of each of those categories (Hugo, 2013). People from the Pacific, like those from other regions, have access to these avenues for immigration (Bedford and Hugo, 2012). There are, however, two exceptions to this policy of not favouring people from particular countries with regards to immigration, and both of them involve immigrants from Pacific Island countries.

The first is the special arrangement which Australia has with New Zealand under the Trans-Tasman Travel Arrangement. As the DIAC (2010, p. 89) has explained:

> Since the 1920s there has been virtually unrestricted movement of people between Australia and New Zealand under various reciprocal entry arrangements. In 1973, the Trans-Tasman Travel Arrangement was introduced allowing Australian and New Zealand citizens to enter each other's country freely to visit, live, work and remain indefinitely without the need to apply formally for authority to enter.

In 2001 new arrangements were introduced which limited New Zealanders' access to social security benefits in Australia (Bedford et al., 2003).

The Trans-Tasman Travel Arrangements have implications for the access of Pacific Islanders to Australia. Pacific Islanders who have entered New Zealand under the arrangements discussed earlier and who qualified for citizenship can enter Australia under the Trans-Tasman Travel Arrangements. At times the Australian government expressed concern about this 'back door' entry, but as long as New Zealand citizens were permitted to enter Australia without having to apply for specific visas, entitling them to work and reside in Australia, there was no way of limiting the flow of Pacific Islanders who were New Zealand citizens.

It is clear from Table 13.3 that a significant number of Pacific Islanders, especially Samoans and Cook Islanders, have entered Australia via New Zealand. Around 20 per cent of Australia's Pacific Island-born population in 2008, for example, had come into the country as New Zealand citizens under the Trans-Tasman Agreement. This proportion may be even higher since some may have taken out Australian citizenship before the change in Australia's social security legislation which has affected the ability of New Zealanders to access employment-related benefits in Australia since 2001 (Bedford et al., 2003).

Table 13.3 Australia: New Zealand citizens resident in Australia but born in a Pacific country, 31 December 2011

Country	Number
Western Samoa	10,331
Cook Islands	5,128
Fiji	2,812
Tonga	1,316
Niue	642
Other Pacific	850
Total	21,079
Source: DIAC, 2012, 44	

The second exception is the Pacific Seasonal Workers Pilot Scheme (PSWPS) which was introduced in 2008 to provide for Pacific Islanders to fill seasonal labour shortages in the horticultural industry. In December 2011, the Australian government agreed that the scheme would be made permanent. The introduction of the pilot in 2008 followed several decades of discussion. As Millbank (2006, p. 5) pointed out:

> Requests from political leaders of Pacific region countries for Australia to open its labour markets to their workers have been made since the 1960s. A series of parliamentary and government appointed inquiries over the last 20 years … have responded sympathetically to these calls.

She summarizes the conclusions of those inquiries and these are presented in Table 13.4. It is apparent that there was considerable opposition to the introduction of any special schemes that favoured a particular region. Nevertheless, the World Bank (2006, p. ix) was influential in arguing:

Table 13.4 Conclusions of Australian patient and government inquiries into Pacific seasonal migration

Committee to review the Australian Overseas Aid Program (Jackson Committee), 19S4s
• The Pacific Island States of Kiribati and Tuvalu (remote minute and heavily populated) in particular face a difficult future, because unlike the micro-states of Cook Islands, Niue and Tokelau they do not have access to NZ citizenship, and thus to the Australian as well as NZ labour markets. • Australia should go beyond the traditional notions of aid and develop a special immigration quota for Kiribati and Tuvalu. The numbers involved would be small. • A long-term strategy based on training arrangements under the aid program is needed to provide training in skills to promote employment in Australia.

Parliamentary and government inquiries
Joint Committee on Foreign Affairs, Defence and Trade inquiry into Australia's relations with the South Pacific, 1989[9] • As population pressures increase in the region the issue of migration has the potential to damage Australia-South Pacific relations. It requires periodic review. • Migration in various forms is an established fact throughout the region. Aid and remittances are the dominant sources of foreign exchange earnings in a number of countries. Large aid flows have led to large public sectors and artificially inflated wages, coinciding with high unemployment. • The Australian Government, in conjunction with private enterprise, should establish a work experience program' for the South Pacific region.
AusAID inquiry (by Reg Appleyard and Charles Stahl) into South Pacific migration and its implications for Australia, 1995[10] • Remittances and aid are crucial to the survival particularly of the small island countries. Indeed, getting at least limited access to Australia's (and NZ's) labour market is imperative in the case of the 'unfurnished' microstates of Tuvalu and Kiribati. • Committee to Review the Australian Overseas Aid Program (Simons Committee), 1997[11] • Government should reconsider the option of migration for islanders from the smaller Pacific States where there is little or no chance of self-reliance. • Access to Australia's labour market would be a more cost-effective way to assist States whose only export is labour services than aid in perpetuity.
Senate Committee on Foreign Affairs, Defence and Trade inquiry into Australia's relations with Papua New Guinea and the island States of the Southwest Pacific, 2003 • Australia has an obligation to assist the Pacific States, and there would be serious implications for Australia if the economies in the region collapsed. • Migration is widely seen in the region as the route to enable people to learn skills earn money and support family networks and contribute to economies. • The Australian Government should Support Australian industry groups, State governments, unions, NGOs and regional governments to develop a pilot program for labour to be sourced from the region for seasonal work in Australia' .
The Core Group recommendation for a White Paper on Australia's aid program, December 2005[12]: • The Pacific Islands are important to Australia because of shared history, geographical proximity, and the threat they pose to regional stability. • They suffer from low growth, fragile States, health risks (including AIDS) and high vulnerability. Governments of Pacific Island countries need to provide opportunities for their populations. The need is urgent, given rapid population growth and a 'youth bulge'. • In the absence of migration it is unlikely that the economies of microstates such as Tuvalu, Kiribati and Nauru will become viable. • The government should consider developing a 'Pacific unskilled migration window'. Further analysis and research on the relationship between migration and development, especially in the Pacific, is needed.
Source: Millbank (2006, pp. 6-7)

If migration is to be used as an instrument to foster greater regional stability and achieve pro poor outcomes (in the Pacific), migration options need to be extended beyond the skilled and elite to the poor and unskilled

> who are unlikely to find such opportunities domestically. Evidence from other parts of the world, where international mobility for unskilled labour exists, points to its positive impact in improving social equity in sending countries, reducing social tensions, and creating a larger consistency for economic growth and governance reform.

This resulted in the initiation of the Pilot Scheme which was open to citizens of Kiribati, Papua New Guinea, Tonga and Vanuatu. Take-up of the programme has been relatively slow and by March 2012 only 1,100 PSWPS workers had arrived since the commencement of the scheme (Hay and Howes, 2012)[98].

The introduction of the PSWPS in Australia represented a significant departure from established migration policy in a number of ways:

- It is restricted to a limited number of countries.
- It is focused on low- and semi-skilled workers.
- It is focused on meeting sectoral labour shortages in the labour market.
- It cautiously takes into account the development impact of the migration on origin communities.

An important factor in the Australian introduction of the PSWPS was the successful introduction of the Recognised Seasonal Employer (RSE) Work Policy in New Zealand (Ramasamy et al, 2008). In October 2006 New Zealand's Prime Minister, Helen Clark, announced at the Pacific Forum meeting that a scheme to assist local employers in the horticulture and viticulture industries to attract immigrant seasonal workers on secure contracts would be trialled. The RSE work policy became operational in April 2007 and prioritized the recruitment of seasonal workers from the Pacific to assist with the planting, maintaining, harvesting, and packing of crops where there were no suitable New Zealand workers available. The RSE policy is geared towards Pacific States where employers can recruit from eligible Pacific Island Forum Member States – Federated States of Micronesia, Papua New Guinea, Kiribati, Nauru, Palau, The Republic of Marshall Islands, Solomon Islands, Tonga, Tuvalu, Samoa and Vanuatu. Employers can recruit from other countries only if the employer has made a reasonable attempt to recruit from the Pacific. RSE employees can stay in New Zealand for up to 7 months at a time (9 months if they are from Kiribati and Tuvalu) and they can return in consecutive seasons. Employers are encouraged to build long term relationships with migrant workers and training opportunities are being created. Employers are obliged to pay half of the travel costs, pay for an average of at least 30 hours per week, provide pastoral care, and contribute to the costs of locating workers who fail to return home (Ramasamy et al., 2008).

The RSE work policy and the PSWPS both place considerable emphasis on applying best practice lessons with a view to achieving positive development outcomes in the source communities. There was quite an extensive evaluation of the RSE scheme

98 Note of the editors: By September 2012 this figure had increased to 1,623 workers. More recent statistics are not currently available. See http://docs.employment.gov.au/node/30840.

after the first two years of operation and the conclusion, as it relates to development impacts, was generally very positive. They observed:

> Pacific governments welcome the opportunity for their young people and unwaged citizens to earn an income In New Zealand. That is of direct benefit to the workers' families and communities at home. At a national level, Pacific states have the opportunity to leverage off the RSE Policy to strengthen their economy and work towards economic development goals. Although the Pacific economic development goal may be a secondary aim for the New Zealand Government, the policy is extremely important for Pacific states (Evalue Research, 2010, p. 72).

Pressure for access to temporary work opportunities in New Zealand and Australia has intensified since the introduction of the RSE scheme and the initiation of the PSWPS. In New Zealand the dairy and meat processing industries have requested the Department of Labour to extend the provisions of the RSE work policy to their primary-sector operations, and there may still be opportunities for temporary work relating to the ongoing reconstruction of Christchurch after the earthquake. The challenge in all of these approaches is the need to demonstrate clear seasonal labour demands if the temporary work permits are to apply to employment that has clearly defined peaks that cannot be met by local labour supply. In addition to the pressure from employers in New Zealand for greater access to short-term temporary labour, there is pressure from island governments, especially Samoa, for more opportunities for their working-age populations to access temporary work in New Zealand. In the case of Samoa the pressure is for work that matches the skills of the workers, and can contribute to enhancing these skills in the labour force back in Samoa.

Looking ahead, there is no doubt that the demand for places in schemes like the RSE and PSWPS will continue to grow in the islands. Only a small number of the island countries are involved in the schemes at present and there is growing demand in all of the participating countries for more opportunities for seasonal work in New Zealand and Australia. Fuelling this demand is the persistent shortage of wage-earning opportunities in the island countries themselves and the rapid growth of the youthful workforce, especially in those countries with few outlets for migration overseas.

One development in the Pacific Rim 'destination' countries has been the formulation of the 'Australia-New Zealand Immigration Forum' in 2007. This involves an annual meeting between senior officials of the Australian Department of Immigration and Citizenship and New Zealand's Department of Labour. This forum allows officials to discuss migration issues of common concern, among which Pacific Island migration issues loom large, and provides a formal mechanism for migration cooperation between the two nations which share so many values and interests in migration (Hugo, 2004; Bedford et al., 2007).

13.6 Looking to the future

Almost half way into the second decade of the 21st century, and as we look ahead to the 2050s, there are three major developments that are going to have profound implications for population movement within and between the Pacific islands, as well as to countries outside the Pacific region. In no specific order of priority these are:

- The projected 85 per cent increase in the region's population from just below 10 million in 2010 to over 18 million by 2050. The mobile youth population (aged 15-34) could increase from 3.4 million in 2010 to 5.7 million by 2050.
- The possibility of a doubling of the share of the region's population that is living in urban areas of the islands, from around 25 per cent in 2010 to the current global average of 50 per cent by 2050.
- The impact on the region's population of the projected warming of the world's climate and associated implications for the region's El Niño and La Niña weather patterns and sea-surface temperatures and levels.

The trajectories of these projected developments vary considerably across the region, but a common challenge in all of the island states and territories is ensuring that satisfying livelihoods for their populations can be sustained in the face of significant demographic and environmental change. During 2010, the New Zealand and Australian Governments both made renewed commitments to provide development assistance in the region through significant increases in their budgets for aid. The Pacific 'neighbourhood' has assumed higher priority than it has had in recent decades, partly because of concerns about growing political instability in several parts of the region and the implications this has for the security of Australia and New Zealand's borders, and partly because of the longstanding commitment to support former colonies, dependencies and allies (Bedford and Hugo, 2012).

The Pacific is already the global region most influenced by migration and remittances. Demographic change, resource endowment limitations, climate change, and security considerations will ensure that migration will be a crucial element in the region's future. The scale and form that this mobility takes, and the extent to which it can be a force for development in the Pacific, is dependent upon a number of factors, but levels of cooperation and institutional development between PICT countries, and with Pacific Rim country destinations, will be of vital significance.

Opeskin and MacDermott (2010, pp. 3-4) have argued strongly that Pacific Rim nations should accept further responsibility for further immigration from PICTs on the following grounds:

First, these states owe the PICs obligations arising from past and present exploitation and injustices. These include, for example, nuclear testing, as well as the mining of phosphate in islands like Nauru (Connell, 2006) and Ocean Island in Kiribati, which has massively depleted land resources. In addition, there are issues concerning the responsibility of the global north for the excessive greenhouse gas emissions raising sea levels. Second, ethical obligations to provide development assistance. It is clear that a 'development friendly' migration policy can be a significant plank in assisting development in origin countries (DFID, 2007).

To these arguments, two further considerations which relate to the self-interest of the destination countries can be added: First, the Pacific is an important global region from a strategic security perspective. This is particularly the case for the Pacific Rim countries, especially Australia and New Zealand. Migration has in the past provided a 'safety valve' for social and economic frustration with the lack of opportunity in some Pacific microstates (Ware, 2005, p. 451) and it will be an important element in the future security of the region, especially in volatile areas of Melanesia. A second consideration must be the ageing of Pacific Rim country populations that will create significant labour shortages, both in lower and higher skilled areas. The Pacific could be an important source for such labour. While we must not fall into a 'demographic determinism' trap of assuming imbalances between countries with declining working age populations and those where they are increasing, there can be no doubt that immigration will be an important element in the future of the Pacific Rim countries, as it indeed has been for the last century. The issue becomes the extent to which those countries are willing to give the Pacific special consideration in this immigration given proximity and mutual relationships and obligations.

The Pacific Forum remains the major institutional structure to facilitate an integrated approach to migration. When an eminent group of Pacific politicians reviewed the Forum in 2004, they encouraged all of the participants to: 'listen to the needs and aspirations of the burgeoning population of young people in the region, and recognize the impact of bigger and more youthful populations on the resources required for education and vocational training, healthcare and job opportunities' (Chan et al., 2004). Migration issues have been discussed at successive annual meetings of the Forum, with particular reference to greater access to labour markets in Australia and New Zealand for Pacific workers and the challenging issue of migration in response to environmental degradation, associated with changes in sea levels and the changing frequency and distribution of tropical cyclones.

The World Bank (2006), among others, has highlighted the particular challenge of providing greater employment opportunities for the Pacific's burgeoning workforce age groups. The New Zealand and Australian Governments both recognize the growing demand for job opportunities for Pacific peoples in their labour markets. In addition to the seasonal work schemes discussed above, Australia has been expanding training opportunities for Pacific peoples in their home countries, with a view to improving the prospects for potential immigrants from these countries meeting the points selection criteria for entry under Australia's skilled migration programme. An example of this is the KANI (Kiribati-Australia Nursing Initiative) that has led to small numbers of I-Kiribati nurses being trained in Australia and Kiribati to a level that qualifies those who complete the training to be admitted into this occupation (and permanent residence if they obtain a job) in Australia. New Zealand's Pacific Access Category (PAC), introduced in 2002, offers opportunities for small annual quotas of I-Kiribati, Tuvaluans and Tongans to enter and settle in New Zealand, as well as around 1,000 Samoans each year under the Samoan Quota, subject to obtaining work at the destination (Bedford, 2008).

At subsequent Forum meetings there has been an increasing focus on the lack of job opportunities in the islands for the growing workforce in the region (ibid.). In this discussion there has been some pressure on Australia and New Zealand to open up their labour markets in order to absorb some of these workers as part of wider agreements relating to trade and economic development (Warner, 2008). Options for increased labour mobility have entered the discussions on PACER Plus – The Pacific Agreement on Closer Economic Relations. As we noted earlier, the Pacific countries have indicated that they would like migration to be part of the PACER Plus negotiations, but Australia has thus far indicated that the focus should only be on trade[99].

While the focus of recent Forum meetings has been on good governance and security, international migration has figured prominently in those discussions. At the 2009 meeting the Heads of State attending the Forum gave the go-ahead to commence negotiations on the PACER Plus regional trade and economic agreement. In the Communique of the 41st Pacific Islands Forum meeting in Vanuatu in August 2010 it was noted, with regard to labour mobility, that:

> Leaders noted ongoing developments on labour mobility in the region as well as parallel developments on Temporary Movement of Natural Persons-related activities and the labour mobility objectives of Smaller Island States under the auspices of PACER-Plus, PICTA, EPA and other trade negotiations (Pacific Islands Forum, 2010)[100].

What are the elements which will shape international migration and challenge regional approaches in the Pacific over the next few decades?

- The challenge of demography for democracy, especially in Melanesia where rapid population growth and sluggish growth in employment outside of subsistence production are producing increasing tensions. Moreover, the loss of skilled workers to high income countries can threaten the development of those societies. It will not be the poor who leave – rather those with the talents that are essential for contributing to the development of urban societies and economies in the islands.
- A shift in levels of reliance on and engagement with New Zealand and Australia, especially in Melanesia, as a result of the increasing involvement of China, Taiwan, Malaysia, Korea and, in the longer-term, India, in the region.

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99 Note of the editors: Australia's reluctance to include provisions on labour mobility in the agreement remains an obstacle to the conclusion of negotiations. Nevertheless, as of December 2014 it is hoped that an agreement can be reached in 2015. According to the Solomon Star (2014) 'the FICs have two basic demands (regarding labour mobility), namely the increase in the quota levels under Australia's Seasonal Worker Programme and New Zealand's Recognised Seasonal Employer programme, and the extension of these schemes to new occupational areas where the FICs can fill the gaps in the labour markets of Australia and New Zealand'.

100 Note of the editors: The communique of the forty-fifth Pacific Islands Forum focused overwhelmingly on issues of climate change, good governance and security. Perhaps tellingly, labour mobility is not mentioned in the document (Pacific Islands Forum, 2014).

As Crocombe (2007) has shown in his comprehensive review of Asia in the Pacific Islands, Pacific states are re-aligning their strategic alliances and leveraging their voting power in UN agencies to gain significant development assistance from China and Taiwan especially. Companies involved in timber extraction in Malaysia and fishing in Korea have gained privileged access to forests in Melanesia and licences to exploit exclusive economic zones in several Pacific states. The flows of capital, products and labour associated with these developments are resulting in a reorientation of population flows into and out of the islands. The sources of consultants, skilled labour, entrepreneurs[101] entering the region, and the movements of students, high- and low-skilled workers, government officials and businesspeople leaving are changing as, in Crocombe's words, Asia replaces the West in the Pacific.

- Increasing attention in New Zealand and Australia to security issues in the Pacific, especially in Melanesia, and growing concern about the trend away from acceptance of their advice and influence. To win back their influence New Zealand and Australia will need to make more concessions to Pacific states, especially in access to their labour markets for workers with a wide range of skills, markets for Pacific produce, and support for Pacific (rather than Australia-New Zealand, or ANZ) development objectives. There is less allegiance to colonial legacies and much more concern to meet locally defined agendas and objectives.
- Environmental change is accelerating throughout the region, partly as a result of demographic changes, both population growth and decline (abandoned plantations and mine sites); partly as a result of the transformations in land use (especially more intensive cultivation), exploitation of forests and fisheries, problems of pollution and waste disposal; and partly as a result of longer-term systemic change in the atmosphere, the lithosphere and the oceans. The warming of the oceans and changes in climate are having significant implications for coastal communities where most Pacific peoples now live. These environmental changes will have significant effects on population movement, both within and between countries, movements that have been occurring for some time already in different parts of the region and which will intensify significantly in future.
- The strengthening 'Melanesian spearhead' group is becoming much more prominent in Pacific affairs and is increasingly challenging the political influence that Australia and New Zealand, and their smaller Polynesian neighbours, have previously had in a wide range of regional organizations over the past 50 years; especially the South Pacific Commission (now the Secretariat of the Pacific Community) and the Pacific Islands Forum, in

101 Note of the editors: Setting up a business in the Pacific can be fraught with obstacles, including for women (IFC, 2010). However, there are many examples of successful female entrepreneurs in the Pacific Islands, whose stories have been collected in a publication by the World Bank Group (see IFC, 2010).

particular its secretariat in Fiji. Fiji's military dictatorship is playing off 'Pacific' versus 'ANZ' interests in the region and encouraging disengagement with their southern neighbours. Asian political and economic interests are supporting this realignment of influence and forcing an increase in the development assistance offered by ANZ in the region. Concerns about corruption in governments, deteriorating levels of compliance with regulations and laws, growing civil unrest, and increasing crime and violence, have generated new labels for Melanesia, as an arc of instability, a neighbourhood of fragile states, and a potential security problem for ANZ. These labels have had negative impacts on flows of people into the region, especially tourists and business people from Australia and New Zealand, as well as flows out. There is increasing pressure for opportunities to get education and jobs off-shore as services deteriorate at home and options for the future seem to be becoming more constrained and limiting rather than more attractive, especially for children.

- Australia and New Zealand, along with the other 'rich' nations have enhanced their border security considerably since 2000 (Moriarty, 2008). For Melanesians especially there is a growing sense of 'fortress ANZ', that it is not easy to get residence approval in the two countries and that with small diaspora of indigenous Melanesian peoples in the two countries (except Fijians) it is difficult to work the family reunion/sponsorship categories of immigration policy (Bedford and Hugo, 2012). Looking ahead it is extremely important that ANZ does not become perceived as a 'fortress' by residents in neighbouring countries. Perceived permeability of borders to legal flows in an increasingly interdependent world is essential to avoid growth in illegal flows. This has been demonstrated clearly in Europe and North America where resorting to building walls has achieved very little in containing flows of undocumented migrants across borders. Australia especially faces increasing challenges from 'boat people,' but these are not 'boat people' from the Pacific. ANZ still have opportunities to develop relationships with Pacific neighbours that do not generate the sort of desperation that compels people to resort to 'boat people' strategies. But the next 30-40 years will be much more challenging compared to the previous 30-40 years. It will thus require very different levels of engagement with Melanesians, both with those remaining at home, as well as with new immigrants, than have been typically characteristic since the end of the colonial era.

13.7 Conclusion

In considering the future of regional integration and migration agreements in the Pacific it is necessary to remember that Pacific countries vary considerably in the scale and nature of migration pressures and in their degree of access to labour markets in high income countries. Much of Micronesia and the Northern Pacific have longstanding migration networks with, and relatively easy access to, the United States. On the other

hand, the greatest pressures for migration will be in Melanesia, especially Papua New Guinea, Solomon Islands and Vanuatu and the channels available for migration, especially for low-skilled workers who constitute a great majority, are extremely limited. There are clearly problems of coherence with such varying contexts and interests. Nevertheless, there has been an increase in regional integration occurring through institutions like the Pacific Forum and there is an increasing consideration of migration issues in those fora, as manifested in the Pacific Immigration Directors' Conference. The existing regional institutions have the important advantage in that most include both the mainly 'sending' PICTs and the mostly receiving Pacific Rim countries. Hence there are existing institutions where there is a dialogue and longstanding relationships around a range of political, economic, development, security and cultural issues and they are the most appropriate fora for the consideration of migration issues.

There is no other major global region where migration has been so significant in its economic impact and this will continue in the future. It is important too that migration is not viewed as a 'silver bullet' solution to the development of the Pacific. There are already situations where migration has been perceived in this way and this led to the ignoring of other options (Connell, 2003). Migration can play an important facilitating and supportive role in development, but it is not a substitute for good governance and social development policy.

Hayes, (2010, pp. 74-75) has argued that there is currently very weak capacity to address migration issues in the Pacific, and that this is evident in the lack of consideration of international migration in the National Sustainable Development Strategies of all but one of the countries of the region. He puts forward the following as the main reasons for a lack of capacity in planning for international migration in the region at the individual country level.

- International migration is a politically sensitive issue in some countries and for this reason planners may be reluctant to address the issue in much depth.
- A lack of familiarity with recent international developments in the migration field, particularly the changing perspectives on the links between migration and development that have gone some way towards legitimizing migration as a development strategy, rather than perceiving it as a sign of 'national failure'.
- The belief that migration policy is essentially determined by the receiving countries and that there is little that countries of origin can do to influence these policies.
- The absence of any reference to international migration in the Millennium Development Goals (MDGs) that have provided the framework for development planning in the region over the past decade (Haberkorn, 2007/08).
- The lack of up to date population policies that would have provided a context in which the role of international migration could be reviewed.
- The lack of a Regional Consultative Process on Migration (RCPM) or a Country Reporting System (CRS) that have been initiated in other world regions.

- The absence of a recent and comprehensive study of international migration in the Pacific.
- Limited attention paid to international migration by international and regional development agencies.
- A reduced role of development planning in the context of economic and political reform.
- Data collection systems that fail to capture key dimensions of population movement and insufficient analysis of the data that do exist.

Many of these 'national' capacity issues, however, apply across the region and would benefit from region-wide initiatives, greater regional integration on migration issues, and strengthening of regional institutions and processes on migration.

The result of Free Trade agreements, PACER Plus and PICTA, will have an influence not only on trade in the Pacific but potentially on migration as well. Walmsley et al. (2005) have modelled bilateral migration flows in the Pacific region resulting from liberalization under GATS mode 4 negotiations. They show that a 1 per cent increase in quotas of unskilled labour from PICTs to Australia and New Zealand would result in an increase in welfare in the Pacific, but a similar increase in skilled migration would reduce welfare in the absence of capacity-building efforts.

Pacific Island leaders are attempting to use the PACER Plus negotiations as a way of opening up Pacific Rim labour markets to low-skilled workers from PICTs and these pressures are likely to continue. It is important, however, that dialogue and discussion on Pacific migration are not confined to the FTA negotiations. The potential of migration to not only provide partial solutions to building demographic and economic pressures in the Pacific but to bolster and facilitate development efforts demands a broader approach. The role of existing institutions, like the Pacific Forum, in developing coherence and integration of efforts to develop and harness migration is important but there is also scope for the development of a regional consultative process, building on the Pacific Immigration Directors' Conference initiative, focusing specifically on migration and involving not only PICTs but Pacific Rim countries as well.

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14

Migration, free movement and regional integration: concluding remarks

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14.1 Introduction

The purpose of this volume has been to present an overview of the various ways in which different regional arrangements are dealing with free movement as an issue. The regional level has shown itself to be increasingly important in international migration management. More so than national migration regimes, the regional management of migration appears to offer a more comprehensive answer to the questions posed by today's complex and constantly changing international migration flows. Necessarily, international migration involves more than one state; cooperation between neighbouring states is therefore imperative. In addition, the fact that a multilateral (global) agreement on free movement appears still to be a distant prospect means that the regional level may present a more realistic avenue for international migration management.

In two ways, all the regional arrangements considered in this publication are similar. First, they are all characterized by a certain degree of (formal) institutionalization. Second, these arrangements all –either through a legal mandate in the field of movement of people, or through the situation of the issue on their agenda – consider the movement of people to be an issue of relevance. At the same time, the regional arrangements surveyed are separated by very considerable differences. In large part this is because the states of every regional arrangement are responding to the specific nature of the movement of people in their region, assigning varying degrees

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of importance to its various aspects. These aspects include not just free movement policies[7], but also ancillary issues such as the mutual recognition of qualifications, the human rights of migrants and their families, and the portability of social security rights. As a result, there are perhaps as many different approaches to the issue as there are regions.

In this, the concluding chapter, we make an assessment of these various regional approaches, grouping them according to their shared characteristics and identifying key cleavages relating both to their policies and to their degrees of success. We also provide a note on the gender perspective of migration processes in the various regions. Finally, we reflect on the future of regional migration approaches and formulate suggestions for further research.

14.2 Commonalities and cleavages

The similarities between the regional arrangements reviewed here are few, but they deserve mention. First, all of the arrangements considered within this volume are characterized by a degree of formal institutionalization. From the North American Free Trade Agreement (NAFTA) to the Pacific Islands Forum (PIF) to the East African Community (EAC), they are all serviced by at least a secretariat, if not by other institutions too. Second, for all of them the movement of people is considered to be an issue of relevance. Whether because of a legal mandate or because of the placing of the issue of the movement of people onto the regional agenda, states have attempted to manage the movement of people through regional solutions based on regional arrangements.

That said, there are a number of ways in which the regional arrangements surveyed clearly differ in relation to the management of the movement of people. Three in particular stand out; these are: the levels of socio-economic inequality of their Member States; their level of formal institutionalization; and the way in which they or their Member States have sought to frame free movement as an issue.

14.2.1 Socio-economic inequality

As stated at the beginning of this volume, economic imbalances within a region can constitute significant challenges for free movement. It is clear from the contributions to this publication that the memberships of many regional arrangements are cleft by socio-economic divides. Where this is the case, meaningful progress towards the regional management of the movement of people appears to become less likely[8]. As

7 These policies themselves cover the rights to entry, residence, work and establishment, both temporary and permanent, for students, various classes of workers (from low-skilled to high-skilled) and individuals (regional citizens and third country nationals).

8 The Commonwealth of Independent States is an obvious exception. Significant socio-economic inequalities did not prevent the instauration of a relatively generous free movement regime over the course of the 1990s.

an obstacle to the development of regional approaches to the movement of people, socio-economic disparities were particularly cited in the contributions covering North America, the Pacific, Southern Africa and East Africa, and to a lesser extent in the chapters on the Association of Southeast Asian Nations (ASEAN) and the Caribbean Community (CARICOM). However, those arrangements riven by deep socio-economic divisions may be contrasted with others, among them the Common Market of the South (MERCOSUR), the Andean Community (CAN), the Economic Community of West African States (ECOWAS) and the European Union (EU), where inequalities, although evident, are less pronounced, and do not appear to constitute the major obstacle to the development of regional policies to manage the movement of people[9]. Further along the scale lies the Gulf Cooperation Council (GCC), where fairly equal levels of social and economic development have resulted in only limited movement across borders within the region, which has facilitated the development of a fairly comprehensive free movement regime for regional citizens (if not for third country nationals). It is clear therefore that regional arrangements are characterized by differing levels of socio-economic inequality, with implications for the development of regional regimes to manage the movement of people.

14.2.2 Formal institutionalization

The degree of formal institutionalisation of these regional arrangements also varies greatly. At one end of the scale sits the EU, with a powerful central secretariat in the form of the European Commission endowed with an exclusive right of initiative for policy proposals and responsibility for the implementation of a wide range of legislation. At the other end lies the North American Free Trade Agreement (NAFTA), very lightly institutionalized and entirely intergovernmental, its secretariat divided into country sections and virtually confined in its responsibilities to dispute settlement. Between the two extremes lie a host of other regional arrangements, including ASEAN, the GCC, MERCOSUR, and others, with varying levels of institutionalization. At the same time, while institutionalization varies, the Member States of most of the regional arrangements examined tend to hold realist, sovereignist attitudes towards regional integration. These states are more inclined to sign consensus-based protocols and conventions to regulate free movement, rather than delegate the proposal and implementation of policies to a supranational body. The EU is the obvious exception to this group. Its high degree of institutionalization appears to have supported the successful formulation and implementation of a comprehensive regional regime for the management of the movement of people; indeed, the case of the EU may hint at a positive correlation between the two (institutionalization and progress towards regional free movement).

9 The most recent enlargements of the EU have increased socio-economic inequalities and have therefore also led to more political tensions concerning free movement from East to West.

14.2.3 Framing free movement

There is also a rift concerning the ways in which free movement has been framed as an issue by the memberships of regional arrangements reviewed. For some regional arrangements free or facilitated movement has been linked to the liberalisation of trade in services, especially those falling under Mode 4 of the General Agreement on Trade in Services. As such, the management of movement at the regional level has been conceived of as necessary to deepen regional economic integration. This is certainly the case for NAFTA and for ASEAN, and might also be argued for the pre-Schengen Agreement EU[10]. As stated in the introduction, neither NAFTA nor ASEAN consider the general free movement of people an objective; the free movement of skilled labour is instead regarded as instrumental to the regions' economic integration processes. By contrast, the Member States of other regional arrangements, while still promoting free movement as an economic benefit, also appeal to ideals of regional identity to argue for reinforced regional management of migration. To a large degree, this is due to specific histories and cultures, with regional identity forged by religious or ethnic similarities, common struggles or shared memories of bloody conflict. Under this category might be grouped the GCC, MERCOSUR, the CAN, the CIS and the EU (since Schengen at least)[11]. That the Member States of these arrangements have generally made more progress in developing protocols and legislation to regulate free movement might owe something to the importance they attribute to regional identity.

14.2.4 Migration and gender

In the introduction the social dimension of free movement was identified as a significant challenge for the regional arrangements surveyed here; special attention has therefore been given throughout this volume to the gender dimension of international and intra-regional migration. Presented here is a short overview of the trends, similarities and differences of female migration in the various regions examined.

The Feminization of Labour Migration

Both globally and regionally there has been a significant increase of women participating in labour migration processes over the last few decades. However, the major change that has occurred in the previous decades is not that more women are

10 The management of movement at the regional level of these areas can therefore be associated with the 'first generation of regionalism', as defined in the introduction, where regions link the liberalization of movement to economic activity and the integration of labour markets.

11 The attitude of the Member States of these regional arrangements are consistent with the 'second generation of regionalism' defined in the introduction, based on the idea that economic integration cannot be separated from other political, social or cultural developments. Also mentioned in the introduction, the EU can in addition be associated with the 'third generation of regionalism', which implies that regions are assuming a political role on the world stage through the development of common migration policies towards both third country nationals inside the territory of regional arrangements and would-be immigrants seeking to enter from outside.

crossing borders[12]; it is that women are increasingly migrating independently in search of economic opportunities, rather than traveling as a dependant with husbands or other family members, or subsequently joining them abroad. We have discussed evidence that supports this conclusion among most of the reviewed regions – especially those in Africa – and it marks an essential development compared with previous migration patterns. The GCC is an exception, since most working women there enter the region accompanying a family member and find a job upon arrival.

Main Employment Categories

Migrant women and men usually end up in a highly gendered labour market. Whereas migrant men usually find employment as labourers in the construction, fisheries or agricultural sectors, migrant women mainly work as domestic workers, as well as in entertainment and commerce. On the other hand, more skilled migrant women often respond to the high demand for teachers or caregivers in rich countries. This is aggravating the ongoing 'brain drain' of less developed countries, for women dubbed 'the gender brain drain'[13]. In African regions, women are also broadly active in cross-border trading activities. Worldwide, female migrants often take up employment in the informal sector, for lack of better options.

The Effect of Migration on Women's Status

Migration, by either a woman or her husband, can have significant implications for a woman's status – both within the household and within society – and can also alter how a woman perceives her own status. A migrating woman can find economic and social independence by migrating for job opportunities. Migration can also be a way to escape patriarchal societies and unequal gender relations, to postpone marriage and family life, or even to find a new partner. When a woman's husband migrates, she usually becomes head of the household, which often entails more independence, new daily responsibilities, and new roles within the family and even society at large.

Human Trafficking

It has become clear that women and young girls are the most at risk for human trafficking and are also the biggest victims of this form of abuse. In every reviewed region, trafficking was mentioned, showing how widespread the phenomenon is. The gender-segregated labour market again plays a role in this. Female labour migrants often perform 'women's work', as nannies, maids and sex workers, occupations that are usually associated with poor working conditions. This puts women in a weaker position, which opens the door for exploitation, such as human trafficking. It is not

12 In 1990 48.8% of the world's total migrant stock was female; in 2013 this figure was 48.0% (UN, 2013). See also, UN-INSTRAW (2007).

13 See e.g. Dumont et al. (2007).

uncommon that women and young girls who are lured with promises of well-paid domestic jobs in more developed countries end up in forced labour or the sex industry upon reaching their destination. In these sectors, abuse, violence and exploitation are not uncommon. Migrant domestic workers, for example, are employed in a globally unregulated sector and regularly face abuse and human rights violations, such non-payment of wages, humiliation and sexual harassment. Although many regions are aware of the problem and are attempting to address the situation, the worldwide incidence of human trafficking shows that there is still a long way to go to tackle the problem and to protect victims.

Gender Protocols

In addition to scholars and academics, the Member States and institutions of regional arrangements are also increasingly aware of the important link between female migration and development. Most of them have acknowledged that the advancement of women can contribute to the development of the region and have therefore agreed on several pacts or protocols to take the living conditions and economic and social opportunities of (migrant) women into account when creating new policies.

14.3 The future of regional migration approaches[14]

The regional level can provide ways of addressing the free movement of people that are distinctly different to what could be accomplished at the global or national levels. In this section, the future of regional migration approaches will be examined.

In a couple of cases strong progress has been made in upgrading the management of migration to the regional level. The EU is the clear frontrunner in this regard, with full freedom of movement offered to workers, an open borders regime within the Schengen Area, a sophisticated mutual recognition regime, and a regional justice system to safeguard the rights of EU citizens as well as third country nationals. The GCC too has developed a fairly advanced regime, with free movement in the region offered to all GCC citizens, and a degree of transnational social security coverage[15]. Although faced with problems – not least the existence of the kafala system operating in the Gulf – these two arrangements stand as examples for the positive potential of regional solutions in managing migration flows.

In most other cases however, the situation looking into the future is less positive. This is not surprising; it was already acknowledged in the introduction to this volume that the establishment of a free movement area is a long-term and complex process offering challenges as well as opportunities. What is clear from the contributions to this volume is that states could do more to elaborate upon and implement existing regional conventions, protocols and treaties relating to the management of the

14 For a review of the state of the regions, examined in this paragraph, see annex 14.1.

15 However, as mentioned in before, GCC nationals rarely seek employment opportunities within the region, due to the fact that GCC Member States confer a higher status to own citizens.

movement of people. Although in some regions steps have been taken to address the implementation issue, several of the contributors have noted that in many of them the comprehensive implementation of existing agreements is still lacking. For these arrangements rhetorical support for free movement is not being underwritten by correct implementation; this is the case for ECOWAS, CARICOM and for the CAN, where – to a greater or lesser extent – certain necessary regulations still need to be adopted, and for ASEAN, where integration in services has a long way to go. It is hoped that with time the capacity of these states to make good on their commitments will increase.

For other regional arrangements, it is the attitudes of individual Member States that are stalling progress. Socio-economic divides and migratory pressures have reduced the willingness of certain states to liberalize free movement by working through regional frameworks. This is the case for Australia as part of the PIF and the US as a member of NAFTA, which have been unwilling to push forward regional approaches to migration management. In other regions this lack of political will appears more general and less concentrated on individual Member States; this is perhaps the case for MERCOSUR, and to an extent CARICOM. Barring radical change in their migratory contexts, the management of movement at the regional level looks unlikely to advance in these regions any time soon.

Unfortunately, for some areas the prospects for regional free movement appear bleak. Both the EAC and the SADC suffer from both problems of implementation and from the reluctance of powerful Member States to pursue free movement at the regional level (these are Kenya in the case of the EAC and South Africa as part of SADC)[16]. Meanwhile, in the CIS there are, according to Irina Molodikova, 'perhaps more grounds for pessimism than for optimism'. Here, the patchy implementation of regional conventions, the lack of legislative harmonization and the complications associated with Member State interactions – all combined with a general lack of political will – have made of the region the only one reviewed where the coverage of regional free movement agreements has actually shrunk. In fact, the CIS is a regional arrangement whose very future is in doubt. In this way, it can be grouped with Mercedes Eguiguren's 'CAN in crisis.' Both arrangements are struggling to find a balance with other regional arrangements – the Eurasian Economic Community (EURASEC) and the EU in the case of the CIS, MERCOSUR, the Pacific Alliance and the Union of South American Nations (UNASUR) in the case of the CAN – and to clarify their reasons for existing. The regional management of movement in both the former Soviet Union and the Andean regions will in all likelihood assume a new form in the future.

The future for the regional management of the movement of people is therefore mixed. While some regions are advancing, others are stalling, while a few appear to have ground to a halt. Mired progress, whether because of implementation deficits, a lack of political will, or both, is having concrete implications for the rights of migrant

16 It was also pointed out in the introduction that establishing a free movement area challenges the traditional role of the state, since the state is obliged to transfer some of its sovereignty to the regional level, something both Kenya and South Africa are reluctant to do.

workers and their families, border traffic-based economies, and services trade. With increasing migratory pressures resulting from population growth, technological innovation (related to communication and transportation), climate change, and a turbulent global economy, it is something that policy-makers will have to address as a matter of priority.

14.4 Future research

Every region has its own specificities to take into account when addressing the concept of free movement. Indeed, given the specific character of migratory movements in each region there are perhaps as many different approaches to the subject as there are regions. The authors of this volume have adopted very different approaches to conceptualize and analyse regional efforts to manage the movement of people at the regional level. Some, such as Carla Gallinati and Natalia Gavazzo in their chapter on South American regional arrangements, used a discursive approach to track the trajectory of regional action to manage migration[17]. Most looked at regional protocols and conventions[18], or else at regional legislation and case law[19]. The chapters also had different foci. Whereas some focused exclusively on intra-regional migration, others considered the fate of emigrants leaving the region, or else of immigrants entering. Finally, while some authors confined themselves to the consideration of regional initiatives, others examined national legislation with regional implications as well[20].

Different approaches and foci are appropriate for a volume such as this. They can help illuminate the differences between the free movement policies of such diverse regional arrangements. However, further research might consider adopting a single approach[21], to allow for a more direct comparison of regional migration initiatives through the formulation and testing of specific hypotheses. Research like this could contribute greatly to our knowledge about why and how states turn to regional solutions to manage migration, and about the obstacles that can arise in the process. Several questions touched upon by this volume might serve as starting points for researchers. For example, what conditions are conducive to the development of regional free movement policies? To what extent do socio-economic inequalities hinder collaboration? What is the effect of shared histories and/or culture on the formulation of regional initiatives for free movement? Further research is necessary to provide an answer to these questions. Potential also exists for further empirical research, for example regarding the attitude of citizens of regional arrangements

17 Morris also adopted elements of a discursive approach in his chapter on free movement in the Caribbean.

18 The case for Molodikova, Segatti, Kabbanji, Oucho.

19 In the case of De Bruycker in his chapter on the European Union and, to a lesser extent, Eguiguren in her contribution on the Andean Community.

20 Studer in her chapter on NAFTA and Molodikova in her chapter on the CIS.

21 Within this single approach research, one could also give attention to the various arrangements, directed at the various skills levels of migrants and their living and working conditions.

towards immigrants from within the region[22], or on the responsiveness of (regional) migration policies to the emergence of new migration patterns and actors[23]. Finally, great potential exists also for quantitative analysis depending on the availability of more and better data on migration flows, including intra-regional migration flows (Ceccorulli et al. 2010; De Lombaerde, Guo and Póvoa Neto, 2014).

This volume has given us new insights into how regional arrangements are dealing with the free movement of people. In presenting a broad, multi-approach overview of the topic, it has allowed for an appreciation of the diversity of regional approaches to migration management. These approaches are responses to diverse migratory contexts, and are shaped by socio-economic inequalities, the levels of formal (regional) institutionalization and the framing of the issue of free movement by states and supranational bodies. Crucially, this volume has also identified the key stumbling blocks in the road towards regional free movement. The research undertaken as part of this publication will hopefully open the door to further research on this timely and important topic.

14.5 Annexes

Annex 14.1

Review of the current state of the regional arrangements and implications for the future

Region	Reason
Exemplary cases of strong progress in the management of migration to the regional level	
EU	• Full freedom of movement offered to workers • Open borders regime within Schengen Area • Sophisticated mutual recognition regime • Prohibition laws for discrimination against EU citizens on the basis of nationality
GCC	• Free movement for all GCC citizens • A degree of transnational social security coverage
Cases lacking implementation of existing agreements	
ECOWAS	Lacking comprehensive implementation of the agreed upon arrangements
CARICOM	Lacking comprehensive implementation of the agreed upon arrangements
CAN	Several necessary regulations still need to be adopted
ASEAN	Higher integration in services is needed

22 In his chapter on the EAC, Oucho highlighted the lack of research that has been undertaken on the attitudes of the community's citizens towards migrants from within the region.

23 On the latter, see e.g. De Lombaerde, Guo and Póvoa Neto (2014).

Region	Reason
Cases lacking political will for further progress	
PIF	Australia is less willing to liberalize free movement due to socio-economic divides within the region
North America	The US is less willing to liberalize free movement due to socio-economic divides within the region
MERCOSUR	General political will of the Member States is lacking for further progress
CARICOM	General political will of the Member States is lacking for further progress
Cases with lack of implementation as well as good progress on agreements	
SADC	Lack of comprehensive implementation as well as unwillingness from South Africa to progress on free movement due to socio-economic divides within the region
EAC	Lack of comprehensive implementation as well as unwillingness from Kenya to progress on free movement due to socio-economic divides within the region
CIS	• Patchy implementation of regional conventions • Lack of legislative harmonization • Complications with the Member States' interactions • General lack of political will

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MIGRATION, FREE MOVEMENT AND REGIONAL INTEGRATION

In 2015, more than 244 million people were living away from their country of birth. Many of these had chosen a new residence within the frontiers of organizations within their own region, where human mobility has been increasingly stimulated by regional integration – a global trend interwoven with economic liberalization and enlarged markets.

This publication documents from a cross disciplinary perspective the different approaches to free movement by some thirty regional organizations in Africa and the Middle East, the Americas and the Caribbean, Europe and Central Asia, and Asia and the Pacific. It also presents a comparative review of the various measures taken and the obstacles encountered, to highlight current and emerging trends.

Beyond the research community, these findings will be essential to decision-makers from the organizations under review and the United Nations system, as well as to policy-makers and civil society actors.

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