

## **CARIM INDIA – DEVELOPING A KNOWLEDGE BASE FOR POLICYMAKING ON INDIA-EU MIGRATION**

Co-financed by the European Union

### ***Reaching Out – The External Dimension of the EU’s Migration Policy*** **A Comparative Study on India and Australia**

**Katharina Eisele**

**Anja Wiesbrock**

CARIM-India Research Report 2013/12

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**Developing a knowledge base for policymaking on India-EU migration**

**Thematic Report**  
**Case Study**  
**CARIM-India RR2013/12**

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**A Comparative Study on India and Australia**

**Katharina Eisele<sup>(1)</sup> and Anja Wiesbrock<sup>(2)</sup>**

PhD Candidate at the Faculty of Law, Maastricht University (1);  
University Lecturer at the Faculty of Law, University of Oslo (2)

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European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy

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## **CARIM-India – Developing a knowledge base for policymaking on India-EU migration**

This project is co-financed by the European Union and carried out by the EUI in partnership with the Indian Council of Overseas Employment, (ICOE), the Indian Institute of Management Bangalore Association, (IIMB), and Maastricht University (Faculty of Law).

The proposed action is aimed at consolidating a constructive dialogue between the EU and India on migration covering all migration-related aspects. The objectives of the proposed action are aimed at:

- Assembling high-level Indian-EU expertise in major disciplines that deal with migration (demography, economics, law, sociology and politics) with a view to building up migration studies in India. This is an inherently international exercise in which experts will use standardised concepts and instruments that allow for aggregation and comparison. These experts will belong to all major disciplines that deal with migration, ranging from demography to law and from economics to sociology and political science.
- Providing the Government of India as well as the European Union, its Member States, the academia and civil society, with:
  1. Reliable, updated and comparative information on migration
  2. In-depth analyses on India-EU highly-skilled and circular migration, but also on low-skilled and irregular migration.
- Making research serve action by connecting experts with both policy-makers and the wider public through respectively policy-oriented research, training courses, and outreach programmes.

These three objectives will be pursued with a view to developing a knowledge base addressed to policy-makers and migration stakeholders in both the EU and India.

Results of the above activities are made available for public consultation through the website of the project: <http://www.india-eu-migration.eu/>

*For more information:*

CARIM-India

Robert Schuman Centre for Advanced Studies (EUI)

Convento

Via delle Fontanelle 19

50014 San Domenico di Fiesole

Italy

Tel: +39 055 46 85 817

Fax: + 39 055 46 85 770

Email: [India-EU.Migration@eui.eu](mailto:India-EU.Migration@eui.eu)

**Robert Schuman Centre for Advanced Studies**

<http://www.eui.eu/RSCAS/>

## **Abstract**

This paper seeks to examine the external dimension of the EU's migration policy by concentrating, first, on the EU's legal framework in the area of migration followed by an analysis of the policy developments under the GAMM. In a second step, this paper depicts the EU relations with India and Australia, respectively, in terms of migration matters with a view to explore how the EU has defined its current positions towards these two third countries in form of a comparative case study. India and Australia have been selected for an analysis because the migration flows prevailing in each state vary and the level of economic development differs notably. While Australia has always been an immigration country and maintains traditional ties with the European continent, India has only recently emerged as a major country of emigration to the EU. Yet, the EU constitutes a major partner for both countries. Finally, some conclusive remarks are made on the diverging migration rules for third-country nationals from India and Australia.

## I. Introduction

In recent years the “external dimension” of the EU’s migration policy has been high on the agenda of EU policy makers and of Member States’ representatives alike. But it was in fact at the beginning of the 1990s – more than 20 years ago – that the European Commission emphasised that population movements would continue and that migration had a European dimension which called for internal and external policy action.<sup>1</sup> Gradually, the awareness rose that there was a necessity to develop a common European migration policy; this awareness included the understanding that a successful immigration policy does not only compose of an internal set of legislation applicable to individuals from outside of the EU, but equally required an external approach addressed to countries of origin and transit. Against this background the EU has sought to establish partnerships with third countries with the objective to enhance dialogue and cooperation concerning a wide variety of migration-related issues. Since the entry into force of the Treaty of Amsterdam in 1999 the EU has obtained competences to adopt EU secondary legislation in the field of immigration and asylum. The European Council proclaimed the objective of creating a common European immigration policy at the Tampere summit in the same year, where the EU Heads of State and Government stressed building partnerships with countries of origin and transit in order to manage migration flows more effectively. In 2005, such policy makers adopted the so-called “Global Approach to Migration”, which promotes synergies between migration, external relations and developmental policies on the European level in order to deal with the subject-matter in an integrated and comprehensive manner. The Commission revised the Global Approach and renamed it “Global Approach to Migration and Mobility” (GAMM) in 2011.<sup>2</sup>

The steady increase of migratory movements constitutes a phenomenon that not only the EU has to cope with. The general trend can be observed that more countries are significantly affected by migration flows, and the categories of migrants have multiplied creating a considerable impact on politics at the regional, national and international level.<sup>3</sup> With this in mind, it comes as no surprise that Europe and the Asia-Pacific region are characterised by migratory flows which have, in the past, been under constant growth.<sup>4</sup> This paper seeks to examine the external dimension of the EU’s migration policy by concentrating, first, on the EU’s legal framework in the area of migration followed by an analysis of the policy developments under the GAMM. In a second step, this paper depicts the EU relations with India and Australia, respectively, in terms of migration matters with a view to investigate how the EU has defined its current positions towards these two third countries in form of a comparative case study. India and Australia have been selected for an analysis because the migration flows prevailing in each state vary and the level of economic development differs notably. While Australia has always been an immigration country and maintains traditional ties with the European continent, India has only recently emerged as a major country of emigration to the EU. Yet, the EU constitutes a major partner for both countries. Finally, some conclusive remarks are made on the diverging migration rules for third-country nationals from India and Australia.

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<sup>1</sup> European Commission Communication: SEC(91) 1855 final, 23.10.1991.

<sup>2</sup> European Commission Communication: COM(2011) 743 final, 18.11.2011.

<sup>3</sup> Castles, S./Miller, M., *The Age of Migration – International Population Movements in the Modern World*, 4<sup>th</sup> ed., Basingstoke, Palgrave Macmillan, 2009, pp. 2-12. Castles also lists the feminisation of migration and the proliferation of migration transition as general trends.

<sup>4</sup> See Massey, D.S. *et al.*, *Worlds in Motion: Understanding International Migration at the End of the Millennium*, Oxford, Clarendon Press, 1998, pp. 108-133 and 160-195, as well as Massey, D.S./Taylor, J.E., *International Migration – Prospects and Policies in a Global Market*, Oxford, Oxford University Press, 2004, pp. 77-103.

## II. The EU Legal Framework on Migration

### A. Title V of the Treaty on the Functioning of the European Union (TFEU)

The EU for the first time acquired competence to adopt rules in the area of migration law with the entry into force of the Treaty of Amsterdam in 1999. However, for the following decade, the legislative provisions on migration law in the EC Treaty continued to feature a number of particularities.<sup>5</sup> These were finally abandoned with the Lisbon Treaty, which entered into force on 1 December 2009.

Prior to the entry into force of the Lisbon Treaty, matters of justice and home affairs were divided between Title IV of the first (Community) pillar (asylum, immigration, visas, and judicial cooperation in civil matters) and the third pillar (police and judicial cooperation in criminal matters). Justice and home affairs, which now fall mainly under the Community method of decision-making, are dealt with in Title V TFEU. In principle, the Commission enjoys the exclusive right of legislative initiative. Qualified majority voting has become the usual voting method in the Council and the co-decision making procedure (known as the “ordinary legislative procedure”) applies in most areas of justice and home affairs.<sup>6</sup> Moreover, the Court of Justice of the European Union has eventually received full jurisdiction in respect of almost all matters of justice and home affairs.<sup>7</sup>

Articles 77 to 80 TFEU deal with policies on border checks, asylum and immigration. Article 77 TFEU specifies that the Union shall develop an internal/external border control policy by adopting a number of measures such as a common visa policy, external border checks, and the conditions under which third-country nationals shall have the freedom to travel within the Union for a short period. Article 79 TFEU constitutes the new legal basis for adopting measures on legal migration. Paragraph 3 of Article 79 TFEU introduces, for the first time, an explicit reference to the conclusion of readmission agreements with the countries of origin. Concerning economic migration, Article 79(5) TFEU provides that the right of Member States to determine volumes of admission of labour migrants will not be affected.

### B. The EU Visa Regime

While collaboration on visas was intergovernmental under the 1985 Schengen Agreement<sup>8</sup>, the Treaty of Amsterdam endowed the EU with the competence to adopt measures on short-term visas (now Article 77(2)(a) TFEU). On the basis of this provision, the EU has enacted secondary legislation including rules for a visa format<sup>9</sup> and harmonising measures for the issuance of visas.<sup>10</sup> In April 2010

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<sup>5</sup> For the previously applicable rules see footnotes 5 and 6; see also Peers, S., “The EU Institutions and Title IV”, in S. Peers and N. Rogers (eds.), *EU Immigration and Asylum Law*, The Hague, Martinus Nijhoff Publishers, 2006, pp. 47-80.

<sup>6</sup> Until 2004, the Commission shared the right to propose legislation with the Member States and almost all measures under Title IV EC required unanimous approval of the Council. In addition, the participation of the European Parliament was, in some fields, restricted to consultation. With the lapse of the five-year transitory period, the co-decision procedure and qualified majority voting in the Council was introduced with regard to most measures under Title IV EC. Unanimity in the Council was still required concerning legislative instruments that deal with legal migration.

<sup>7</sup> Previously, the jurisdiction of the Court under the third pillar was limited, primarily due to the fact that the principles of direct effect and primacy of EU law did not apply. Moreover, even under the former Title IV of the first pillar, preliminary rulings of the ECJ could only be sought if there were no national legal remedies available (see Article 68 EC).

<sup>8</sup> See also the Convention implementing the Schengen Agreement of 1990, which stipulates detailed rules on a number of issues, including the harmonisation of visa policies.

<sup>9</sup> See Council Regulation No 1683/95 of 29 May 1995 laying down a uniform format for visa as well as subsequent amending Council Regulations No 334/2002 of 18 February 2002; No 333/2002 of 18 February 2002; No 856/2008 of 24 July 2008.

a Community Code on Visas entered into force, which contains rules for the processing of applications and requirements for obtaining a visa for the Schengen area. The legal framework for short-stay Schengen visas consists of three main instruments: Regulation (EC) No 539/2001 listing third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempted from that requirement; Regulation (EC) No 810/2009 establishing a Community Code on Visas and Regulation No 1683/95 laying down a uniform format for visas.

The Visa Code lays down criteria for issuing short-stay and transit visas. It applies to all nationals of third countries who are required by Council Regulation 539/2001<sup>11</sup> to be in possession of a visa when crossing EU external borders. A short-stay visa is valid for no longer than three months in any six-month period. The Code lies down the procedures and conditions for issuing visas, including which state is responsible,<sup>12</sup> the procedure and deadline for submitting and examining visa applications,<sup>13</sup> visa fees<sup>14</sup> and reasons for refusal.<sup>15</sup> Article 2 defines three types of visas which allow for entry to the territory of the EU: (1) “uniform visa” – valid for the entire territory of the EU; commonly called “Schengen visa”; (2) “visa with limited territorial validity” – valid for the territory of one or more Member States; called also “national visa”; (3) “airport transit visa” – valid for transit through the international transit areas in the airports of the Member States. Uniform visas can be issued in the form of single or multiply entry visa and have a validity of between six months and five years.<sup>16</sup>

Council Regulation No 539/2001 introduced, in conjunction with the “black list” enumerating the states whose nationals must be in possession of a visa when crossing the Member States’ external borders, a second “white list” identifying the states whose nationals are exempted from a visa requirement. Both lists have been subject to several modifications moving countries from one list to the other and *vice versa*.<sup>17</sup> The criteria as to whether a country is listed on Annex I or II the Regulation, and as a consequence which third-country nationals do or do not require a visa to enter the Schengen area could be described as vague and general, possibly leading to arbitrary treatment in practice. According to Recital 5 of the Regulation, this decision is governed by “a considered, case-by-case assessment of a variety of criteria relating *inter alia* to illegal immigration, public policy and security, and to the EU’s external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity”. The first assertion is that the visa list breaches the principle of non-discrimination taking into account that the visa requirement is in particular imposed on states that have a large black or Muslim population.<sup>18</sup> A second contention is that this approach involves a “virtual delocalisation” of frontiers for third-country nationals who must be in possession of

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<sup>10</sup> See Peers, S., *EU Justice and Home Affairs Law*, 2<sup>nd</sup> ed., Oxford, Oxford University Press, 2006, pp. 162-165. The so-called Common Consular Instructions stipulated some basic changes of the incorporated visa Schengen rules. These rules will be replaced by the new visa code that aims to simplify and amend the current system. The visa code was adopted by the Council on 25 June 2009 and entered into force on 5 April 2010. Article 25 of the new code enables Member States to circumvent Schengen rules by opening up the possibility of national visas to become valid for several Schengen states.

<sup>11</sup> Council Regulation No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

<sup>12</sup> Articles 4 to 7 of the Visa Code.

<sup>13</sup> Articles 9–13 and 18–30 of the Visa Code.

<sup>14</sup> Articles 16 and 17 of the Visa Code.

<sup>15</sup> Article 32 of the Visa Code.

<sup>16</sup> Article 24.1 of the Visa Code.

<sup>17</sup> For more information, see Peers, S./Rogers, N., *EU Immigration Law and Asylum: Text and Commentary*, Leiden, Nijhoff, 2006, pp. 185-200 as well as Council Regulation No 1932/2006 of 21 December 2006 amending Council Regulation No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

<sup>18</sup> Peers, S., *EU Justice and Home Affairs Law*, 2<sup>nd</sup> ed., Oxford, Oxford University Press, 2006, p. 167 and Guild, E., “The Border Abroad – Visas and Border Controls”, in K. Groenendijk/E. Guild/P. Minderhoud (eds.), *In Search of Europe’s Borders*, The Hague, Kluwer Law International, 2003, pp. 87-104.



a visa in order to enter the Schengen area. These individuals face the first frontier in their own country, notably at a Schengen consulate, where the important decision will be taken as to whether or not be admitted. This “border shifting” which entails that the admission decision is taken before the actual journey starts, constitutes part of the Schengen strategy.<sup>19</sup>

In order to monitor visa reciprocity, which shall ensure the exemption from visa requirements for all parties concerned, a reporting system was installed.<sup>20</sup> Despite the progress on visa reciprocity within Australia, the country still violates the reciprocity principle. The Commission monitors the implementation of the new eVisitor system closely as the fifth and sixth Commission reports on “certain third countries' maintenance of visa requirements in breach of the principle of reciprocity” demonstrate.<sup>21</sup> The Commission made clear that “in principle the eVisitor provides equal treatment of the citizens of all Member States and Schengen associated countries” and that “the average autogrant percentage remains very high.” Yet, the Commission highlighted also that “the reports show that due to Australia’s integrity concerns applications by citizens of some Member States are mainly processed manually in order to allow for additional examination.”<sup>22</sup>

The Visa Information System (VIS) also forms part of the EU visa regime.<sup>23</sup> It provides a system for the exchange of visa data between Member States so as to facilitate the visa application procedure, to prevent fraud, and to enhance border control.<sup>24</sup> However, it is questionable whether the prevention of threats to internal security merely plays a ‘secondary role’, rather than serving as the primary objective of visa facilitation.<sup>25</sup> Arguably, the VIS, as a supplement to the Eurodac database, is designed to play a major role in the combat against terrorism and the protection of internal security.<sup>26</sup> The Regulation also raises concerns regarding the protection of the data of migrants and the abuse of control mechanisms by national security authorities. Even though Chapter IV of the Regulation enumerates a number of rights with regard to data protection, it is unclear to what extent third-country nationals will be able to enforce such rights.<sup>27</sup>

The Union has also entered into agreements with some third countries with a view to facilitating or waiving the issuance of visa for their nationals.<sup>28</sup> However, such agreements were mainly concluded in exchange for the signing of EU readmission agreements (see below). Moreover, it has been underlined

<sup>19</sup> Guild, E./Bigo, D., “La mise à l’écart des étrangers – La logique du Visa Schengen”, in *Cultures & Conflits*, 2003 (49), pp. 82-95.

<sup>20</sup> See Council Regulation No 851/2005 of 2 June 2005 amending Council Regulation No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism.

<sup>21</sup> Fifth progress report, European Commission Communication: COM (2009) 560 final, 19.10.2009; Sixth progress report, European Commission Communication: COM (2010) 620 final, 5.11.2010.

<sup>22</sup> Sixth progress report, European Commission Communication: COM (2010) 620 final, 5.11.2010.

<sup>23</sup> Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

<sup>24</sup> Article 2(a)-(d) of Regulation No 767/2008.

<sup>25</sup> For this opinion, see Hobbing, P./Koslowski, R., The Tools Called to Support the ‘Delivery’ of Freedom, Security and Justice: A Comparison of Borders Security Systems in the EU and in the US, *European Parliament Briefing Paper*, February 2009, p. 8.

<sup>26</sup> Meirlaen, M., “Biometrische en elektronische identificatoren en privacy”, in G. Vermeulen (ed.), *Privacy en strafrecht. Nieuwe en grensoverschrijdende verkenningen*, Antwerpen, Maklu, 2007, p. 345.

<sup>27</sup> Guild, E./Carrera, S./Faure Atger, A./Wiesbrock, A., *An Area of Freedom, Security and Justice for the EU: Testing Fundamental Rights Compliance of European Law on Immigration, Borders and Asylum*, (forthcoming).

<sup>28</sup> As of 21.12.2012, EU visa facilitation agreements were concluded with the Republic of Albania, Bosnia and Herzegovina, the Republic of Montenegro, the Former Yugoslav Republic of Macedonia, the Republic of Serbia, the Republic of Moldova, the Russian Federation, Georgia and Ukraine; EU visa waiver agreements were concluded with Antigua and Barbuda, Barbados, the Commonwealth of the Bahamas, the Federation of Saint Kitts and Nevis, the Republic of Mauritius, and the Republic of Seychelles.

that whilst facilitating travel opportunities for citizens of third countries, the visa facilitation agreements are being undermined by the tightening of border control in the wake of the Schengen enlargement process.<sup>29</sup>

### III. The External Dimension of EU Migration Law and Policy

One aspect of EU migration law which has gained increasing importance in recent years is the “external dimension” of EU migration policies – that is, the link between EU migration law with other policies, in particular development and foreign policy.

#### A. The Global Approach to Migration and Mobility

The European Council first explicitly mentioned the Global Approach to Migration in December 2005.<sup>30</sup> Emphasis was put on the need to effectively manage migration by improving the cooperation between Member States and by intensifying the dialogue with the countries of origin, as well as EU neighbouring states. In a Communication of October 2008, the Global Approach to Migration is defined as the external dimension of the EU's migration policy based on partnerships with third countries.<sup>31</sup> The Global Approach had initially three dimensions consisting of legal economic migration, irregular migration, and migration and development. In November 2011 the Commission amended the Global Approach into “Global Approach to Migration and Mobility” (GAMM).<sup>32</sup> The GAMM is said to be more strategic and efficient strengthening the mobility of third-country nationals across the EU's external borders. The GAMM should be firmly embedded in the EU's external foreign policy, and be implemented by the Commission, the EEAS and the Member States.<sup>33</sup> In context of the task of fully integrating the Global Approach into the EU's other external policies and guaranteeing coherency, it has been pointed out that “considerable work still needs to be undertaken to ensure coherence and synergies between the (admittedly still) fledgling external dimension of the EU's immigration policy and its internal dimension.”<sup>34</sup> The GAMM has added a fourth dimension dealing with international protection, and the GAMM is contended to be migrant-centred focusing on the needs, aspirations and problems of individuals. The Commission pointed out that the human rights of migrants are a cross-cutting theme that concerns all four dimensions. As regards the geographic coverage, the GAMM aims to be truly global covering all interested and relevant partners.

In the context of legal economic migration, mobility partnerships were introduced by the Commission in May 2007. These are political agreements between a number of EU Member States and third countries concluded with the goal to promote legal migration opportunities such as regulated short-term stays for the respective third-country nationals.<sup>35</sup> However, some argue that due to the predominance of security in the driving rationale of these partnerships, they should rather be called ‘security partnerships’ for the EU Member States and ‘insecurity partnerships’ for the liberty and rights of third-country nationals.<sup>36</sup>

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<sup>29</sup> Trauner, F./Kruse, I., EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood, *CEPS Working Document No. 290*, April 2008.

<sup>30</sup> See Presidency Conclusions of the Brussels European Council, 15 and 16 December 2005.

<sup>31</sup> European Commission Communication: COM (2008) 611 final, 8.10.2008.

<sup>32</sup> European Commission, COM(2011) 743, 18.11.2011.

<sup>33</sup> European Commission, COM(2011) 743, 18.11.2011, pp. 3-5.

<sup>34</sup> Cholewinski, R., “The External Dimension of the EU Immigration Policy”, in M. Maes/ M.-C. Foblets/P. De Bruycker (eds.), *External Dimensions of EU Migration and Asylum Law and Policy*, Bruxelles, Bruylant, 2011, pp. 485-500.

<sup>35</sup> European Commission Communication: COM (2007) 248 final, 16.5.2007.

<sup>36</sup> Carrera, S./Hernández i Sagraera, R., The Externalisation of the EU's Labour Immigration Policy. Towards Mobility or Insecurity Partnerships?, *CEPS Working Document No. 331*, October 2009, pp. 35-36; see also Reslow, N., The New

Mobility partnerships to date have been concluded with Cape Verde<sup>37</sup>, the Republic of Moldova<sup>38</sup>, Georgia<sup>39</sup>, and Armenia.<sup>40</sup> Negotiations are underway with Ghana, Morocco, Tunisia, and Egypt, while the talks on a mobility partnership with Senegal stalled in 2009.<sup>41</sup>

The readmission agreements with third countries are the main external policy tool addressing irregular migration.<sup>42</sup> These agreements aim to facilitate the return of a person residing without authorisation in a Member State.<sup>43</sup> The accords on readmission are reciprocal - an aspect which has been labelled as hypocritical, as the partner states have as a general rule no problems with the expulsion of EU Member States' nationals.<sup>44</sup> As an incentive to enter into readmission agreements with the Union, third countries are offered visa facilitation arrangements and trade concessions. With regard to migration and development, no concrete measures have been adopted. The Commission has encouraged Member States to adopt measures stimulating economic development in the countries of origin. Possible measures include the reduction of fees for the transmission of remittances and the engagement of diaspora communities with countries of origin.

In the ambitious Stockholm Programme adopted on 11 December 2009, the European Council emphasised the importance of the external dimension of the EU's policy in the area of freedom, security and justice.<sup>45</sup> It called for the consolidation, development and implementation of the Global Approach and stressed the need to balance the three policy dimensions.

## B. EU External Competences in the Field of Migration

Prior to the introduction of the European External Action Service (EEAS) no less than four Directorates-General (DGs) of the Commission were concerned with the administration of the Union's external relations, including DG Development (now DG Devco), DG Trade, DG Enlargement and DG External Relations (now replaced by the EEAS). It was the Treaty of Lisbon that established the EEAS, a diplomatic service, to provide the EU with a more visible image on the international plane. The EEAS assists the High Representative of the Union for Foreign Affairs and Security Policy who conducts the Union's common foreign and security policy, as well as the common security and

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Politics of EU Migration Policy: Analysing the Decision-Making Process of the Mobility Partnerships, 2010, Paper presented at the IS-Academy conference 'Migration: A World in Motion', Maastricht, 18-20 February 2010.

<sup>37</sup> Europa Press Release IP/08/894: The European Union and Cape Verde enter into a mobility partnership, 5.6.2008.

<sup>38</sup> Europa Press Release IP/08/893: The European Union and the Republic of Moldova enter into a mobility partnership, 5.6.2008.

<sup>39</sup> Europa Press Release IP/09/1853: The European Union and Georgia enter into a mobility partnership, 30.11.2009.

<sup>40</sup> Council of the European Union, Joint Declaration on a Mobility Partnership between the European Union and Armenia, 3121<sup>st</sup> Justice and Home Affairs Council Meeting, Luxembourg, 27-28 October 2011.

<sup>41</sup> Reslow, N., "The Role of Third Countries in EU Migration Policy: The Mobility Partnerships", 14 *European Journal of Migration and Law* (2012), 393-415, p. 395.

<sup>42</sup> As of 21.12.2012, thirteen EU readmission agreements were concluded with the Republic of Moldova, Bosnia and Herzegovina, Georgia, Pakistan, the Republic of Montenegro, the Republic of Serbia, the former Yugoslav Republic of Macedonia, Ukraine, the Russian Federation, the Republic of Albania, the Democratic Socialist Republic of Sri Lanka, the Macao Special Administrative Region of the People's Republic of China and the Government of the Hong Kong Special Administrative Region of the People's Republic of China.

<sup>43</sup> Peers, S./Rogers, N., *EU Immigration Law and Asylum: Text and Commentary*, Leiden, Nijhoff, 2006, p. 881.

<sup>44</sup> Trauner, F./Kruise, I., EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood, *CEPS Working Document No. 290*, April 2008, p. 9.

<sup>45</sup> The Stockholm Programme is the third multi-annual policy programme in the area of freedom, security and justice. See Council of the European Union, "European Council 10/11 December 2009 Conclusions", document number: EUCO 6/09 of 11 December 2009.

defence policy.<sup>46</sup> The policy area of migration is explicitly identified as one of the global challenges, which the EEAS aims to tackle.

In compliance with the principle of subsidiarity, a legal basis is a precondition for the Union to take action. Competences can be expressly laid down in the Treaty or they can be implied, as the Court has held in the famous *ERTA*-case.<sup>47</sup> Express external powers relate for instance to the Common Commercial Policy or the conclusion of association agreements. According to the jurisdiction of the Court of Justice of the European Union, international agreements concluded by the Community under Articles 300 and 310 EC (now Articles 218 and 217 TFEU) form an integral part of Community law.<sup>48</sup> In *Demirel* the Court ruled that it can construe the provisions of such agreements, even those that deal with migration, and that a provision in these agreements can be directly applicable, if the respective provision is clear, precise, and unconditional.<sup>49</sup> In numerous instances individuals invoked such provisions of international agreements, which specify the free movement of workers, services and establishment, in particular on the basis of the EU Turkey Association Agreement and its secondary legislation.<sup>50</sup>

With the Treaty of Lisbon the EU has moreover received the express competence to conclude readmission agreements with the third countries (Article 79(3) TFEU). Generally speaking, the external dimension of Articles 77 and 79 TFEU is striking considering that these provisions almost exclusively refer to third-country nationals, although they provide primarily for the adoption of internal legislation. As the Union's powers in the field of migration and asylum are restricted, and only minimum standards can be defined, the competence in this area is shared between the Union and the Member States.<sup>51</sup> Under Article 3(2) TFEU, the Union has the exclusive power to conclude international agreements when its conclusion is provided for in a legislative act, or is necessary for the Union to exercise its internal competence, or when its conclusion affects common rules.

#### IV. Case Studies: India and Australia

Having outlined the EU's legal framework on migration as well as having provided a synopsis on the external dimension of the EU migration law and policy, this section contains the case studies on India and Australia. These case studies include an overview of migration rules in both countries with respect to the EU and *vice versa*. Importantly, some third-country nationals hold a privileged status owing to their nationality. This becomes noticeable when comparing for example the divergent rules for entry to the territory of an EU Member State.

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<sup>46</sup> Articles 18 and 27 (3) TEU.

<sup>47</sup> ECJ, Case 22/70 *Commission v. Council (ERTA)* [1971] ECR 263, para. 16.

<sup>48</sup> ECJ, Case 181/73 *Haegeman* [1974] ECR 449, para. 5.

<sup>49</sup> ECJ, Case 12/86 *Demirel* [1987] ECR 3719, paras. 7-12 and 14.

<sup>50</sup> See Peers, S., "EU Migration Law and Association Agreements", in B. Martenczuk and S. van Thiel (eds.), *Justice, Liberty, Security: New Challenges for EU External Relations*, Brussels, VUBPress, 2008, pp. 53-87.

<sup>51</sup> Eeckhout, P., *External Relations of the European Union – Legal and Constitutional Foundations*, Oxford, Oxford University Press, 2004, p. 134.

## A. India

### 1. EU-India Relations

India was one of the first countries to initiate diplomatic relations with the EEC in the 1960s.<sup>52</sup> The political dialogue between the EU and India only gained momentum in the 1990s with the adoption of a Joint Political Statement in 1993 and a Cooperation Agreement in 1994.<sup>53</sup> Since then annual EU-India summits have been conducted, most recently in Marseille on 29 September 2008.<sup>54</sup> In 2005, the India-EU Strategic Partnership Joint-Action Plan<sup>55</sup> was adopted in conjunction with a commitment to improve the economic relations. The EU is India's largest trading partner, accounting for almost one quarter of India's total trade (23 percent in 2007) and one of the largest sources of foreign direct investment. Amongst the EU's trading partners, India ranks number 10, contributing to about 1.8 percent of the total EU trade.<sup>56</sup> Negotiations for an EU-India free trade agreement were launched in June 2007, but due to a slow negotiation process the agreement is not expected to be signed until the end of 2010. In 2008, the partners adopted a Joint Work Programme on climate change, and cooperation in the field of education<sup>57</sup>, and India also participates in EU development cooperation programmes.<sup>58</sup> The EU's "Country Strategy Paper" for India 2007-2013<sup>59</sup> focuses on development cooperation in the areas of health, education and the implementation of the Joint Action Plan.

### 2. Migration between the EU and India: An Overview

Migration from Europe to India occurred mainly at the height of the British Empire, when British citizens moved to India, giving rise to an Anglo-Indian community. The number of Europeans living in India rose to about 150 000 persons in the late 19<sup>th</sup> century.<sup>60</sup> On the contrary, Indian migration to Europe started relatively late, remaining peripheral and transitory until the Second World War. However, from the late 1950s onward the movement of Indian nationals to Europe became increasingly substantial and permanent. Four waves of immigration of Indian citizens to Europe can be identified.<sup>61</sup> The first wave consisted of Indian migrants who had initially moved to the colonies of the European powers as indentured labourers. The second wave of Indian migration, called the "new diaspora" movement, occurred mainly during the 1960s and 1970s. The high demand for labour stirred by the economic reconstruction after the Second World War, and the facilitation of labour migration to Western Europe

<sup>52</sup> Caillouet, M., *European Union's Vision for India*, 2002, Meeting on "Destination West Bengal", Kolkata, 9 November 2002.

<sup>53</sup> Cooperation Agreement between the European Community and the Republic of India on Partnership and Development of 27 August 1994, OJ L 223/24.

<sup>54</sup> See EU-India Joint Press Communique, Marseille, 29 September 2008, available at [http://ec.europa.eu/external\\_relations/india/sum09\\_08/joint\\_communique\\_2008\\_en.pdf](http://ec.europa.eu/external_relations/india/sum09_08/joint_communique_2008_en.pdf).

<sup>55</sup> The India-EU Strategic Partnership Joint Action Plan of 7 September 2005, available at: [http://ec.europa.eu/external\\_relations/india/docs/joint\\_action\\_plan\\_060905\\_en.pdf](http://ec.europa.eu/external_relations/india/docs/joint_action_plan_060905_en.pdf).

<sup>56</sup> Singh, K., *India-EU Free Trade Agreement: Should India Open Up Banking Sector?*, 2009, p. 10.

<sup>57</sup> Joint Work Programme, EU-India Cooperation on Energy, Clean Development and Climate Change 2008, available at [http://ec.europa.eu/external\\_relations/india/sum09\\_08/climatechange\\_workprog\\_2008\\_en.pdf](http://ec.europa.eu/external_relations/india/sum09_08/climatechange_workprog_2008_en.pdf) and Joint EU-India Declaration on Education of 12 November 2008, available at: [http://ec.europa.eu/education/external-relation-programmes/doc/jdindia\\_en.pdf](http://ec.europa.eu/education/external-relation-programmes/doc/jdindia_en.pdf).

<sup>58</sup> Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financial instrument for development cooperation.

<sup>59</sup> Available at: [http://ec.europa.eu/external\\_relations/india/csp/07\\_13\\_en.pdf](http://ec.europa.eu/external_relations/india/csp/07_13_en.pdf).

<sup>60</sup> Richards, E., *Britannia's Children: Emigration from England, Scotland, Wales and Ireland Since 1600*, London, Hambledon Continuum, 2004, p. 268.

<sup>61</sup> See Giri, D.K., "Indians in Europe", in B. Vivekanandan/D.K. Giri (eds.), *Contemporary Europe and South Asia*, New Delhi, Concept Publishing Company, 2001, pp. 177 ff.

encouraged many professional and skilled Indian migrants to settle in Europe.<sup>62</sup> A third wave of migration of highly skilled professionals, such as doctors, engineers and scientists occurred in the 1980s. At that time, the restrictive immigration rules of the European countries already prohibited the migration of semi- or unskilled labour from developing countries to the EU. The fourth wave of immigration in the 1990s was dominated by Indian Internet Technology (IT) software specialists.

Today, Europe has a large Indian diaspora comprising approximately 5 to 8 percent of the entire European population. According to Eurostat estimates<sup>63</sup>, Indian nationals were the fourth largest group of non-EU immigrants in the EU-27 in 2006. Most people of Indian origin live in Western Europe, particularly in the UK. In fact, the UK accounts for two thirds of the Indian community in the EU, with a diaspora totalling nearly 1.2 million.<sup>64</sup>

### 3. *The Framework for Cooperation in the Field of Migration*

EU-India cooperation in the field of migration has intensified gradually but there is little in terms of hard law in this area. In 2000, the India-EU Joint Working Group on Consular Issues was set up in order to enhance cooperation in facilitating the movement of people between India and the EU. The 2005 Strategic Partnership Joint-Action Plan<sup>65</sup> emphasises the importance of migration and consular issues. However, the actual commitments merely relate to holding dialogues on migration matters and to carrying out joint studies on skill shortages and demographic profiles. India has also started to conclude bilateral social security agreements providing for exemption from social security contributions for migrant workers with a short-term contract and/or exportability of pensions at the event of relocation. Such an agreement was first concluded with Belgium in 2006, followed by agreements with the Netherlands and Germany.<sup>66</sup> In addition, the Indian government has signed a Memorandum of Understanding on the conclusion of a labour mobility partnership agreement with Denmark to promote cooperation including employment facilitation and organised entry.<sup>67</sup> Undoubtedly, India's stature as a major source country of highly skilled migrants has increased. In March 2009 the Ministry of Overseas Indian Affairs organised a conference with a view to conclude a EU-India mobility partnership in the years to come. While the notion of "mobility partnership" has not been used anymore recently, it is clear that the EU and India have both high ambitions to intensify collaboration on migration issues as evidenced at the National Consultation Workshop that took place on 6-7 September 2012 in New Delhi bringing together government representatives of India and the Member States, as well as EU officials, academics, and other stakeholders who discussed how safe and legal migration could be facilitated and irregular migration could be prevented.<sup>68</sup>

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<sup>62</sup> Whereas most migrants moved to the UK, other major destination countries included Germany, the Netherlands, France and Belgium.

<sup>63</sup> Available at: <http://ec.europa.eu/eurostat>.

<sup>64</sup> Sinhvi, L.M. *et al.*, *Report of the High Level Committee on the Indian Diaspora*, 2001, Government of India, Ministry of External Affairs, p. 138.

<sup>65</sup> The India-EU Strategic Partnership Joint Action Plan of 7 September 2005, available at: [http://ec.europa.eu/external\\_relations/india/docs/joint\\_action\\_plan\\_060905\\_en.pdf](http://ec.europa.eu/external_relations/india/docs/joint_action_plan_060905_en.pdf).

<sup>66</sup> Ministry of Overseas Indian Affairs (MOIA), *Annual Report 2007-08*, 2008, p. 9.

<sup>67</sup> Press release: "India and Denmark agree over labour mobility" of 19 June 2009, available at [http://www.thaindian.com/newsportal/india-news/india-and-denmark-agree-over-labour-mobility\\_100206908.html](http://www.thaindian.com/newsportal/india-news/india-and-denmark-agree-over-labour-mobility_100206908.html).

<sup>68</sup> National Consultation Workshop on Facilitating Safe and Legal Migration and Preventing Irregular Migration, 6-7 September 2012 at The Claridges, New Delhi.

#### 4. Entry to and Residence in EU Member States for Indian Citizens

In accordance with Article 1(1) and Annex I of Regulation (EC) No 539/2001, Indian nationals must hold a visa when crossing the external borders of the EU. Under Article 18 of the Convention implementing the Schengen Agreement, short-stay visas with a validity of up to three months that are issued by a Schengen state are valid for the entire Schengen area.<sup>69</sup> A single-entry Schengen visa with a validity of up to 90 days costs €60 (INR 4 374).<sup>70</sup>

Visas for visits exceeding three months remain subject to national procedure and allow the holder to stay in the visa-issuing Member State only.<sup>71</sup> On the basis of Council Directive 2009/50/EC highly-skilled Indian migrants will be able to acquire a residence permit for up to four years in one of the Member States bound by Title V TFEU.<sup>72</sup> Apart from this new “EU Blue Card scheme”, several Member States have introduced preferential admission policies for highly skilled migrants. Examples are the points-based system introduced in the UK in 2008, the Dutch “knowledge migrant scheme” and the admission of highly qualified migrants under Section 19 of the German Residence Act. Indian citizens have been amongst the largest group of non-EU labour migrants making use of such highly skilled migrant schemes. For instance, one-third of the total number of 5200 “knowledge migrants” residing in the Netherlands in 2007 was of Indian origin.<sup>73</sup>

The costs for staying in one of the Member States of the EU for a period of more than three months depend on the legislation of the host Member State, and the purpose of residence. For example, the costs for a provisional residence permit (mvv) in the Netherlands vary from €750 (INR 54 676) to enter as a highly skilled migrant to €250 (INR 18 225) for the purpose of staying with a family member or a relative.

#### 5. Entry to and Residence in India for EU Citizens

In order to enter India, European citizens require a valid passport and valid Indian visa obtained from an Indian Embassy or Consulate before entry. Visitors are generally granted a multi-entry visa with a validity of six months from the date of issuance. In recent years the visa collection and delivery services in several European countries have been outsourced to private visa agencies. For example, since 1 November 2007 Dutch nationals have to obtain their visa from one of the two visa agencies: Indian Visa Service (IVS) or Visumdienst India. The outsourcing of visa services has also led to an increase in visa fees. For example, €15 of the total visa fee of €65 for a 6 month multiple-entry visa is a service charge, whilst €50 constitutes consular fees.<sup>74</sup> The same applies to residents of certain federal states in Germany, where visa services have been outsourced. For instance, residents of Bremen, Hamburg and Niedersachsen have to pay a total fee of €63,50 for a 6 month tourist visa, €13,50 of which are service fees.<sup>75</sup> By contrast, in other federal states, where visa request are handled by the Embassy or Consulates, that same type of visa can be obtained for a fee of €50.<sup>76</sup>

<sup>69</sup> It is crucial to note that the UK and Ireland do not participate in the Schengen cooperation and maintain autonomous visa, immigration and asylum policies.

<sup>70</sup> See for instance Section 46 of the German Residence Ordinance.

<sup>71</sup> Section 2.2 of Part I of the Common Consular Instructions on Visas.

<sup>72</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

<sup>73</sup> IND, *Monitor Kennismigranten 2008*, available at [www.ind.nl](http://www.ind.nl).

<sup>74</sup> See website of the Indian Visa Services at [http://www.indianvisaservice.nl/pages/NL/tourist\\_visa.php](http://www.indianvisaservice.nl/pages/NL/tourist_visa.php).

<sup>75</sup> See the website of the IGCS: [http://www.igcsvisa.de/IGCSHAMBURG/deu\\_igcsham\\_visa.htm](http://www.igcsvisa.de/IGCSHAMBURG/deu_igcsham_visa.htm).

<sup>76</sup> See for the rates of visa fees the website of the Indian Embassy in Berlin at <http://www.indianembassy.de/>.

## B. Australia

### 1. The EU-Australia Relations

The relationship between the EU and Australia is characterised by strong historical and cultural ties that have laid the foundations for close political, economic and social cooperation. The European Commission considers Australia and the EU as “like-minded partners”, who, in principle, assume the same stance on pivotal subject-matter in the international arena.<sup>77</sup> Both partners share the common principles of democracy, the respect for fundamental freedoms and human rights, and the rule of law. The bilateral economic collaboration also contributes to a keen partnership. For over two decades the EU has been Australia’s largest trading partner: recent figures indicate that Australian trade with the EU amounted to 17 percent in 2008.<sup>78</sup> Finally, there has been a strong interest on both sides in reinforcing collaboration in the fields of education, technology and science, development assistance, counter-terrorism action and visa reciprocity. The establishment of three EU centres at Australian universities, as well as the launching of Erasmus Mundus scholarships to encourage higher education mobility represent the most vivid examples in the area of education.<sup>79</sup> The 2008 EU-Australia Partnership Framework provides for a 12 to 18 month action plan for cooperation between the partners on a broad variety of issues including the movement of people. The document is a mere political statement and hence, not legally binding. However, in 2010 Prime Minister Gillard suggested a further upgrade of the partnership- officials from both sides have started discussions on this proposal in 2011.

### 2. Migration between the EU and Australia: An Overview

The expansionist movements of European colonisers reached the Australian continent in the 15<sup>th</sup> century. Driven by imperialistic intentions, settlers from Europe reorganised aboriginal societies and civilisations in one of the most distant part of the New World from a European perspective.<sup>80</sup> Thus, the phenomenon of migration intrinsically links Australia and Europe. The migration flows between the EU and Australia today are significant. Undoubtedly, the European ancestry borne by a large percentage of the Australian population plays a major role in this respect. According to the Australian government, approximately 1.3 million European citizens travel to Australia on an annual basis, whereas around 1 million Australian tourists come to Europe.<sup>81</sup> In the time period from July to December 2008, most settler arrivals – 20.1 percent – came from Europe.<sup>82</sup> Permanent immigration to Australia has increased steadily in recent times. Under the 2007-08 Australian Migration Programme 158 630 entries were registered, which represents the largest number in two decades. The Migration Programme facilitates the temporary or permanent entry or stay of persons with a view to contributing as a positive force to economic, social and demographic challenges prevailing in Australia.<sup>83</sup> The

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<sup>77</sup> See website of the EEAS on the EU-Australia relations: [http://eeas.europa.eu/australia/index\\_en.htm](http://eeas.europa.eu/australia/index_en.htm).

<sup>78</sup> Europa Press Release MEMO/09/289: EU-Australia Trade in Facts and Figures, 23.6. 2009. See also website of the European Commission, DG Trade, Bilateral Trade Relations with Australia: [http://ec.europa.eu/trade/issues/bilateral/countries/australia/index\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/countries/australia/index_en.htm).

<sup>79</sup> See website of the EEAS on the EU-Australia relations: [http://eeas.europa.eu/australia/index\\_en.htm](http://eeas.europa.eu/australia/index_en.htm) and Europa Press Release IP/09/1068: 10 000 Erasmus Mundus Scholarships for 2009-2010, 1.7.2009.

<sup>80</sup> Moran, A., *Australia – Nation, Belonging, and Globalization*, New York, Routledge, 2005, pp. 1 and 133.

<sup>81</sup> See website of the Australian Government, Department of Foreign and Trade Affairs: Australia’s Relation with the EU, available via: [http://www.dfat.gov.au/geo/european\\_union/eu\\_brief.html](http://www.dfat.gov.au/geo/european_union/eu_brief.html).

<sup>82</sup> See “Immigration update – July to December 2008” p. 3 published by the Australian Government, Department of Immigration and Citizenship in May 2009, available via: <http://www.immi.gov.au/media/publications/statistics/immigration-update/update-dec08.pdf>.

<sup>83</sup> See Chapter 2 on the Migration Program, in: “Population Flows: Immigration Aspects 2007-08 Edition” published by the Australian Government, Department of Immigration and Citizenship in March 2009, available via: [http://www.immi.gov.au/media/publications/statistics/popflows2007-08/PopFlows\\_09\\_chp2.pdf](http://www.immi.gov.au/media/publications/statistics/popflows2007-08/PopFlows_09_chp2.pdf).



Programme consists of two main streams, a skill stream and a family stream, where the former is designed to respond to Australian labour market shortages. In this context, skilled migration has continued to grow, adding up to almost 70 percent of the total Migration Programme.<sup>84</sup>

Likewise, the EU constitutes an immigration destination. In 2010, citizens of countries outside the EU-27 made up 4 percent (20.1 million) of the total population residing in the EU Member States according to Eurostat data.<sup>85</sup> Nationals of Oceania totalled 0.7 percent of the EU-27 total foreign population in 2008.<sup>86</sup> Approximately 26 000 Australian nationals resided in the UK in 2006; they made up the fifth largest group of immigrants living in the UK.<sup>87</sup>

### 3. *The Framework for Cooperation in the Field of Migration*

As stated in the fifth paragraph of Recital 18 of the EU-Australia Partnership Framework, it is a common goal of the partners to facilitate the movement of people. This policy goal is more specifically addressed in Objective 5 of the Partnership Framework, which highlights two areas in this respect: enhanced mobility with regard to students and scholars, as well as collaboration on visa policies, in order to facilitate the travel scheme for citizens of both parties. These policy objectives have been partially implemented, as explained below. Among the measures envisaged: enhancement of border security, the security of global travel, and the identification of terrorists, criminals, and people traffickers and smugglers, as set out in Objective 1 of the Partnership Framework. Moreover, the EU and Australia have entered into 80 multi- and bilateral agreements, three of which deal with the movement of persons in a broader sense: firstly, the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime; secondly, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, both signed in 2000; and finally, the Agreement between the EU and Australia on the processing and transfer of European Union-sourced passenger name record data by air carriers to the Australian customs service, signed in 2008.<sup>88</sup>

### 4. *Entry to and Residence in EU Member States for Australian Citizens*

For stays of no more than three months, Australian nationals are excluded from the visa requirement in accordance with Article 1(2) in combination with Annex II of Council Regulation 539/2001. This basically means that Australian nationals need no visa to enter an EU Member State for semi-annual visits of three months, and that they can travel freely within the Schengen area during this time period. For stays which exceed the three month period, Australian nationals require authorisation from the Member State in which they reside or plan to reside. Consequently, for stays that exceed three months the national law of the respective Member State is applicable. The authorisation usually takes the form of a residence permit, and depending on the purpose of the stay, the type of residence permit can differ. While some Member States (e.g. Germany and the Netherlands) allow Australian nationals to apply for such a residence permit while on their territory, other Member States (e.g. France) require a

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<sup>84</sup> See "Immigration Update – July to December 2008" pp. 18 and 51 published by the Australian Government, Department of Immigration and Citizenship in May 2009, available via: <http://www.immi.gov.au/media/publications/statistics/immigration-update/update-dec08.pdf>.

<sup>85</sup> European Commission Communication: COM(2011) 291 final, 24.5.2011, p. 1.

<sup>86</sup> Vasileva, K., Citizens of European Countries Account for the Majority of the Foreign Population in EU-27 in 2008, *Eurostat Statistics in Focus*, document number 94/2009, p. 2.

<sup>87</sup> Herm, A., Recent Migration Trends: Citizens of EU-27 Member States Become Ever More Mobile While EU Remains Attractive to Non-EU Citizens, *Eurostat Statistics in Focus*, document number 98/2008, p. 10.

<sup>88</sup> As of 21.12.2012, see EU Treaties Office Database: <http://ec.europa.eu/world/agreements/default.home.do>.

residence permit before departure from Australia.<sup>89</sup> It is notable that when applying for a residence permit for the purpose of family reunification, Australian nationals are generally exempted from pre-entry integration requirements, such as language and civic integration tests.<sup>90</sup> As a rule, Australian nationals are required to have sufficient funds and medical insurance for the intended duration of the stay. Next, they must not be considered a threat to public order or national security. Interestingly, the national visa fees vary considerably from Member State to Member State. For instance, the costs for a one to two year residence permit for Australian nationals for study purposes add up to €60 (\$AUD 103) in Germany<sup>91</sup>, whereas the fee amounts to €433 (\$AUD 754) for a one-year residence permit in the Netherlands. A student visa in the UK, which is not a Schengen state, costs €350 (\$AUD 450) for an Australian national.<sup>92</sup>

### 5. Entry to Australia for EU Citizens

EU citizens are required to hold a visa in order to be granted access to Australian territory. This visa, known as the eVisitor, is an electronically stored travel authority for which EU citizens must apply online at least two weeks before the envisaged date of travel. The eVisitor was established in October 2008 and is free of charge. Still, this practice breaches the principle of reciprocity as observed by the Commission in several reports. The Fifth Progress Report provides an overview of granted and refused eVisitor applications from October 2008 to June 2009. Though a high number of applications were granted automatically, a significant percentage was still processed manually, which requires the further monitoring of the new system.<sup>93</sup> If EU citizens want to spend more than three months in Australia, a different visa will be required. Again, the type of visa differs contingent upon the purpose of the stay.<sup>94</sup> Also, it is in principle necessary to have health insurance, sufficient financial means and to approve the Australian Values Statement. By comparison, EU citizens who wish to come to Australia to study have to pay approximately €440 for a student visa.

## C. A Comparative Analysis

It appears from the preceding comparison that there are substantial differences between migratory patterns and migration regimes between the EU and India on the one hand, and the EU and Australia on the other. Potential migrants from Australia are subject to more favourable rules than their Indian counterparts. This preferential treatment can be observed in respect to short-term as well as long-term stays. It also affects, to different degrees, all categories of migrants, including those moving for the purposes of employment, studies or family reunification.

In respect of short-term stays, Australians benefit from an exemption to the visa requirement under Regulation No 539/2001. They may freely enter and travel within the Schengen area for a period of up to three months. By contrast, Indian nationals must hold a visa when crossing the EU's external borders. Thus, they are faced with a visa fee of €60 and the bureaucratic process to obtain the visa.

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<sup>89</sup> See paras. 4 and 6 of the Exchange of Letters constituting an Agreement between the Government of Australia and the Government of the Republic of France relating to the Movement of Nationals between the Two Countries of 14 July 1998.

<sup>90</sup> See Wiesbrock, A./Schneider, H., Circular Migration and Mobility Partnerships, *Briefing Paper European Parliament February 2009*, available at: <http://www.ceps.eu/files/circular.pdf>.

<sup>91</sup> The exact validity period of the residence permit depends on the type and duration of the studies in accordance with Section 16(1) of the German Residence Act.

<sup>92</sup> See website of the UK Home Office, border agency: <http://www.ukba.homeoffice.gov.uk/visas-immigration/studying/adult-students/visa-fees/>.

<sup>93</sup> Fifth progress report, European Commission Communication: COM (2009) 560 final, 19.10.2009.

<sup>94</sup> For a detailed overview of the different types of visas, see: Vrachnas, J. et al., *Migration and Refugee Law – Principles and Practice in Australia*, 2<sup>nd</sup> ed., Cambridge, Cambridge University Press, 2008.

With regard to the acquisition of long-term residence permits, most Member States apply favourable rules to Australians wishing to acquire a residence permit for longer stays under national law. Interestingly, Australian citizens are in many cases exempted from pre-entry integration tests.<sup>95</sup> If Indian citizens wish to obtain a residence permit for a period of more than three months, the conditions applicable under national law are generally very demanding. Even though Directive 2003/86/EC provides for a certain degree of harmonisation in respect of the admission of family migrants, the provisions of the Directive are not applicable to the UK, the most important country of destination for Indian migrants. Moreover, other Member States have interpreted the provisions of the Directive restrictively, applying strict financial, residential and integration conditions to potential migrants.<sup>96</sup>

Seeing that integration abroad requirements apply exclusively to migrants from certain non-western countries, they are considered to amount to indirect discrimination on grounds of nationality.<sup>97</sup> According to the German government, the difference in treatment on grounds of nationality is justified, since Germany wishes to encourage the immigration of nationals from Australia.<sup>98</sup> The Dutch government argued that the countries whose citizens are exempted from the integration abroad requirement have a comparable level of economic, social and political development regarding other European countries. Therefore, it is contended that these countries do not pose the risk of causing massive inflows of migrants, which would in turn result in problems in respect of integration and social cohesion.<sup>99</sup> Australians are also exempted from other national immigration requirements, such as the participation in a medical examination of an infectious disease<sup>100</sup> and the acquisition of a provisional residence permit<sup>101</sup> before entering the Netherlands.

There are historical, demographic and socio-economic factors accounting for the difference in treatment between Indian and Australian migrants wishing to come to the EU. For centuries, Australia has had strong ties with the European continent, especially with the UK. Following British settlement and colonisation in the 18<sup>th</sup> century, Australia remained loyal to the Crown as a member of the New Commonwealth after its independence in 1901. Stimulated by the UK's accession to the EC in 1973, relations between the EU and Australia were strengthened thereafter. Demographically, it is notable that 98 per cent of the Australian population in the early twentieth century had migrated from Britain and Ireland.<sup>102</sup> Moreover, migration from continental Europe to Australia was frequent during the Second World War and in the immediate post-war years. As a consequence, up to today large parts of the Australian population have European ancestors. Therefore, personal contacts, ties and visits to family and friends have remained very strong. According to a former Australian Minister for Foreign Affairs, "no two countries in our respective regions know each other better, trust each other more, and have closer relationships than Australia and Britain"<sup>103</sup>. Additionally, socio-economic links have been fostered by the long-standing ties between Australia and the UK. Australia has long been dependent on farm exports to the UK and continues to rely on Europe as a major market for its agricultural products. With respect to migratory movements, for centuries migration flows between Australia and the EU

<sup>95</sup> See Section 30(1), third sentence, No. 4 of the German Residence Act.

<sup>96</sup> See Wiesbrock, A., *Legal Migration to the European Union*, The Hague, Martinus Nijhoff Publishers, 2010, pp. 111-113; see also ECJ case C-578/08 *Chakroun* [2010] ECR I-01839.

<sup>97</sup> Human Rights Watch, *The Netherlands: Discrimination in the Name of Integration*, 2008, available at: [www.hrw.org/background/2008/netherlands](http://www.hrw.org/background/2008/netherlands).

<sup>98</sup> Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Sevim Dagdelen, Ulla Jelpke, Karin Binder, weiterer Abgeordneter und der Fraktion DIE LINKE – Drucksache 16/5201 „Geplante Regelungen zum Familiennachzug“, Bundestags-Drucksache 16/5498, Berlin, p. 6.

<sup>99</sup> Memorie van Toelichting bij de Wet inburgering in het buitenland, *Kammerstukken II*, 2003/04, 29 700, no. 3, p. 19.

<sup>100</sup> Article 16(1)(e) of the Dutch Aliens Act.

<sup>101</sup> Article 17 of the Dutch Aliens Act.

<sup>102</sup> Kirk, N., "Why Compare Labour in Australia and Britain?", *Labour History* 88, 2005.

<sup>103</sup> Downer, A., *Australia and Europe: A Revitalised Relationship, Address to the Australia-British Chamber of Commerce*, Sydney, 17 September 1997.

have been dominated by Europeans settling on the Australian continent. There exist bilateral agreements on migration between Australia and a number of Member States, which are still in force and which date partly back to the 1950s and 1960s. Australia has concluded so-called “migration and settlement agreements” with Italy and Malta, and concluded agreements on assisted migration with Germany and the Netherlands.<sup>104</sup>

The ties between the EU and India are of a much more recent nature. Even though India was equally part of the British Empire in the first half of the twentieth century (1900-1947), economic and demographic links were not as extensive as in the case of Australia. EU-India relations, starting off in the 1960s, turned out to be delicate. Especially in the area of trade, agreement between the two partners has been difficult. Population movements between the EU and India also differ markedly from the migratory patterns dominating the EU-Australia relationship. Instead of temporary movements for the purpose of tourism, family visits and studies, migratory movements between the EU and India have traditionally been much more permanent in nature. Differences in the level of economic growth certainly play a vital role in this context.

## V. Conclusion

By introducing the GAMM, the EU demonstrates that it is not only aware of the new challenges that the complex phenomenon of migration today poses, but is also willing to address its global implications with an integrated strategy. However, not much has been done to date to transform the security-oriented approach concerning migration into a more balanced approach. Moreover, the entry and residence requirements for third-country nationals who wish to come to the EU differ considerably, which makes it difficult to speak of a common EU migration policy.

Migratory movements between the EU and Australia remain largely confined to migration for temporary purposes, such as tourism, studies or working and holiday schemes. The number of Australians wishing to settle permanently in the EU and *vice versa* remains relatively modest in spite of Australia's recent emergence as an attractive country for emigration. India, on the contrary is emerging as one of the most important source countries of highly skilled migrants coming to the EU. As European countries are redesigning their rules on labour migration in an attempt to attract highly qualified migrants to meet their labour market demands, Indian specialists are amongst the largest groups of beneficiaries. In addition, Australia and India differ markedly in terms of their state of economic development, which has shaped their position as partners of the EU. Trade and cultural relations are amongst the most important aspects of the EU's external relations with Australia, whereas India's relations with the EU are dominated by development cooperation concerns, with the negotiation of a free trade agreement proving difficult and controversial.

The question arises whether the difference in treatment and the restrictive rules applied to Indian nationals is set to change. According to estimations of T. Poddar and E. Yi, India's GDP will surpass that of the US before 2050, turning India into the world's second largest economy behind China.<sup>105</sup> If India advances to a major economic force and a free trade agreement between India and the EU is concluded, these developments are prone to affect migratory movements, and as a result, the prevailing migration rules. It is conceivable that Indian highly-skilled migrants will advance to a much desired “resource” in the years to come, with a potential positive and liberalising effect on migration rules in general.

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<sup>104</sup> See the Australian Treaty Database on the website of the Australian Government, Department of Foreign and Trade Affairs: <http://www.info.dfat.gov.au/treaties/>.

<sup>105</sup> Poddar, T./Yi, E., India's Rising Growth Potential, *Global Economics Paper No. 152*, 2007, p. 5.