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SPANISH LEADERSHIP IN DEVELOPING A “COMMON”  
EUROPEAN IMMIGRATION POLICY:  
AN INTERGOVERNMENTALIST SUPRANATIONALIZATION  
APPROACH

A Thesis

Presented in

Partial Fulfillment of the  
Requirements for the Degree of  
Master of Arts

June 2011

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# Chapter 1: Introduction

## Description of the Study

In this study, I examine the chronological development of a “common” European immigration policy and evolution of the Spanish immigration laws and the regularization programs with respect to illegal immigration and external border controls. By referring to a “common” policy, I point to an envisioned goal of creating a unified immigration policy, which has not yet culminated with final process of the supranationalization<sup>1</sup> of national policies. Thus, (the development of) a “common” immigration policy is synonymous with a pathway to the prospective, but still questionable, communitarization of national immigration laws.

After the chronological evolution of policies/laws at both the EU and national levels, I analyze the initiation of the harmonization in the mid-1980s within the lines of neofunctionalism and, from there on, the ongoing process of the communitarization of migration policies within the lines of supranationalism. Furthermore, I apply (liberal)<sup>2</sup> intergovernmentalism to the case study of Spain. I finally scrutinize how each of the analytical frameworks has played out in two-tier processes: 1) gradual empowerment of the EU institutions through official treaties, summits and programs; and 2) role of a member state in the communitarization of immigration policies.

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<sup>1</sup> In this context, supranationalization refers to an ultimate integration of policies, which then fall under day-to-day processes of policymaking at the EU level.

<sup>2</sup> I leave the word “liberal” in parenthesis because I reference both intergovernmentalism and its offshoot, liberal intergovernmentalism.

## **Background**

Negotiations for European integration<sup>3</sup> began almost immediately after World War II and resulted in the Treaty of Paris of 1951, which established the European Coal and Steel Community (ECSC). The main objectives of this historical document embodied the incremental, special-purpose economic integration of the signatory countries.<sup>4</sup> Many politicians envisioned the ECSC and the European Economic Community (EEC) of 1958 as building blocks of a full-fledged economic cooperation. Subsequently, the European Community<sup>5</sup> began to experience gradual socio-political integration, which over time has been legitimizing this phenomenal and historic European project. The Treaty of European Union of 1993 (TEU) represented a new stage of integration by opening a way to political unity. Initially, the member states had not anticipated integration of policy areas such as gender equality or environmental protection. Likewise, the highly contested topic of immigration has been the source of resentment and skepticism among national governments since an early attempt to “communitarize” migration policies in the 1980s. Completion of the ongoing initiative would empower the EU central institutions with decision-making and policymaking initiatives in a policy area that has long been regarded as too closely linked to the issue of sovereignty, hence too difficult to “communitarize.”

The ongoing European debate on unification of national immigration policies has now a very long history. The harmonization of the migratory regime

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<sup>3</sup> European integration refers to a transfer of policymaking power from the national to the supranational level.

<sup>4</sup> The signatory countries were France, West Germany, the Netherlands, Belgium, Luxembourg, and Italy.



for EU citizens and legal residents commenced in the 1980s with the Schengen Agreements of 1985 and the Single European Act (SEA) of 1987. Ever since, the process of the development of a “common” immigration policy has faced stagnation; some of the many member states have treated immigration issues as an essential part of their national sovereignty. Regardless of the observable stagnation, the “common” immigration policy rhetoric found outlets for gradual evolution. The nation states have progressively pooled and delegated their decision making to the EU institutions: the European Commission, the European Parliament, and the European Court of Justice. We may assert that the recent Treaty of Lisbon also strengthened the fervent debate on the envisioned communitarization of immigration policies.

A debate on a unified policy has been divided into several theoretical camps, including institutionalism and state-centrism. On the one hand, institutionalist theorists have emphasized the role of supranational institutions, the European Commission and the European Court of Justice, in directing the communitarization of national immigration policies. On the other hand, state-centric theorists have accredited the role of national governments in deciding on the degree of pooling domestic policies, based on their national interests, preferences and expectations. At a first glimpse, the process of the development of a potential “common” immigration policy seems to align with institutionalist theories due to evident, gradual empowering of the EU institutions over time. However, many would argue that the member states have continued to be the driving force behind deepening integration, awarding the EU institutions with

control only minimally and seeing them as mere facilitators in state and inter-state decision-making processes.

### **Importance of the Study**

Generally, scholars of European integration argue that Germany, France and the United Kingdom have steered economic, political and social development of the European Union. Similar assumptions hold with regards to formation of a unified migration policy. However, countries of the South have in fact significantly contributed to the process of shaping the EU migration rhetoric, mainly due to their geographical proximity to North Africa and the Middle East. As I argue in this study, Spain is, in fact, a leader in the debate on the process of the development of a “common” immigration policy, especially in the realm of illegal immigration and external border control. Such an observation shows that not only Berlin, Paris and London dictate the nature of the harmonization of case-sensitive policies. Spain’s socio-economic upheavals, large influx of immigrants, and geopolitical proximity to North Africa have accredited Spain as an important player in the decision-making process. Thus, Spain’s active advocacy for the communitarization of immigration policies has followed an intergovernmental pattern, emphasizing importance of this nation state’s preferences. Significance of domestic interests has been noticeable in the Spanish regularization programs, which have run counter to EU restrictive objectives.

### **Structure of the Study**

The paper comprises six chapters which are divided in smaller subchapters. Following this introductory chapter, chapter two is a brief literature

review, where I introduce key scholars of: neofunctionalism, supranationalism, and (liberal) intergovernmentalism; the timing of European cooperation and the process of harmonization in the area of immigration policy; the EU's influence on Spanish policymaking; and Spain's impact on EU objectives. I also introduce my own theoretical position and contribution to these field studies. Subsequently, chapters three and four constitute chronological approaches to the "common" immigration policy development and the national immigration laws respectively. In the former section, I focus on the European Community/Union<sup>6</sup> treaties, immigration policy-oriented summits, programs and other EU developments. In the latter chapter, I look at the Spanish immigration laws and the regularization programs, in addition to several national programs. I also outline possible rationales behind Spain's advocacy for a harmonized policy and its selective transposition of EU objectives.

Chapter five comprises applicability of theoretical frameworks. I examine neofunctionalist argumentation to the initiation of the harmonization process in the 1980s and relevance of supranationalism in the study of the "common" immigration policy development. I also incorporate an intergovernmentalist challenge to the discussed institutionalist theories. Furthermore, I look at liberal intergovernmentalism and its pertinence to Spain's role in the communitarization of immigration policies. Lastly, I scrutinize all theories and, based on my research, either negate or (partially) accept each of the theoretical frameworks.

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<sup>6</sup> In my work, I will use the term European Community (EC), instead of the European Union (EU) when referencing to the EU before 1993. After that year, I will utilize the term European Union due to the name change during the Treaty of the European Union (1993). At times, I will also use the two abbreviations at once, i.e. EU/EC when seen as necessary.

Finally, chapter six outlines analytical conclusions and adds any relevant remarks to the study.

### **Scope of the Study**

Due to the magnitude of the research topic, I introduce several parameters to it. For the purposes of the paper, my definition of immigration policies comprises illegal immigration, which is only one of the four politically defined categories of migration. Additionally, I take into consideration external border controls and legalization programs for illegal immigrants at a national level. I intend to study: the process of empowering of the EU institutions (through qualified majority voting in the European Council of Ministers and co-decision in the European Parliament) by the member states via the treaties, and the evolving nature of a “common” policy (restrictive or expansive). Thus, I mainly concentrate on the treaties, topic-specific summits, time-specific immigration programs, pacts and other migration- and external border-related establishments, which involve cooperation of the EU heads of government and state. I do not focus on directives, regulations, and recommendations in the chapter on the process of the “common” immigration policy development. Nonetheless, the chapter on the Spanish immigration law and the regularization programs incorporates such law-binding legislations<sup>7</sup> in order to trace the EU’s impact on the country’s national policies.

It is crucial to mention that I do not cover the process of Europeanization, which is a second wave of scholarship after the European integration.

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<sup>7</sup> Existing directives and regulations on immigration are a first step on a pathway to any unified policy.

Europeanization mainly defines a top-down process of a member state's adaptation to EU objectives. As referenced, the chapter on the evolution of the Spanish immigration law briefly refers to EU's influence on Spanish legislations. However, I do not need to apply a whole new theoretical approach to this relatively short section of the paper in order to define the role that the EU has played since the mid-1980s. My study focuses more on the bottom-up process between Spain and the EU institutions.

Moreover, I introduce a modified version of liberal intergovernmentalism as an analytical tool. Unlike Andrew Moravcsik, a prominent intergovernmentalist scholar, I place emphasis on the electorate, whose influence is omitted in the process of international negotiations. As I introduce my hypothesis below, I am fully aware of the theory's limitations.

Another delimitation of my work is a focus on a single case study. Some may argue that research conclusions should not be based on sole examination of legal developments in one nation state. However, I intend to reach a conclusion about the Spanish immigration law development and to see what light it sheds on the intrgovernmentalist-supranationalist dichotomy, rather than to make claims that may be applicable across the 27 member states. I argue that liberal intergovernmentalism has, in fact, been one of the most important contributors to the study of European integration and students of the development of a "common" immigration policy have marked this theory as viable.<sup>8</sup>

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<sup>8</sup>For example see Finn Laursen, "Theory and Practice of Regional Integration," *Miami-Florida European Union Center of Excellence: Jean Monnet/Robert Schuman Paper Series* 8, no. 3 (February 2008), <http://www6.miami.edu/eucenter/LaursenLongSympos08RegIntegedi.pdf> (accessed September 30, 2009).

## **Theoretical Foundations**

The examination of the Spanish immigration law and the regularization programs sheds light on socio-economic and political factors that have led to the amendment of immigration policies. It also unravels the Spanish government's relationship to a potential, evolving "common" immigration policy. Introduction of a case study allows us to get a deeper and fuller understanding of the harmonization of immigration policies and a role played by a particular member state in its process.

I use numerous data sources in this work. Due to the topic of my study, qualitative rather than quantitative data are more commonly presented. However, the latter is introduced when referring to particular official statistics related to a number of immigrants, for instance, who enter Spain and who are granted amnesties. My qualitative data collection has focused on: firstly, primary documents of the EU institutions in form of treaties, summits, time-framed programs, EU directives, and certain Commission communications; secondly, secondary sources such as relevant literature, books, doctorate and master's theses, scholarly journals and articles, both in print and online.

## **My Anticipated Contribution**

I intend to show that Spain has undoubtedly been a leader in the process of the "common" immigration policy development. Its active advocacy, which began in the 1990s, has placed Spain as one of few major voices in the non-monolithic process of shaping a "common" migration policy. By using the EU as an effective arena to resolve domestic issues, the Spanish governments (socialist and

conservative) have been able to project their ideas and concepts, especially in the realm of security concerns with illegal immigration, to the EU level. The country's geostrategic location has allowed it to edge out as a powerful state, which sits behind drafting of a unified policy among other decision-making countries, such as Germany, France, the Netherlands and Belgium. Such an observation leads to an argument that Spain's lobbying power exerts decisive influence on the policymaking process. Hence my coined term, "intergovernmentalist supranationalization," I argue that intergovernmentalism has been the means of reaching the envisioned supranationalist end, thus showing that nation states have continued to play a major role in defining a common approach to certain policies at the EU level.

### **Hypothesis**

In the process of developing a "common" immigration policy, countries have gradually pooled and delegated decision-making process over illegal immigration and border controls. A case study of Spain supports (liberal) intergovernmentalism as a process of achieving a supranational migration regime and thus reflecting "intergovernmentalist supranationalization." Spain's well-pronounced political and socio-economic interests that relate to immigration ultimately shape EU objectives. The EU member state has been one of the leaders, rather than laggards, in the process of drafting a "common" immigration policy, by using the EU as an effective tool to solve its domestic issues.

## Chapter 2: Literature Review

### Theoretical Framework

#### *Neofunctionalism*

Theoretical assumptions by prominent scholars of early neofunctionalism, Ernst Haas and Leon Lindberg, are of particular relevance to the study of regional integration. In the late 1950s, Haas describes Western Europe as a “living laboratory” for the study of collective action between European states.<sup>9</sup> He foresees that the European project would culminate as an economic and political community through the process of European integration. Haas defines political integration as

the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new center, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of process of political integration is a new political community, superimposed over the pre-existing ones.<sup>10</sup>

Lindberg builds on Haas’ theory. He observes the process of integration with a particular caution. According to him, political integration is

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<sup>9</sup> Laura Cram, “Integration Theory and the Study of the European Policy Process,” in *European Union: Power and Policy-making*, ed. Jeremy Richardson (London: Routledge, 2001), 55.

<sup>10</sup> Ernst Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (London: Stevens, 1958), 16.

For more on neofunctionalist approach to European integration, see Ernst Haas and Philippe Schmitter, “Economic and Differential Patterns of Political Integration: Projections about Unity in Latin America,” *International Organization*, 18, no. 4 (Autumn 1964); Ernst Haas, “The ‘Uniting of Europe’ and the Uniting of Latin America,” *Journal of Common Market Studies*, 5 (June 1967); Philippe Schmitter, “Ernst B. Haas and the Legacy of Neofunctionalism,” *Journal of European Public Policy* 12, no. 2 (April 2005); Ernst Haas, “The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing,” in *Regional Integration*, ed. Leon Lindberg and Stuart Scheingold (Boston: Harvard University Press, 1971), 3-42.



(1) the process whereby nations forgo the desire and ability to conduct foreign and key domestic policies independently of each other, seeking instead to make *joint decisions* or to *delegate* the decision-making process to new central organs; and (2) the process whereby political actors in several distinct settings are persuaded to shift their expectations and political activities to a new center.<sup>11</sup> [original emphasis]

Similarly to Haas, Lindberg perceives regional integration, particularly European integration, as a process rather than a condition. Both scholars see political integration as a result of economic integration, which is fueled by the logic of “spillover.” “Spillover” is noticeable when integration of one sector creates pressure, which then pushes states to integrate other sectors. This snowball effect has metamorphosed into three variants of “spillover:” functional, political and cultivated.<sup>12</sup> Functional “spillover” refers to a process where harmonization in one segment of policymaking moves to cooperative activities in other sectors, which are closely linked to the former integrated sector.<sup>13</sup> As Neill Nugent summarizes, political “spillover” describes the process, where: national elites<sup>14</sup> turn their attention to supranational levels of activity and decision making. They become favorably disposed toward the integration process and the upgrading of common interests. Subsequently, the supranational institutions and non-governmental actors become more influential in the integration process, while the

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<sup>11</sup> Leon N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford: Stanford University Press, 1963), 6.

<sup>12</sup> This three-layered distinction has not been originally defined by Haas or Lindberg, but adopted by other scholars; i.e. see Stephen George, *Politics and Policy in the European Community* (Oxford: Clarendon Press, 1985).

<sup>13</sup> Cram, “Integration Theory,” 58.

<sup>14</sup> Haas dealt almost exclusively with non-governmental elites, whereas Lindberg stressed the importance of governmental elites in the political “spill-over.”

nation states and governmental actors become less influential.<sup>15</sup> Finally, cultivated “spillover” deals with the importance of the central institutions, strongly emphasized by both Haas and Lindberg in their findings.

As Jeppe Tranholm-Mikkelsen, a more contemporary neofunctionalist scholar, mentions, Haas and Lindberg assert that the central institutions serve as “midwives” for the integration process through embodying common interests of the member states.<sup>16</sup> Tranholm-Mikkelsen concludes that the mechanisms of “spillover,” which reinvigorated the neofunctionalist theory in the 1980s (after the stagnation of European integration in the late 1960s and the 1970s), have made neofunctionalism “indispensable” for the analysis of regional integration.<sup>17</sup>

### *Supranationalism*

The theory of supranationalism builds on the neofunctionalist approach, mainly because the latter view endorses supranational governance and serves as a mother theory to the former framework. Indisputably, Jean Monnet has been considered as one of the founding fathers of the European Community and an influential scholar in contributing to the theory of supranationalism. In his work titled *A Ferment of Change* (1962), the French civil servant and diplomat projects a necessity of European nation states to adopt common rules governing their behavior and create centralized institutions in order to avoid future continental conflicts. Nonetheless, Monnet does not refer to a centralized, federal-like government with exclusive powers. He perceives the process of integration as a

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<sup>15</sup> Neill Nugent, *The Government and Politics of the European Union* (Durham, NC: Duke University Press, 1999), 507.

<sup>16</sup> Jeppe Tranholm-Mikkelsen, “Neofunctionalism: Obstinate or Obsolete?” *Millennium: Journal of International Studies* 20, no. 1 (1991): 6.

<sup>17</sup> *Ibid.*

means of creating a “supranationalized” unity of states with common institutions facilitating the process of decision making.<sup>18</sup>

Similarly, Rafael Leal-Arcas summarizes supranationalism as a system where the member states still have power, which is then shared with other actors. Since majority voting becomes the main decision-making mechanism, a member state with an opposing decision finds itself pushed by other actors to agree on a final outcome. Each nation state joins the European Union on voluntary basis, and thus may leave it anytime it desires.<sup>19</sup> Although skeptics have often voiced fears of the loss of national sovereignty to the centralized institutions, the scholar correctly used the key term “voluntarism” in describing the European project.

Another renowned institutionalist scholar, Joseph Weiler, defines supranationalism as not merely a phenomenon “over and above individual states.”<sup>20</sup> Drawing upon Haas and Monnet’s definitions, Weiler accredits the presence of national governments as influential in and accountable for European integration. The scholar divides European integration into two processes: normative and decisional. The former type of supranationalism refers to a relationship between the Community policies and member states’ competing policies.<sup>21</sup> One can notice a hierarchical dichotomy between the European level and national level policies. Moreover, the decisional supranationalism constitutes

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<sup>18</sup> Jean Monnet, “A Ferment of Change” in *The European Union: Readings on the Theory and Practice of European Integration*, ed. Brent F. Nelsen and Alexander C-G. Stubb (Boulder; London: Lynne Rienner Publishers, 1994), 20.

<sup>19</sup> Rafael Leal-Arcas, “Theories of Supranationalism in the EU,” *Bepress Legal Series*, paper 1790 (2006): 5, <http://law.bepress.com/cgi/viewcontent.cgi?article=8481&context=expresso> (accessed August 5, 2009).

<sup>20</sup> Joseph Weiler, “The Community System: the Dual Character of Supranationalism,” *Yearbook of European Law* 1 (1981): 267.

<sup>21</sup> *Ibid.*, 271.

the political approach. It defines the way in which decision-making processes are executed at the European level.<sup>22</sup>

More contemporary theorists have attempted to emphasize the role played by the EU institutions and the presence of multi-level governance in the European Union. Wayne Sandholtz, a supranationalist successor of neofunctionalists, rejects the intergovernmental view of the EU as a bargaining forum for its member states. Sandholtz sees the EU institutions as powerhouses, sharing interests of the member states and defining paths of political influence.<sup>23</sup> According to him, the central institutions have had a substantial dominance to influence political behavior of the actors. They have not only transformed into autonomous bodies, but also shaped opinions for the member states and introduced changes at the domestic level.<sup>24</sup> Aligning with the original theory of supranationalism, Sandholtz sees the European Commission and the European Court of Justice as architects of compromises between the states. The scholar provides empirical evidence to underline the institutions' leading roles. He argues that the EU has in fact been capable of changing domestic policies by enmeshing in national politics. The member states may change their viewpoints as a result of the EU institutions' scope of influence over their decisions.<sup>25</sup> Sandholtz claims that when there is a common policy that a member state dislikes, it is unlikely to withdraw because it

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<sup>22</sup> Ibid.

<sup>23</sup> Wayne Sandholtz, "Membership Matters: Limits of the Functional Approach to European Institutions," *Journal of Common Market Studies* 34, no. 3 (September 1996): 405.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid., 426.

would also abandon other bargains that produce benefits in its various domestic sectors.<sup>26</sup>

### *Intergovernmentalism*

In contrast to the above institutionalist theories, Stanley Hoffman argues that nation-states are the basic units in world politics.<sup>27</sup> While classical neofunctionalism has placed a passive role to the member states by focusing more on the EU institutions as powerhouses, Hoffman's intergovernmentalist critique emphasizes the role of national governments as promoters of the interests of the people.<sup>28</sup> National governments have been more "obstinate" than "obsolete" in the process of European integration, thus challenging the snowball effect of cooperation proposed by neofunctionalists.<sup>29</sup> According to Hoffman, diversity of national interests would set limits to "spillover" because national governments would not compensate their losses by gains in other areas.<sup>30</sup> Additionally, "high politics" like foreign, security and defense policies, unlike "low politics" of economic and welfare policies, would be least likely to undergo political integration due to the high political salience.

Moreover, Hoffman's work analyzes the connotation of the phrase "upgrading the common interest." Haas and Lindberg understand the creation of a political community through pooling common interests and "upgrading" them through supranational advocacy. However, Hoffman asserts that the common

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<sup>26</sup> Ibid.

<sup>27</sup> Ben Rosamond, *Theories of European Integration* (New York: St. Martin's Press, 2000), 76.

<sup>28</sup> Cram "Integration Theory," 60.

<sup>29</sup> Ibid.

<sup>30</sup> Stanley Hoffman, "Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe," *Daedalus* 95, no. 2 (Spring 1966): 882.

interest is in reality an interest of a single nation state, most likely the most predominant one.<sup>31</sup> The scholar raises a rhetorical question of what is truly the common interest. At the time of his writing, Hoffman states that the European Community is still in the realm of “strategic-diplomatic behavior” where rules of the game apply.<sup>32</sup> Each country’s interests reflect different concerns, favored by domestic incongruence. The envisioned political unification could have smoothly succeeded if nation states truly shared concerns, without diverging foreign policies.<sup>33</sup>

### ***Liberal Intergovernmentalism***

Drawing on Hoffman’s theory, Moravcsik develops a more pluralist theoretical framework, which he names liberal intergovernmentalism. His novel approach to the importance of state-centrism has received a great deal of attention since its emergence in the 1990s. Similarly to Hoffman’s arguments, Moravcsik criticizes supranational dimensions of neofunctionalism.<sup>34</sup> The scholar defines the European Union as a series of intergovernmental negotiations.<sup>35</sup>

Liberal intergovernmentalism is based on two assumptions about politics: the rationality of state behavior and states’ role as actors. The assumption that states are rational is a basic aspect of the theory. Moravcsik and Paul

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<sup>31</sup> Stanley Hoffman, “Discord in Community: The North Atlantic Area as a Partial International System,” *International Organization* 17, no.3 (Summer 1963): 527.

<sup>32</sup> *Ibid.*

<sup>33</sup> Hoffman, “Obstinate or Obsolete?” 863.

<sup>34</sup> Steve Smith, “International Theory: European Integration,” in *International Relations Theory and the Politics of European Integration*, ed. Morten Kelstrup and Michael C. Williams (London: Routledge, 2000): 45.

<sup>35</sup> Andrew Moravcsik, “Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach,” *Journal of Common Market Studies* 31, no.4 (December, 1993): 473.

Schimmelfenning argue that states are actors in the world of politics.<sup>36</sup> Countries have been capable of achieving goals through intergovernmental negotiations and bargaining, rather than through a central authority in charge of making and enforcing decisions.<sup>37</sup> They have also continued to enjoy decision-making power and political legitimacy, even when being members of the European entity.

Moreover, the liberal intergovernmentalist framework focuses on three fundamental phases of negotiations: national preference formation, interstate bargaining, and institutional choice.<sup>38</sup> The liberal theory of national preferences applies the theory of international relations and focuses on the state-society relations in shaping domestic preferences. Private individuals, voluntary associations, civil society, and et cetera have lobbied national governments and formulated choices and desires of the nation states. Their interests are articulated and pushed forward. Governments then determine preferences based on these domestic groups. Certain sub-groups within the interest domestic groups have a multitude of benefits to gain or lose in a certain policy. Therefore these lobbyists may become the most viable ones in the formation of preferences.<sup>39</sup>

Furthermore, the interstate negotiations are embedded in a bargaining theory of international cooperation. The latter theory indicates that the outcome of international negotiations depends on the relative bargaining power of the actors.<sup>40</sup> The interstate bargain outcomes are conclusively shaped by the nation

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<sup>36</sup> Andrew Moravcsik and Frank Schimmelfenning, "Liberal Intergovernmentalism," in *European Integration Theory*, ed. Antje Wiener and Thomas Diez (Oxford: Oxford University Press, 2009), 68.

<sup>37</sup> Ibid.

<sup>38</sup> Andrew Moravcsik, *The Choice of Europe* (Ithaca, NY: Cornell University Press, 1998), 24.

<sup>39</sup> Moravcsik, "Preferences and Power," 483.

<sup>40</sup> Moravcsik and Schimmelfenning, "Liberal," 71.

states, whose powers collide asymmetrically. In his book, Moravcsik portrays how intensive bargaining may create threats of veto proposals, withholding of financial side-payments, or alternative alliance formations.<sup>41</sup> Also, if one nation state depends more on a given agreement, it will be more prone to compromise in order to achieve envisioned goals.

Institutional choice includes a dilemma of pooling and delegation of sovereignty, which encompasses qualified majority voting and ceding of decision-making powers to the supranational institutions. Basing their argument on neoliberal institutionalism developed by Robert Keohane and Joseph Nye,<sup>42</sup> Moravcsik and Schimmelfenning argue that international institutions are in fact necessary for durable international cooperation. Pooling and delegation of authority to the EU institutions helps the nation states to reach a superior outcome by reducing the transaction costs. Additionally, domestic actors who benefit from common policies and compliance have advocated for pooling and/or delegation of powers.<sup>43</sup>

### **The Timing of European Cooperation in the Area of Immigration Policy**

With regards to initiation of the cooperation in the 1980s, institutionalist scholars point to the “spillover” mechanism, whereas state-centric scholars have underlined a rather intergovernmental pattern. In their descriptive chapter on the theory of neofunctionalism, Arne Niemann and Philippe C. Schmitter examine likely cases for the “spillover” conditions. According to their evaluation, internal

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<sup>41</sup> Moravcsik, *The Choice of Europe*.

<sup>42</sup> Robert O. Keohane and Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown and Company, 1977).

<sup>43</sup> Moravcsik, *The Choice of Europe*, 74.



market “spilled over” to the area of Justice and Home Affairs. If the Single Market was to be completed, certain measures were necessary in areas of visa, asylum, immigration and police cooperation.<sup>44</sup> Moreover, David Mutimer adds that abolition of physical barriers and border controls by the Single Market facilitated free movement of people. According to him, dismantling of internal borders would affect the area of immigration in order to control the flows of people, most particularly the undocumented ones.<sup>45</sup> Mutimer’s ambitious and persuasive study shows that a political entity would indisputably follow an economic and political unification.<sup>46</sup>

Yet another support for the “spillover” effect is introduced in Chien-Yi Lu’s work. The author traces a number of initiatives for collective migration policymaking in the history of European integration through analysis of rationales behind them. The scholar argues that the increasing cooperation in the field is found in “spillover” effects, elite advocacy and support of technocrats,<sup>47</sup> thus promoting a supranationalist outlook on integration of migration policies.

To name just a few scholars in the field of international migration, Andrew Gebbes, Dietmar Herz and Virgine Guiraudon present an alternative account to the timing of European cooperation. Although the Single Market provided an impetus to the harmonization of immigration and asylum fields, Gebbes adds that “it is rather difficult to argue that the SM alone caused this

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<sup>44</sup> Arne Niemann and Philippe C. Schmitter, “Neofunctionalism,” in *European Integration Theory*, ed. Antje Wiener and Thomas Diez (Oxford: Oxford University Press, 2009), 57.

<sup>45</sup> David Mutimer, “1992 and the Political Integration of Europe: Neofunctionalism Reconsidered,” *Journal of European Integration* 13, no.1 (Autumn 1989): 86.

<sup>46</sup> *Ibid.*, 101.

<sup>47</sup> Chien-Yi Lu, “Harmonization of Migration in the European Union: A State-Centric or Institutional Explanation?” paper prepared for ECSA Sixth Biennial International Conference (Pittsburgh, PA, June 2-5, 1999), <http://aei.pitt.edu/2322/> (accessed November 16, 2009).

cooperation, which had begun to develop prior to the Single European Act (SEA) and was linked to attempts to consolidate control over international migration.”<sup>48</sup>

Herz, another intergovernmentalist scholar, asserts that, in fact, the first step of the European migration policy harmonization clearly resembled an intergovernmental pattern, rather than “spillover.” Herz underlines the Franco-German initiative as a starting point of the policy development in the 1980s.<sup>49</sup>

Similarly to Herz, Moravcsik also focuses on the negotiating power of France, Germany, and also Britain, but with respect to the Single European Act of 1987. Moravcsik describes the SEA as a union of elites between Community officials and European business interest groups. Its negotiating history is more consistent with an alternative explanation that European reform rested on interstate bargains between the three mentioned super states.<sup>50</sup> His findings configure that the SEA was not a result of the “spillover” mechanism. Instead, intergovernmentalism, lowest-common-denominator bargaining, and protection of sovereignty played decisive role in the implementation of the SEA.<sup>51</sup> The scholar claims that the primary motivations of the member states are rooted in convergence of national economic preferences.<sup>52</sup> Such an argument relates to

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<sup>48</sup> Andrew Gebbes, “The Politics of Migration in an Integrating Europe.” In *The Politics of Migration and Immigration in Europe*, ed. Andrew Gebbes (Thousand Oaks, CA: Sage Publications, 2003), 133.

<sup>49</sup> Dietmar Herz, “European Immigration and Asylum Policy: Scope and Limits of Intergovernmental Europeanization,” paper presented at the 8<sup>th</sup> EUSA Conference (Nashville, TN, March 27-29, 2003), <http://aei.pitt.edu/7061/> (accessed April 1, 2009).

<sup>50</sup> Andrew Moravcsik, “Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community,” *International Organization* 45, no. 1 (Winter, 1991): 20-1.

<sup>51</sup> *Ibid.*, 49-50.

<sup>52</sup> Moravcsik, *The Choice of Europe*, 317.

Gebbes and Herz's assertions about rationales behind the timing of the cooperation in the immigration arena.

Unlike the previously-mentioned scholars, Guiraudon rejects both the "spillover" mechanism and pure interstate bargaining. She describes both theories as inadequate to provide analytical tools. Instead, the scholar generates the theory of "venue-shopping" and describes how political actors seek policy venues, where the balance of forces favors their ideal policy outcomes. Thus, governments have circumvented national constraints on migration control by creating transnational cooperation mechanisms dominated by law and order officials in trans-governmental working groups. Moreover, similarly to intergovernmentalist advocates, Guiraudon gives the EU institutions only a minor role.<sup>53</sup>

### **The Process of the Harmonization of Immigration Policies**

The development of a "common" immigration policy has followed a rather slow and winding pathway. Gebbes is one among experts who describe it as an incremental progress, coupled with reluctance of the member states to empower the supranational institutions.<sup>54</sup> He introduces four periods of EU cooperation in the field of immigration and asylum. He argues that the recent period of communitarization, which was initiated by the Treaty of Amsterdam in 1999, did not "supranationalize" the immigration regime. Martin A. Schain makes a similar assessment of the policy harmonization. The year 1999 showed a considerable

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<sup>53</sup> Virginie Guiraudon, "European Integration and Migration Policy: Vertical Policy-making as Venue Shopping," *Journal of Common Market Studies* 38, no. 2 (June 2000).

<sup>54</sup> Gebbes, "The Politics of Migration," 142.

progress in the fight against illegal immigration and external border controls.<sup>55</sup>

However, previous years revealed very limited cooperation at the EU level. In her 2000 work, Guiraudon also mentions that the harmonization process remains largely intergovernmental, where the EU institutions have in fact played a minor role. In addition, Gallya Lahav, a leading researcher of European immigration politics, shows that despite progress toward a “common” immigration policy, the nation states still resist in many respects, thus revealing that their national-level interests and decision making remain crucial.<sup>56</sup>

In another influential article, Gebbes takes the argument into a new direction and asserts that, in fact, EU cooperation has helped the member states to consolidate more regulation of international migration via the gradual harmonization of national-level immigration policies.<sup>57</sup> Moreover, the scholar perceives the European coordination through the state-centric prism. He argues that the EU has still allowed the pursuit of “selfish” interests of the member states.<sup>58</sup>

To the contrary of the above scholarship, which attributes active role of the member states in the process of European integration, Sandholtz recognizes the EU institutions as drivers of integration. Sandholtz mostly attributes power to the European Commission and the European Court of Justice, even arguing that such institutions can, in fact, shape national governments and thus define their

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<sup>55</sup> Martin A. Schain, “The State Strikes Back: Immigration Policy in the European Union,” *The European Journal of International Law* 20, no.1 (2009): 101.

<sup>56</sup> Gallya Lahav, *Immigration and Politics in the New Europe: Reinventing Borders* (Cambridge, Cambridge University Press, 2004), 57.

<sup>57</sup> Andrew Gebbes, “International Migration and State Sovereignty in an Integrating Europe,” *International Migration* 39, no. 6 (2001): 30.

<sup>58</sup> *Ibid.*

interests.<sup>59</sup> The scholar openly criticizes liberal intergovernmentalism, which, according to him, is a mere account of state-to-state bargaining. The state-centric theory not only excludes everyday policymaking and solely focuses on treaties, but also underestimates the role that states' interests and preferences are shaped by the membership.<sup>60</sup>

Several authors referenced in this research stress that the process of the communitarization of immigration policies has followed a restrictive pattern. In their persuading article, Terri Givens and Adam Luedtke argue that when political salience is high (like in the case of immigration issues), national governments either block harmonization, or allow only restrictive pathway of harmonization at the EU level.<sup>61</sup> Schain makes a similar observation. He claims that, although progress has been noticeable with regards to the fight against illegal immigration and border control, failure to harmonize immigration policies stems from the fact that if cooperation takes place, it tends to support control and exclusion, rather than expansion and harmonization.<sup>62</sup> Lahav also questions the outcome of the ongoing harmonization of immigration policies. According to her evaluation, the European Union resembles a hybrid of intergovernmentalism and supranationalism in the field of migration regime. Thus, a potential “common” immigration policy would be rather restrictive in nature.<sup>63</sup>

### **The EC/EU's Influence on the Spanish Immigration Laws and Policies**

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<sup>59</sup> Sandholtz, “Membership Matters,” 405.

<sup>60</sup> Ibid.

<sup>61</sup> Terri Givens and Adam Luedtke, “The Politics of EU Immigration Policy,” Paper presented at 8<sup>th</sup> EUSA (Nashville, TN, March 26-29, 2003), <http://aei.pitt.edu/2862> (accessed October 10, 2009).

<sup>62</sup> Schain, “The State Strikes Back,” 102-103.

<sup>63</sup> Lahav, *Immigration and Politics*, 9.

A body of scholarship has focused on the EU institutions' influence on the member states' policymaking. Generally, this top-down process has been called Europeanization. With regards to Spain, its accession to the European Community (EC) in 1986 has not only legitimized its then-recent transition to democracy, but also allowed Europe to exert substantial impact on its national policies and legislations. Experts on Spanish immigration have presented mixed opinions regarding the timing of the country's first immigration law in the mid-1980s. Wayne Cornelius argues that immigration policy in Spain arose from the EC pressure;<sup>64</sup> and Gemma Pinyol pinpoints that Spain needed to meet the Community standards.<sup>65</sup> In addition, Francisco Javier Moreno Fuentes asserts that LO 7/1985, the first immigration focusing on the rights and liberties of the foreigners in Spain, was nothing more than placing Spain as a gatekeeper of the EC's southern border. Similarly to Pinyol's argument, the document's restrictiveness and focus on border controls did not correspond with the migratory processes that were affecting Spain at that time.<sup>66</sup>

The early 1990s continued to portray the EU's impact on Spanish policymaking. Expiration of the country's agreements with Morocco and Tunisia for mutual suppression of visas coincided with the EU's pressure for the control

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<sup>64</sup> Wayne Cornelius, "Spain: The Uneasy Transition from Labor Exporter to Labor Importer," in *Controlling Immigration: A Global Perspective*, ed. Wayne Cornelius, Takeyuki Tsuda, Philip L. Martin and James Hollfield (Stanford: Stanford University Press, 2004): 386-429.

<sup>65</sup> Gemma Pinyol, "Europe's Southern Border: Spain and the Management of Immigration," in *Foreign Policy in Dialogue: National Perspectives on EU Immigration Policy* 8, no. 22 (May 2007), eds. Marco Overhaus, Hanns W. Maull and Sebastian Harnisch, [www.deutsche-aussenpolitik.de/newsletter/issue22.pdf](http://www.deutsche-aussenpolitik.de/newsletter/issue22.pdf) (accessed May 25, 2010).

<sup>66</sup> Francisco Javier Moreno Fuentes, "The Evolution of Immigration Policies in Spain: Between External Constraints and Domestic Demand for Unskilled Labour," *Juan March Institute*, working paper 2004/211 (December, 2004), [http://www.march.es/ceacs/publicaciones/working/archivos/2004\\_211.pdf](http://www.march.es/ceacs/publicaciones/working/archivos/2004_211.pdf) (accessed September 20, 2009).

of external borders. Moreno Fuentes asserts that this change related to immigration policies designed at the EU level. Toughened external frontiers also appeared as a precondition for the incorporation of Spain into the Schengen Agreement in 1992.<sup>67</sup> Moreover, Kitty Calavita, whose work focuses on immigration and integration policies in Spain, adds that despite the stepped-up pressure from the EU before Spain's signature under the Schengen Agreements in 1992, visa requirements, in fact, followed new controls against countries, which were the source of large numbers of illegal residents.<sup>68</sup>

EU directives and regulations could be regarded as a major step toward the supranationalization of national policies. In terms of binding documents in the area of immigration and asylum, Spain has been a pioneer in transposing them within general reforms of their immigration law. In her chapter, Margit Fauser argues that Spain has followed a rather selective pathway of Europeanization. That said, its central government has selectively chosen conclusions and objectives reached at the EU level (at times non-binding).<sup>69</sup> Fauser names a number of recent Council directives since 2000, which became a part of the third Spanish immigration law - LO 14/2003.

In other words, the EU's impact on Spanish policymaking has revealed a "pick-and-choose" nature, where the central government has applied EU objectives and (empathically) directives/regulations, when and where needed.

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<sup>67</sup> Ibid.

<sup>68</sup> Kitty Calavita, *Immigrants at the Margins: Law, Race and Exclusion in Southern Europe* (Cambridge: Cambridge University Press, 2005), 29.

<sup>69</sup> Margit Fauser, "Selective Europeanization: Europe's Impact on Spanish Migration Control," in *The Europeanization of National Policies and Politics of Immigration*, ed. Thomas Faist and Andreas Ette (Hampshire, UK: Palgrave Macmillan, 2007), 136-156.

Ryan Newton's research clearly reveals this selectiveness with regard to non-binding conclusions of the Tampere Summit. As he shows, the Tampere objectives were incorporated into the Spanish legal code in order to further restrict policies affecting illegal immigration and external border controls. The administration of former Prime Minister José María Aznar used the Tampere Summit conclusions as a scapegoat for advancing its own national agenda.<sup>70</sup>

### **Spain's Impact on the EU Policy Development**

Two prominent scholars on Spain's membership in the European Union and its impact on both Spain itself and the EU, Carlos Closa and Paul M. Heywood, devote a chapter of their book on Spain's intergovernmentalist approach to policymaking at the EU level.<sup>71</sup> They present three dimensions that support intergovernmentalist interpretation. Firstly, Spain has engaged in "insider policies," by placing nationals in key positions in Brussels in order to help to shape policy from the inside. Secondly, use of the EU Presidency has steered policies in a particular direction. Thirdly, Intergovernmental Conferences (IGCs), which occur before treaty amendments and enlargements, have been used to pursue national interests.<sup>72</sup> Therefore, they show how the Spanish government has taken advantage of its role as an international player.

Historically speaking, the active participation in the construction of a "common" immigration policy officially dates back to the Spanish Presidency of

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<sup>70</sup> Ryan Newton, "Spanish Immigration Policy since Tampere: Implications of the Development of a European Immigration Policy," *International Topic Journal* 1, no. 2 (2003): 9, [http://al.odu.edu/gpis/ITJ/Spanish\\_Immigration\\_Ryan\\_Newton\\_Final\\_8\\_.pdf](http://al.odu.edu/gpis/ITJ/Spanish_Immigration_Ryan_Newton_Final_8_.pdf) (accessed October 15, 2010).

<sup>71</sup> Carlos Closa and Paul M. Heywood, *Spain and the European Union* (New York: Palgrave Macmillan, 2004), 105-134.

<sup>72</sup> *Ibid.*



the EU in 2002.<sup>73</sup> Pinyol asserts that the Presidency and the Seville Summit outlined the country's intention to place immigration issues as a top priority on the EU agenda.<sup>74</sup> In her article, Elisabeth Johansson- Nogués shows how the Presidency was used as a way to coordinate the member states on issues related to this Spanish dilemma.<sup>75</sup> Moreover, Closa and Heywood also see the 2002 Presidency as an arena to prioritize immigration and asylum policies.<sup>76</sup>

As Fauser states, the EU Presidency not only emphasized the need to address growing concerns related to illegal immigration and external border controls, but also used the Seville Summit's conclusions to initiate an introduction of a new Council Directive 2004/82 on the obligation of carriers to communicate passenger data. The Directive aimed at harmonizing carriers' financial penalties provided for by the member states. Fauser also emphasizes that the Seville conclusions were a mere continuation of the Tampere objectives.<sup>77</sup>

Carmen González Enríquez and Alicia Sorroza Blanco from the Real Instituto Elcano assert that Spain promoted FRONTEX (2004) and the Global Approach (2005), which had a clear Spanish stamp on them. The authors add that Spain has in fact been one of the building blocks of a harmonized approach to

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<sup>73</sup> Pinyol, "Europe's Southern Border," 53.

<sup>74</sup> Ibid.

<sup>75</sup> Elisabeth Johansson-Nogués, "A Spanish Model for the European 'Near Abroad'? The Legacy of Aznar to EU's Foreign Policy toward Neighboring Non-candidate Countries," *Institut Universitari D'Estudis Europeus: Observatory of European Foreign Policy* 8 (2004), <http://www.iuee.eu/pdf-publicacio/119/i1QKXulfsYyIVtYSmCtn.PDF> (accessed June 10, 2010).

<sup>76</sup> Closa and Heywood, *Spain and the European Union*.

<sup>77</sup> Fauser, "Selective Europeanization," 151.

address immigration, especially with regards to external border controls and illegal immigration.<sup>78</sup>

Some scholars in the field of the Spain's role on EU policymaking have focused on plausible rationales behind such an active advocacy for the "common" immigration policy development. Closa and Heywood conclude that Spain has been able to use the EU as an effective tool to resolve its domestic issues, mainly through developing ideas and concepts, which are now embedded into EU policies.<sup>79</sup> As I already referenced, Newton gives a similar account by analyzing the Spanish government's adoption of the Tampere Summit's conclusions. He clearly presents that Spain incorporated the non-binding Tampere objectives into its legal body (the third immigration law - LO 8/2000) and used it as justification for more restrictive reforms.<sup>80</sup>

Several internal and external socio-economic and cultural events that took place in the recent years have also become excuses for introducing tougher stance on illegal immigration. One of such circumstances was the El Ejido crime, where a Moroccan immigrant murdered a young Spanish woman. As Ricard Zapata-Barrero argues, this unfortunate event not only ignited anti-immigrant revolts, but also placed immigration under socio-political agenda. As the general election approached, the conservative political party, the Partido Popular (PP), politicized

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<sup>78</sup> Carmen González Enríquez and Alicia Sorroza Blanco, "Working towards a European Immigration Policy," *Real Instituto Elcano*, working paper 57 (2009), [http://www.realinstitutoelcano.org/wps/portal/rielcano\\_eng/Print?WCM\\_GLOBAL\\_CONTEXT=/wps/wcm/connect/elcano/Elcano\\_in/Zonas\\_in/DT57-2009](http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Print?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/elcano/Elcano_in/Zonas_in/DT57-2009) (accessed January 18, 2011).

<sup>79</sup> Closa and Heywood, *Spain and the European Union*, 244.

<sup>80</sup> Newton, "Spanish Immigration Policy."

the event for its mere electoral profit.<sup>81</sup> The PP capitalized on the public's discontent with immigration and linked it to the upcoming elections and legislation. This highly publicized tragedy benefited the right-wing party, which found a solid ground to further restrict the immigration law.<sup>82</sup>

On the other hand, Zapata-Barrero and Nynke de Witte show how Spain has raised awareness that illegal immigration is not just a Spanish problem, but also a European one.<sup>83</sup> Thus, such a transposition of a domestic issue onto the EU level has encouraged the central government to seek a new problem-solving venue. Laura Tedesco, who focuses on the recent economic crisis and its challenges to Spanish immigration policies, argues that utilization of the EU as a venue to fulfill domestic demands and preferences may become more pronounced nowadays. Similarly to the Tampere Summit's conclusions, the Spanish government can again argue that further restrictiveness is due to an essential step to align national immigration policies with EU objectives.<sup>84</sup>

### **My Theoretical Position and Contribution**

In this study, my argument is twofold: firstly, at the EU level, I follow theoretical footsteps of intergovernmentalist scholars, like Gebbes and Herz, and assert that the Single Market was not the major impetus, which caused cooperation in the field of immigration. It was an intergovernmental pattern rather

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<sup>81</sup> Ricard Zapata-Barrero, "Spanish Challenges and European Dilemma: Socialising the Debate on the Integration of Immigrants," *Perspectives on European Politics and Society* 4, no. 2 (2003): 252, <http://dcpis.upf.edu/~ricard-zapata/Article%20PEPS.pdf> (accessed June 2, 2010).

<sup>82</sup> Ibid.

<sup>83</sup> Ricard Zapata-Barrero and Nynke De Witte, "The Spanish Governance of EU Borders: Normative Questions," *Mediterranean Politics* 12, no. 1 (March 2007): 89.

<sup>84</sup> Laura Tedesco, "Immigration and Foreign Policy: The Economic Crisis and Its Challenges," *FRIDE: A European Think Tank for Global Action* no.25 (January 2010): 5, [www.fride.org/download/PB\\_Spain\\_Immigration\\_ENG\\_jan10.pdf](http://www.fride.org/download/PB_Spain_Immigration_ENG_jan10.pdf) (accessed July 20, 2010).

than the “spillover” mechanism. I also agree with immigration experts (Gebbes, Schain, Lahav) who claim that the process of the “common” immigration policy development has shown a very steady and restrictive pathway.

Secondly, I find arguments by Cornelius, Pinyol, and Moreno Fuentes convincing with respect to the timing of the first Spanish immigration law. Upon Spain’s entrance to the European Community, the centralized institutions pressured the country to implement a set of regulations that would target its foreign population. Moreover, I fully agree with Closa and Heywood’s argument that Spain has been a pioneer in influencing the formation of EU objectives in the arena of immigration. I call the Mediterranean country one of the leaders in the process of EU policymaking because Spain has used the EU as an effective tool to solve its domestic issues. With respect to the arena of illegal immigration and external border controls, I focus on the EU and Spain’s impact on each other’s policymaking. Thus, my thesis presents the country’s extensive advocacy for a restrictive, “communitarized” policy as a means to meet national demands.

To strengthen my hypothesis, I incorporate Moravcsik’s three-tier mechanism of EU negotiations: national preference formation, interstate bargaining and institutional choice. Since Moravcsik’s framework only focuses on official negotiations between the member states, my work serves as an innovative approach to Moravcsik’s mechanism because I apply his theory at the national level and examine Spain’s impact on EU initiatives inside and outside of interstate negotiations. Moreover, contrary to Moravcsik’s attribution of a passive role to

the electorate, I describe it as a very influential body in the process of national preference formation and international negotiations.

### **Chapter 3: Chronological Evolution of the Process of the Development of a “Common” Immigration Policy**

Above I outlined and scrutinized three of many theories of European integration: neofunctionalism, supranationalism and (liberal) intergovernmentalism. In this chapter, I introduce the evolution of the process of the “common” immigration policy development with respect to the empowerment of the EU institutions and the character of the “common” policy rhetoric. I explain these phenomena across the three decades of their evolution: the 1980s, the 1990s, and the 2000s. I follow each time framework by a subsection, which defines a noticeable character of each period. Even though I include only a short paragraph about the 1970s with respect to European integration, I focus mostly on the last three decades. As I show below, the 1980s reveal restrictive intergovernmental cooperation; the 1990s follow restrictive and mixed harmonization trend; finally, the 2000s clearly portray further restrictive and gradual harmonization. This chapter intends to show that Spain, as a nation state, has played a decisive role in shaping the “common” immigration policy rhetoric based on its domestic preferences.

### *Map 1 - The European Union*



Source: World Map Maker

European experience with immigration had not been of an alarming concern up until the second half of the twentieth century. Migration to selected Western European countries was mainly driven by economic and infrastructural devastation caused by the two World Wars. The so-called “guest workers” predominantly came from Southern European states. Instead of staying only temporarily, the low-skilled laborers settled permanently in the new host countries, usually industrialized countries in Northern and Western Europe. Inflow of migrants after the Second World War, whether as asylum seekers or laborers, accounted for elevated concerns among the EU heads of state and government. That said such distress mobilized development of legal approaches to deal with overstaying migrants and guest workers. According to Rainer Münz, today’s 27 EU member states had a total population of 415 million in 1960. The

number has increased to over 495 million now.<sup>85</sup> As of 2009, almost 31 million people living in the European Union (EU27) are foreign-born migrants. That number amounts for 6.2 percent of the total population.<sup>86</sup>

As the European population has significantly increased since the mid-twentieth century, the period preceding a collective policy activity of the states in the immigration arena has been characterized by minimal cooperation. I could engage in an argument that the Treaties of Rome establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) in 1957 marked a first attempt to prepare the European Community for the establishment of a future “common” immigration policy. The Treaties of Rome introduced the “free movement of goods, persons, services, and capital,” the so-called “four freedoms,” which became a legal reality with the implementation of the Single European Act of 1987. One of the freedoms is free movement of workers (only EC-nationals) within the borders of the Community. Such freedom complimented the economic structuring of a common market.<sup>87</sup> Nationals of the establishing states gained access to employment and self-employment in any of the signatory countries.<sup>88</sup> The freedoms subscribed to the ideology of supranationalism, envisioned by Schuman and Monnet, where, as I

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<sup>85</sup> Rainer Münz, “Europe: Population Change and its Consequences- An Overview,” *Berlin Institute for Population and Development* (2007), <http://www.berlin-institut.org/online-handbookdemography/europe.html> (accessed January 20, 2011).

<sup>86</sup> Katya Vasileva, “Population and Social Conditions,” *Eurostat: Statistics in Focus* 94 (2009), [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-SF-09-094/EN/KS-SF-09-094-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-09-094/EN/KS-SF-09-094-EN.PDF) (accessed January 20, 2011).

<sup>87</sup> Andrew Gebbes, *Immigration and European Integration: Towards Fortress Europe?* (Manchester: Manchester University Press, 2000), 44.

<sup>88</sup> Giuseppe Callovi, “Part II: Western Europe: New, Old and Recast of Immigration Questions in the Post-Cold War Period. Regulation of Immigration in 1993: Pieces of the European Community Jig-Saw Puzzle,” *International Migration Review* 26, 2 (Summer 1992): 355.



referenced, national control was transposed to the Community level. However, lack of any substantive legal basis in the Treaties for the harmonization of immigration policies alienated the policy from control and influence of the supranational institutions in the 1960s and 1970s.

### **The 1970s – Stagnation of European Integration**

The European Commission attempted to take over some aspects of illegal immigration under the EC control as early as in the 1970s. The member states' reluctance to delegate their sovereign power over such sensitive issues resulted in repetitive deferral of the communitarization of immigration policies. This 'Eurosclerosis' resulted from former French President Charles de Gaulle's unwillingness to cede France's control over its vital affairs, which ultimately led to the Luxembourg Compromise of 1965. The compromise re-introduced the member states' right to veto decisions undertaken by the European Community.<sup>89</sup>

The intergovernmentalist sentiments of the late 1960s and 1970s could have, in fact, considerably influenced such adverse national approaches to further European integration. Nonetheless, the member states had managed to promote cooperative actions outside of the Community structure, siding with intergovernmental cooperation. To give an example, TREVI, whose acronym stands for Terrorism, Radicalism, Extremism, and International Violence, was

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<sup>89</sup> Simon Blumer, "Domestic Politics and European Community Policy Making," in *The European Union: Readings on the Theory and Practice of European Integration*, ed. Brent F. Nelsen and Alexander C-G. Stubb (Boulder; London: Lynne Rienner Publishers, 1994), 149.

formed in 1975 to cooperate on internal security measures. The group's tasks eventually broadened in 1985-86 to include the fight against international crime.<sup>90</sup>

### **The 1980s – Re-Launching of the Integration Process**

Despite of the 1979 oil crisis and the early 1980s economic stagnation of the European countries, the further harmonization of policies was not much affected by internal and external obstacles. The 1980s witnessed revival of European integration. Completion of the Single Market, as being the largest project, significantly influenced the political policy areas, which included the area of immigration and asylum. This particular active engagement in the harmonization process might have begun thanks to either the “spillover” mechanism or mere interstate cooperation. Two crucial documents, which placed emphasis on active collaboration in the immigration realm, were the Schengen Agreements of 1985 and the amendment of the Treaties of Rome- the Single European Act (SEA) of 1987.

In 1986, the TREVI/Interior Ministers set up yet another intergovernmental body, the Ad Hoc (Working) Group on Immigration (AHWGI/AHGI). A myriad of the AHWGI/AHGI groups and subgroups improved checks at external borders of the European Community, coordinated visa policies and combated passport fraud. The creation of the AHWGI/AHGI

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<sup>90</sup> Sandra Lavenex and William Wallace, “Justice and Home Affairs: Towards a European Public Order?” in *Policy-Making in the European Union*, ed. Hellen Wallace, William Wallace, and Mark A. Pollack (Oxford: Oxford University Press, 2005), 459.

stemmed from a potential link between terrorism and border controls/immigration policies.<sup>91</sup>

### ***The Schengen Agreements- 1985***

A first, official step toward the harmonization of immigration policies was undertaken by the Schengen Agreements initially signed in June 1985 by five core EC countries: France, Germany, Belgium, the Netherlands and Luxembourg.<sup>92</sup> As Guiraudon asserts, “there was no formal intergovernmental cooperation on the subject [of immigration] before the 1985 Schengen Agreement and no EU competence for immigration policy before 1992.”<sup>93</sup> The signatory countries launched a joint agreement outside of the EC framework. Due to British and Irish opposition to cooperation in immigration issues, Germany and France succeeded, driven by their domestic interests, to implement the Schengen Agreements as an alternative to a Community solution.<sup>94</sup> In 1990, the member states signed yet another agreement titled the Schengen Convention, often referred to as Schengen II. The document focused on application of the internal border elimination and free movement provisions outlined in the original Schengen document. Ultimately, the year of 1995 officially abolished border controls.<sup>95</sup> Schengen Information System (SIS I) became also operational in 1995. It was a

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<sup>91</sup> Tony Bunyan, “Trevi, Europol and the European State,” *Statewatch*, 1993, <http://www.statewatch.org/news/handbook-trevi.pdf> (accessed November 30, 2009).

<sup>92</sup> Desmond Dinan, *Ever Closer Union: An Introduction to European Integration* (London: Lynne Rienner Publishers, 2005), 562.

<sup>93</sup> Virginia Guiraudon, “The European Union and the New Constitution: A Stable Political Equilibrium? Theme: Immigration,” website of Andrew Moravcsik, memo paper from 2004, [www.princeton.edu/~amoravcs/library/conferences/guiraudon.doc](http://www.princeton.edu/~amoravcs/library/conferences/guiraudon.doc) (accessed December 5, 2009).

<sup>94</sup> Herz, “European Immigration.”

<sup>95</sup> *Ibid.*

sophisticated database used by authorities of the Schengen member countries to exchange data on certain categories of people and goods.

Although the Schengen Agreements prospered outside of the EC structure, their formulation served as a template for further Community establishment of specific measures in the early 1990s after introduction of the internal market. That being said, Schengen became a precursor to internal and mutual cooperation based on the Single Market. The initial aim of the Schengen Agreements was to make a speedier progress in dismantling internal frontiers, originated as a reaction to roadblocks set up by trucks at internal borders.<sup>96</sup> Migration developed as a national concern only later.

The Schengen regime targeted the securing or strengthening of external borders in order to diminish the influx of illegal immigrants, especially after the fall of Communism in Central and Eastern Europe.<sup>97</sup> Illegal immigration became an expensive challenge to the signatory countries. The Schengen Agreements sought to enhance the patrol of external borders and impose more rigid controls against countries outside of Schengen.<sup>98</sup> As Lahav argues, “the evolution of Schengen captures the restrictive implications of coordination for migration.”<sup>99</sup> In a sense, abolishing the internal borders of the Schengen zone led to immigration policy restrictions due to the “porous” nature of internal frontiers and control of occasionally permeable external borders. In Article 7 under Title I, Schengen reads as follows:

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<sup>96</sup> Lahav, *Immigration and Politics*, 42.

<sup>97</sup> *Ibid.*, 563.

<sup>98</sup> Alexander Caviedes, “The Open Method of Co-ordination Immigration Policy: A Tool for Prying Open Fortress Europe?” *Journal of European Public Policy* 11 (April 2004): 291.

<sup>99</sup> Lahav, *Immigration and Politics*, 42.

The Parties shall endeavour to approximate their visa policies as soon as possible in order to avoid the adverse consequences in the field of immigration and security that may result from easing checks at the common borders. They shall take, if possible by 1 January 1986, the necessary steps in order to apply their procedures for the issue of visas and admission to their territories, taking into account the need to ensure the protection of the entire territory of the five States against illegal immigration and activities which could jeopardize security.<sup>100</sup>

The above article calls for visa harmonization to avoid negative consequences that would result in the removal of internal borders.<sup>101</sup> Common visa policies would correlate with the harmonized immigration approach through implementation of a list of third countries whose nationals required visas to enter the Schengen area. As the mid-1980s acutely shifted an outlook on international migration, Schengen became a pioneer of the intensified European illegal immigration stance.

### ***The Single European Act- 1987***

On July 1, 1987 the Single European Act (SEA) marked a profound deepening of the envisioned common market, but this time under the Community framework. The White Paper presented by the European Commission to the European Council of Ministers during the Milan Summit in June 1985 outlined about 300 legislative proposals for creation of the Single Market.<sup>102</sup> Based on this document, the European Community aimed at establishing the goal by December 31, 1992.

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<sup>100</sup> European Union Law, "The Schengen Aquis," *Official Journal of European Communities*, September 22, 2000.

<sup>101</sup> As of now, there are 15 Schengen visa members who share a common visa policy (short-term). An applicant may apply for a visa to one of the countries and travel freely throughout Schengen. Long-term visas are a still a national matter.

<sup>102</sup> Gebbes, *Immigration and European*, 70.

Article 8A of the SEA envisioned an area without internal frontiers. It declares, “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.”<sup>103</sup> The SEA underlined an objective of creating a market, which would be unattainable without implementation of the “four freedoms” of movement. Thanks to the “freedom of labor,” the communitarization of immigration policies was given priority for further development. However, the SEA did not introduce substantial provisions that would transfer control over immigration policies to the supranational level. As Callovi mentions, with respect to migration, the SEA only concentrated on problems related to the removal of physical controls.<sup>104</sup> General Declaration on Articles 13 to 19 clearly states:

Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.<sup>105</sup>

According to this statement, the European Community did not gain substantive competence over immigration policies of the member states. Based on both Schengen and the Single European Act, Callovi argues that a harmonized policy on border controls had been technically feasible without the creation of a “common” immigration policy.<sup>106</sup> Roger Hansen makes a similar observation in

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<sup>103</sup> Council of the European Union, “Single European Act,” September 9, 1985.

<sup>104</sup> Callovi, “Part II,” 358.

<sup>105</sup> Council of the European Union, “Single European Act.”

<sup>106</sup> Callovi, “Part II,” 359.

terms of a common market. He asserts that a customs union could in fact deliver substantial payoffs without creation of a political union.<sup>107</sup>

As already referenced, the SEA confirmed “four freedoms” enshrined in the Treaties of Rome.<sup>108</sup> Nationals of the EC member states could freely move across borders of the member countries. As Lahav emphasizes, the word “people” was not intended to address all residents. Thus, the SEA legislation was only applicable to EC nationals and their families.<sup>109</sup> Reasons behind exclusion of the third-country nationals lay in expansive interpretation of the Article 8A mentioned above.

The 1985 Commission’s *Guidelines for a Community Policy on Migration* focused on three main areas where the Commission intended to focus on:

development of Community legislation for migrants who are citizens of Member States; consultation between Member States and the Commission on problems faced by migrants and introduction of Community guidelines to deal with such problems; information for migrants and action to make them aware of their rights.<sup>110</sup>

As the Commission formulated the first guidelines for a unified policy on migration issues, the member states’ resistance to integration in areas of “high politics” (visa, asylum policies, and the status of non-EC nationals) was evident in the rejection of a common approach to immigration and asylum policies. The 1980s cooperation in the migration field unfolded outside of the EU institutions.

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<sup>107</sup> Roger Hansen, “Regional Integration: Reflections on a Decade of Theoretical Efforts,” *World Politics* 21, no. 2 (January 1969): 254.

<sup>108</sup> Lahav, *Immigration and Politics*, 40.

<sup>109</sup> *Ibid.*

<sup>110</sup> “Guidelines for a Community Policy on Migration: Commission Communication Transmitted to the Council in March 1985 (COM (85) 48 final),” *Bulletin of the European Communities* 9 (1985), from *Archive of European Integration*, [http://aei.pitt.edu/1256/1/migration\\_policy\\_COM\\_85\\_48.pdf](http://aei.pitt.edu/1256/1/migration_policy_COM_85_48.pdf) (accessed February 18, 2011).

This observation brings to discussion Hoffman's intergovernmentalist skepticism of the nation states' sovereignty loss over highly sensitive areas of politics.

As the free movement of EC nationals fell under the competencies of the European Commission and the European Court of Justice, the European Council of Ministers retained unanimity regarding the right of non-EC nationals to move unconditionally across the borders. Additionally, immigration and asylum policies continued to remain outside of the EC framework. Individual member states enjoyed national control over the entrance of foreigners to their territories. Under the SEA, the European Commission was only loosely associated with intergovernmental cooperation of the member states in the migration area, whereas the supranational European Court of Justice and the European Parliament were mainly excluded. The SEA created the "cooperation" procedure in the Parliament, which increased its weight in the legislation process. However, its power remained modest until the introduction of the "co-decision I" through the Treaty of the European Union (1993), and the "co-decision II" through the Treaty of Amsterdam (1999), which made the European Parliament a bigger player in EU politics. Both Schengen and the SEA pursued market integration in addition to restrictive immigration and asylum policies.<sup>111</sup> The SEA, as well as Schengen to an extent, initiated a very slow and incremental movement toward the final product of a "communitarized" immigration policy.

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<sup>111</sup> Andrew Gebbes, "Analysing the Politics of Migration and Immigration in Europe," in *The Politics of Migration and Immigration in Europe*, ed. Andrew Gebbes (Thousand Oaks, CA: Sage Publications, 2003), 12.



### ***The 1980s- Restrictive Intergovernmental Cooperation***

The early 1980s reflected integration stagnation and economic slowdown in Western Europe and the European Community. While the recession created soaring rates of inflation and unemployment, the East-West tension only amplified. Increased rate of immigration had grown out of control and it was politically untenable to sustain inflow of labor migration.<sup>112</sup> Gebbes coined four periods of the European Community cooperation development in the immigration area. The first period incorporated years between 1957 and 1986. From the Treaties of Rome until the Single European Act (exclusively), the European Community witnessed a “minimal immigration policy involvement.”<sup>113</sup> During this time span, intergovernmental cooperation in the immigration sphere flourished through inter-state coordination. The second period, “informal intergovernmentalism,” encompassed a period from 1986 to 1993. This phase was initiated by the Single European Act. As Gebbes states, “states were keen to pursue their domestic immigration control objectives at the EU level without empowering the EU institutions.”<sup>114</sup> As the post-SEA period showed, the member states exhibited skepticism with regards to ceding competencies to the supranational institutions. Several intergovernmental groups, whose objectives concentrated on external border controls, asylum, deportations, and terrorism, continued to favor intergovernmentalism and minimal Community influence on the process of the development of a “common” immigration policy.

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<sup>112</sup> Grete Brochmann, *European Integration and Immigration from Third Countries* (Oslo: Scandinavian University Press, 1996), 27.

<sup>113</sup> Gebbes, “The Politics of Migration,” 131.

<sup>114</sup> *Ibid.*, 132.

Reluctance to granting control to the EC institutions correlated with interstate cooperation, and resulted in restrictive measures in the migration sphere, particularly with regards to illegal migration and external border patrols. The Iranian oil crisis of 1979 affected the economic recovery in Europe.<sup>115</sup> Most Western European countries introduced strict, national immigration regulations in the 1970s, using the oil crisis as a pretext to tackle immigration burden.

The socio-economic situation of the 1980s mobilized the EC member states to cooperate in the migration sphere in order to restrict certain policies through the harmonization process. This cooperation unfolded mainly outside of the EU institutions. However, as Gebbes argues, the European Community served as a “new venue” for the pursuit of domestic policy objectives<sup>116</sup> - objectives that projected national demands of the nation states. The member states reconciled with the definition of the envisioned immigration cooperation as rather restrictive and intergovernmental.

### **The 1990s – Mixed Harmonization of the Immigration Arena**

The early 1990s witnessed a new period of deeper political integration. The fall of Communism in Eastern Europe and the process of German unification speeded up implementation of yet another treaty amendment that would not only deal with external political and economic events, but also with internal strengthening of the Single Market. The collapse of the Iron Curtain manifested into a massive movement of migrants from the East to West. This predictable diaspora markedly invigorated further policy restrictions in the immigration

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<sup>115</sup> Desmond Dinan, *Europe Recast: A History of European Union* (London: Lynne Rienner Publishers, 2004), 167.

<sup>116</sup> Gebbes, “The Politics of Migration,” 146.

sphere.<sup>117</sup> Governments of the member states rationalized the upcoming treaty as a legitimate document, which addressed the ongoing immigration dilemma at the EU level. Several ad hoc intergovernmental groups in the post-SEA period lacked adequate proposals and thus the subsequent treaty raised hopes for further harmonization.

### ***The Treaty of the European Union - 1993***

The Treaty of the European Union (TEU) entered into force on November 1, 1993. Unlike the Single European Act, the TEU formalized cooperation on immigration by placing it under one of three newly created pillars- the semi-intergovernmental (hybrid) pillar of the Justice and Home Affairs (JHA). Although the pillar was placed under the EU roof, aspects of immigration policy were a subject to a “common interest” rather than a “common policy.”<sup>118</sup> The “common interest” under Title IV, Article K1, includes:

Asylum policy; rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; immigration policy and policy regarding nationals of third countries: a) conditions of entry and movement by nationals of third countries on the territory of Member States; b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment; c) combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States.<sup>119</sup>

These points, as Brochmann adds, represented an extension of the areas covered by the extra-Community Schengen Agreements. The TEU also introduced a concept of “people’s Europe,” which involved the notion of European citizenship,

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<sup>117</sup> Channe Lindstrøm, “European Union Policy on Asylum and Immigration: Addressing the Root Causes of Forced Migration: A Justice and Home Affairs Policy of Freedom, Security and Justice?” *Social Policy & Administration* 39 (December 2005): 589.

<sup>118</sup> Gebbes, “International Migration,” 25.

<sup>119</sup> European Union Law, “Treaty of European Union,” July 29, 1992.

which would be granted to prospective EU nationals. Moreover, the name change from the European Community to the European Union indicated nothing more than further social, political and economic integration.

Brochmann sees the TEU as a political will of the then twelve member states to develop a prospective “common” immigration policy.<sup>120</sup> In terms of migration, the TEU compromised between principles of intergovernmentalism and supranationalism. The member states retained their traditional authority over certain aspects of immigration and asylum policies addressed in the third pillar. The “common interest” involved initiatives of both the European Commission and the member states. According to the Article K3,

1. In the areas referred to in Article K.1, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations;

2. The Council may: on the initiative of any Member State or of the Commission, in the areas referred to in Article K.1(1) to (6); on the initiative of any Member State, in the areas referred to in Article K1(7) to (9):

(a) adopt joint positions and promote, using the appropriate form and procedures, any cooperation contributing to the pursuit of the objectives of the Union;

(b) adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged; it may decide that measures implementing joint action are to be adopted by a qualified majority.

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<sup>120</sup> Brochmann, *European Integration*, 88.

The supranational side of the TEU allowed the “common interests” under the Article K1 to be ultimately relocated under the Community pillar, potentially extending the Community law to some areas of the JHA.<sup>121</sup>

Other scholars have had a less optimistic outlook on the TEU. Although, for instance, it upgraded the role of the European Parliament, the TEU brought victory to intergovernmentalism.<sup>122</sup> Adam Luedtke states that,

The resulting Maastricht Treaty prevented immigration policy from becoming ‘supranationalized’ in four respects: 1) it allowed member states the right of initiative to propose new EU-level measures (in “normal” EU decision-making, it is only the Commission who can propose new measures); 2) it allowed the Parliament only the right to be “consulted” over decisions, but gave it no veto or amendment power; 3) it prevented the ECJ from having legal jurisdiction over immigration; and 4) it allowed any member state to veto a proposed measure.<sup>123</sup>

As Lahav mentions, the communitarian approach that was adopted only facilitated the free movement of EU citizens and their equal treatment within the EU; immigration and asylum would be dealt at the intergovernmental level with the JHA,<sup>124</sup> leaving most significant issues (asylum, illegal migration, and visa policies) of migration policy outside of the EU umbrella. Therefore, the Treaty of the European Union formalized cooperation of immigration policies, but it did not harmonize them due to sound opposition from some member states against giving up competencies to the EU institutions. Nonetheless, the TEU drew the project of the immigration harmonization near the envisioned supranational entity of the

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<sup>121</sup> Antony Messina and Colleen Thouez, “The Logics and Politics of a European Immigration Regime,” in *West European Immigration and Immigrant Policy in the New Century*, ed. Anthony Messina (Westport, CT: Praeger, 2002), 101.

<sup>122</sup> Adam Luedtke, “One Market, 25 Stats, 20 Million Outsiders? European Union Immigration Policy,” paper prepared for the 9th Annual Graduate Student Conference (Georgetown University, Washington DC, February 18-19, 2005), <http://aei.pitt.edu/4555/> (accessed December 10, 2009).

<sup>123</sup> *Ibid.*

<sup>124</sup> Lahav, *Immigration and Politics*, 45.

founding fathers due to its noticeable connection between internal free movement and increased external border controls.<sup>125</sup> Parameters of the “common” immigration policy rhetoric began to evolve with an emphasis on selective measures toward securitizing external frontiers from influx of illegal immigrants.

### ***The Treaty of Amsterdam- 1997-1999***

Central components of the discourse on the path to the Treaty of Amsterdam revolved around immigration and asylum policies. The Treaty came into force on May 1, 1999 and introduced a new Title IV *Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons*. Under this title, articles captured matters associated with asylum, immigration and external border controls as contingent of Community procedures after five years (2004) from the entry into force of the Treaty of Amsterdam.<sup>126</sup> With respect to the immigration policy arena, Luedtke asserts that

It was agreed that after five years, the Commission would gain the sole right of initiative, the Parliament would gain the power of ‘co-decision,’ the unanimity requirement (national veto) in the Council would disappear, and decisions would thus be taken by a majority vote (though this arrangement would have to be implemented by a unanimous vote after the five-year transition period!). It was also agreed to give the European Court of Justice jurisdiction over immigration, though with a special exception, in that only high courts could refer cases to the ECJ.<sup>127</sup>

Moreover, the European Court of Justice would only act on the basis of a referral from the “high courts” in the member states.<sup>128</sup>

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<sup>125</sup> Gebbes, *Immigration and European*, 108.

<sup>126</sup> European Union Law, “Treaty of Amsterdam,” November 10, 1997.

<sup>127</sup> Luedtke, “One Market.”

<sup>128</sup> Gebbes, “International Migration,” 26.

From a perspective of pro-internationalists, the key achievements of the Treaty of Amsterdam were creation of the area of freedom, justice and security, and incorporation of “the Schengen acquis”<sup>129</sup> into the EU framework. Significant changes to the third pillar included transition of visa, asylum and immigration policies, as well as judicial cooperation in civil matters, to the Community pillar. Lahav defines this move as “a gradual step toward a supranational immigration policy.”<sup>130</sup> To the bewilderment of many, the Treaty of Amsterdam did not “supranationalize” the immigration policy, but rather “communitarized” it.<sup>131</sup> Luedtke states that the Treaty achieved only a partial supranationalization over migration.<sup>132</sup> Transfer of the Justice and Home Affairs significantly extended tentacles of supranationalism. However, introduction of qualified majority voting (QMV) in the European Council of Ministers would still have to be implemented through a unanimous vote. Therefore, any member state, represented by its national minister, would have a leeway to veto the proposal. Partially winning institutions in the post-Amsterdam period were the European Commission and the European Parliament -the two supranational EU institutions, which have been more open to rights-oriented framework of a “common” immigration policy and thus constituted excellent targets of pro-immigrant NGOs.<sup>133</sup> The Treaty of Amsterdam incorporated anti-discriminatory provisions (especially outlined in the Article 13) and thus gave a more human face to the development of immigration

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<sup>129</sup>“The *acquis communautaire*” refers to the accumulated legislation, legal acts, court decisions which constitute the body of European Union law. “The Schengen *acquis*” means laws adopted under the Schengen Agreement, prior to its integration into the European Union legal order by the Treaty of Amsterdam.

<sup>130</sup> Lahav, *Immigration and Politics*, 46.

<sup>131</sup> Gebbes, “International Migration,” 26

<sup>132</sup> Luedtke, “One Market.”

<sup>133</sup> Schain, “The State Strikes Back,” 102.

and asylum policies at the EU level. Nonetheless, the overall approach to illegal immigration continued to exert a restrictive nature. Since 1985, creation of the migratory policy regime has pursued a limited and selective approach to treatment of undocumented third country immigrants.

### *The Tampere Summit - 1999*

Shortly after the introduction of the Treaty of Amsterdam, a meeting of the EU heads of state and government was held in Tampere, Finland, on October 15-16, 1999. The meeting focused on the following themes: common asylum and migration policies; a union-wide fight against crime; and a stronger external action.<sup>134</sup> One of the Tampere Summit's milestones outlines the following:

It would be in contradiction with Europe's traditions to deny freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.<sup>135</sup>

The Tampere Summit pointed out a mutual obligation to equally treat non-EU nationals who stay within the EU borders. On the one hand, some of its objectives aligned with the European Commission and the European Parliament's more liberal and immigrant-friendly approach. On the other hand, the heads of state and government projected a plan to curtail the inflow of illegal immigrants through

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<sup>134</sup> European Commission, "Tampere: Kick-Start to the EU's Policy for Justice and Home Affairs", Information and Communication unit of the Directorate-General Justice and Home Affairs. Brussels, Belgium, August 2002.

<sup>135</sup> "Tampere Summit Conclusions, 15-16 October, 1999," *Statewatch* (2008) <http://www.statewatch.org/news/2008/aug/tamp.html> (accessed November 10, 2009).



tougher external border controls. An envisioned “common” immigration policy would facilitate the control of inflowing immigrants by developing common measures dealing with illegal border crossings.

Notwithstanding the fact that the Tampere Summit supported anti-discrimination provisions and the incorporation of non-EU citizens into the mainstream society, it markedly underscored the restrictive nature of a projected “common” migration policy. So far, the European treaties have guaranteed the freedom of movement to all EU nationals, and for all non-EU nationals who reside *legally* within the borders of the EU.<sup>136</sup> This approach articulated a need to combat illegal immigration and expel illegal migrants from the EU territory. Additionally, despite repetitive efforts to formulate a supranational immigration policy, the member states continued to address undocumented immigrants at the national level through various measures, be it regularization programs, fixed quotas on immigrants or mass deportation.<sup>137</sup>

### ***The 1990s- Further Restrictive and Mixed Harmonization***

The Treaty of the European Union initiated a novel momentum in the immigration policy realm. It served as a jump start to Gebbes’ third period of the immigration cooperation development titled “formal intergovernmental cooperation.” Most of the member states and the EU institutions have framed a “common” immigration policy as a restrictive tool, which targeted uncontrolled influx of the third-country nationals. With respect to migration, “fortress Europe” continued to grow in the 1990s. Uncontrolled migrant inflows and permeable

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<sup>136</sup> Ibid.

<sup>137</sup> Dinan, *Ever Closer*, 576.

external borders had become of a disquieting concern for national policymakers, politicians and EU officials in the early 1990s. Threats of migration from the Central-Eastern Europe after the end of Cold War intensified a strict nature of policymaking to tackle undocumented immigration.<sup>138</sup> Before the 1990s, illegal migration was generally defined as an inflow of foreigners who illegally overstayed in a country of destination or who entered via unlawful routes. With time, however, illegal immigration became to be perceived as a cause of drug trafficking and international crime. This negative connotation was embedded in the EU rhetoric, which labeled the threat of uncontrolled migration as startling.

### **The 2000s – More Pronounced Harmonization of the Immigration Arena**

The twenty-first century not only escalated a number of inflowing immigrants to certain European countries thanks to their economic prosperity, but also the emergence of pronounced securitization of immigration policies. Unilateral approach to illegal immigration has shown ineffectiveness; “porous” external borders fueled further determination to bring immigration policies to the EU level. As shown below, treaties, summits and programs implemented in the 2000s have resulted in the pronounced process of the development of a “common” migration policy. The recent years have clearly demonstrated the ongoing communitarization of the immigration policy area.<sup>139</sup>

#### ***The Treaty of Nice- 2001***

Following the Amsterdam Treaty and the Tampere Summit, the Treaty of Nice was signed on February 26, 2001 and entered into force two years later.

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<sup>138</sup> Lindstrøm, “European Union Policy,” 589.

<sup>139</sup> Lahav, *Immigration and Politics*, 5.

Similarly to the Treaty of the European Union, the Treaty of Nice was an immediate counter-reaction to political externalities. While the fall of Communism impacted the reformist actions of the European Union in the early 1990s, the prospective EU accession of Eastern European countries (2004) also invigorated necessary institutional reforms.<sup>140</sup>

Lahav describes this Treaty amendment as a building block of the momentum toward supranationalization of the European Union and its member states,<sup>141</sup> which revealed the French leadership at work. It greatly extended qualified majority voting (QMV) to various areas, including further measures to facilitate the freedom of movement of EU nationals. Due to enduring reluctance of the member states to transfer sovereignty in some sensitive areas, QMV was deferred in the immigration and asylum realms. History has indeed repeated itself when it comes to analyzing the Treaty of Amsterdam's postponement of the QMV adoption. The switch to majority votes was deferred to 2004.<sup>142</sup> Neither the Treaty of Amsterdam nor the Treaty of Nice achieved this. Once again, some member states took advantage of the unanimous voting in the European Council of Ministers and rebuked plans of implementing QMV at the time of the Treaty ratification. The Treaty of Nice, as Anna Kicingier and Katarzyna Saczuk mention, did not bring any innovative changes in the field of immigration policy.<sup>143</sup> Rather, it concentrated on the extension of matters, which would be submitted to the

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<sup>140</sup> Europa, "Treaties and Law."

<sup>141</sup> Lahav, *Immigration and Politics*, 47.

<sup>142</sup> Europa, "Summary of the Treaty of Nice," January 31, 2001.

<sup>143</sup> Anna Kicingier and Katarzyna Saczuk, "Migration Policy in the European Perspective- Development and the Future Trends," *CEFMR*, working paper 1 (2004): 13, [http://www.cefmr.pan.pl/docs/cefmr\\_wp\\_2004-01.pdf](http://www.cefmr.pan.pl/docs/cefmr_wp_2004-01.pdf) (accessed November 20, 2009).

majority voting procedure in the European Council of Ministers in next five years following the signatory date.

### *The Laeken Summit- 2001*

The “9/11” heightened security and immigration concerns among the developed nation states. Following the Treaty at Nice, the European Council held a Summit in Laeken, Belgium, on December 14-15, 2001. A major goal of the Laeken Summit concentrated on strengthening and hastening common standards on external border controls. The document’s conclusion outlines the following objectives:

Better management of the Union’s external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council of Ministers and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created.<sup>144</sup>

In addition to border control, the EU heads of state and government stressed the urgency to immediately adopt a “common” immigration policy on the basis of the preceding Tampere Summit. The European Council aimed at the development of a common system for exchanging information on asylum, migration and countries of origin, and the establishment of specific programs to fight discrimination and racism.<sup>145</sup> Similarly to Tampere, Laeken outlined non-binding

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<sup>144</sup> Council of European Union, “Presidency Conclusions: European Council Meeting in Laeken – 14 and 15 December 2001.”

<sup>145</sup> Ibid.

rhetorical goal, thus producing theoretical, rather than practical results, aftereffect in the field of a “common” immigration policy.<sup>146</sup>

### ***The Seville Summit - 2002***

Under the Spanish Presidency, the European Council meeting at the Seville, Spain, on June 21-22, 2002 specifically focused on the need to establish a “common” immigration policy.<sup>147</sup> The Seville Summit agreed on “increased security at external borders with joint operations at ports and airports; creation of a special unit of heads of border control from the member states; new rules encouraging increased penalties for people smuggling; a policy of speeded up repatriations for those who do not qualify.”<sup>148</sup> Repatriation included joint strategies to work with migrant-sending countries.

The Seville Summit concretized the restrictive face of a “common” immigration policy. Due to its toughened approach to illegal immigration, the Seville Summit was accused of moving toward the negatively-connoted notion of “fortress Europe.”<sup>149</sup> Nonetheless, international events of the early-2000s excused the Seville agenda and furthered securitization of the immigration issues with more restrictions and control on inflowing numbers of third-country migrants.

### ***The Hague Program- 2004-2009***

The European Council meeting on November 4-5, 2004, in Brussels, Belgium, followed very similar objectives of its preceding meetings. On May 10,

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<sup>146</sup> It is noteworthy to mention that the European Council is not a decision-making body of the EU.

<sup>147</sup> Council of the European Union, “Thessaloniki European Council: Presidency Conclusions,” October 1, 2003.

<sup>148</sup> Paul Reynolds, “Seville Summit- What Did It Achieve?” *BBC News*, June 24, 2002, <http://news.bbc.co.uk/2/hi/europe/2062661.stm> (accessed November 25, 2009).

<sup>149</sup> Lahav, *Immigration and Politics*, 48.

2005 the European Commission presented a communication to the European Council where it outlined ten priorities of the Hague Program for the next five years (2004-2009). Some of the priorities included: fight against terrorism; balanced approach to deal with legal and illegal immigration (especially combating illegal immigration); controlling external borders and developing a visa policy; and tackling organized crime. In terms of illegal immigration and terrorism, the Presidency Conclusions clearly mentioned the negative outcomes of post-“9/11” and Madrid terrorist attacks of 2004. The document states:

The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime, as well as the prevention thereof.<sup>150</sup>

As can be inferred from the treaties and summits I have been discussing, augmentation of a more coordinated EU approach to a “common” immigration policy has retained a restrictive character, especially at the turn of the century with external (“9/11”) and internal (Madrid 2004, Ceuta and Melilla 2005, and London bombings 2005) factors. The process of the development of an envisioned “common” immigration policy has gradually, albeit very moderately, evolved with help of a number of supportive member states and EU officials. The Hague Program only added teeth to the process of building the supranational immigration empire.

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<sup>150</sup> Presidency Conclusions, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union,” 4-5 November, 2004.

### *The Establishment of FRONTEX – 2004*

In order to secure the free movement of persons within the EU, the European Council, upon the proposal from the European Commission and opinion from the European Parliament, passed a Council Regulation (EC) 2007/2004, which established a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) in October, 2004. According to the main website of the agency, FRONTEX's responsibility lies in "ensuring that the EU external borders remain permeable and efficient for bona fide travelers while being an effective barrier to cross-border crime."<sup>151</sup> FRONTEX could be regarded as a child of "the Schengen acquis," which has aimed at strengthening external borders through mutual cooperation of the member states. In Chapter 2, Article 2, the Council Regulation lists major tasks of FRONTEX. They are as follows:

(a) coordinate operational cooperation between Member States in the field of management of external borders; (b) assist Member States on training of national border guards, including the establishment of common training standards; (c) carry out risk analyses; (d) follow up on the development of research relevant for the control and surveillance of external borders; (e) assist Member States in circumstances requiring increased technical and operational assistance at external borders; (f) provide Member States with the necessary support in organising joint return operations.<sup>152</sup>

It is crucial to mention that the independent FRONTEX does not constitute a supranational institution *per se*. The responsibility for control and

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<sup>151</sup> FRONTEX, <http://www.frontex.europa.eu> (accessed January 18, 2011).

<sup>152</sup> European Union Law, Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union," *Official Journal of the European Union*, October 26, 2004.

surveillance of external border lies within the sovereignty of the member states.<sup>153</sup> The agency serves as an additional financial and physical assistance in cases of inability to nationally deal with a burden of guarding external borders. Its budget covers revenue from the EU budget.<sup>154</sup> Border countries of Eastern, South-Eastern and Southern Europe have greatly benefited from FRONTEX as an aid in fighting against illegal inflows of immigrants. Its recent development, RABIT 2010 (Rapid Border Intervention Teams) has aimed at immediate deployment of trained border guards in case of urgent and exceptional migratory pressure<sup>155</sup> (i.e. Greece situation in 2010 and North African revolutions in 2011).

### ***The European Pact on Immigration and Asylum- 2008***

Although the document I describe below is neither a treaty amendment nor a resolution of the European Council summit meeting, it is noteworthy due to its sequential contribution to the development of the “common” immigration policy rhetoric. The EU heads of state and government adopted the so-called European Pact on Immigration and Asylum (EPIA) on October 16, 2008. Similarly to the previously-described documents, the document called for political rather than legal force. In other words, it did not constitute a concretized basis for a “common” immigration policy. The European Parliament, the European Council of Ministers, the European Commission and the member states

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<sup>153</sup> Ibid.

<sup>154</sup> FRONTEX.

<sup>155</sup> Ibid.



planned to implement the EPIA, which was a French initiative negotiated with Spain and Germany.<sup>156</sup> The French Presidency's main objective was to establish a "common" immigration policy. Endorsement of this document had successfully fulfilled some of French President Nicolas Sarkozy's reforms. According to Sergio Carrera and Massimo Merlino, the EPIA embodied a nationalistic and intergovernmental approach, which sought to legitimize certain French immigration policies at the EU level.<sup>157</sup>

Page two of the document underlined negative consequences of illegal immigration affecting the member states. One paragraph reads, "The majority of European countries have to cope with illegal immigration, which is an obstacle to the smooth integration of legal immigrants, and a cause of conflict. Governments cannot settle for such a situation."<sup>158</sup> The EPIA commits its member states in five key areas:

To organize legal immigration to take account of the priorities, needs and reception capabilities determined by each Member State, and to encourage integration; to control illegal immigration by ensuring the return of illegal immigrants to their country of origin or a country of transit; to make border controls more effective; to construct a Europe of asylum; to create a comprehensive partnership with countries of origin and transit to encourage synergy between migration and development.<sup>159</sup>

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<sup>156</sup> L'immigration, l'integration, l'asile et le developpement solidaire [Ministry of Immigration, Integration, National Identity and Codevelopment of France], "The European Pact on Immigration and Asylum," [http://www.immigration.gouv.fr/IMG/pdf/Plaquette\\_EN.pdf](http://www.immigration.gouv.fr/IMG/pdf/Plaquette_EN.pdf) (accessed February 10, 2009).

<sup>157</sup> Sergio Carrera and Massimo Merlino, eds., "Assessing EU Policy on Irregular Immigration under the Stockholm Programme," *Centre for European Policy Studies* (October 2010): 3, <http://shop.ceps.eu/book/assessing-eu-policy-irregular-immigration-under-stockholm-programme> (accessed October 20, 2010).

<sup>158</sup> L'immigration, l'integration, l'asile et le developpement.

<sup>159</sup> Ibid.

The latter objectives did not escape controversy due to their strong stance on expulsion of illegal immigrants, which, as mentioned, reflected French domestic interests. In spite of occurring opposition, all 27 member states agreed to follow the objectives, perhaps climbing voluntarily toward the creation of a “common” immigration policy.

The document targeted the unwanted immigrants who, by their illegal status, contribute, politically and socio-economically, to problems at the national and international levels. As already mentioned, the EPIA did not legally bind the member states. Like the former treaties (specifically from 1993 and onward) and summits (from 1999 and onward), this document haltingly furthered the development of a unified migration policy. It could be said that the Treaty of Lisbon is a product of two decades of negotiations and policymaking.

### ***The Treaty of Lisbon- 2007-2009***

The Treaty of Lisbon, initially signed on December 13, 2007 has ascended the ladder of the prospective communitarization with respect to immigration issues. Failure of the European Constitution of 2004, due to rejection of the French and the Dutch voters in 2005, led to its replacement by the aforementioned Treaty. The latter document did not succeed in the 2008 ratification because the Irish electorate failed to accept its provisions. However, the Treaty of Lisbon passed the second referendum in 2009 and entered into force on December 1, 2009 to the great benefit of the EU institutions.

The Treaty of Lisbon was a leap forward in the history of the development of a “common” immigration policy. It introduced a profound reform in the sphere

of illegal immigration. The Treaty of Lisbon confirmed a shared competence of the EU and the member states over immigration issues. This situation did not designate full legislative initiative to the European Commission. However, the Treaty of Lisbon shifted from unanimity to qualified majority voting in the European Council of Ministers and co-decision in the European Parliament.<sup>160</sup> The latter institution already has an equal say with national ministers in the areas dealing with immigration, border controls, and visa issues. Nonetheless, the Treaty of Lisbon will eventually empower the European Parliament with more say in both legal and illegal migration measures.<sup>161</sup> Qualified majority voting and co-decision are already applicable in the legislative procedures in the illegal immigration field and will be extended to the legal migration legislative actions. This step in decision-making process debilitates voices of resentment of the member states' officials in certain migration legislations. The reforms in the area of freedom, security and justice have called for accelerated creation of "common" immigration and asylum policies. Under *General Provisions*, Article 2 notes:

The Union shall offer its citizens an area of freedom, security and justice 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.<sup>162</sup>

In case of a "common" immigration policy, the enhanced process of decision making would allow the European Union and its member states to define the

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<sup>160</sup> "The Lisbon Treaty: 10 Easy-to-read Fact Sheets," *Foundation Robert Schuman*, December 2009, <http://www.robert-schuman.eu/doc/divers/lisbonne/en/10fiches.pdf> (accessed December 15, 2009).

<sup>161</sup> Hugo Brady, "European Migration Policy: An A-Z," *Centre for European Reform* (February 2008), [http://www.cer.org.uk/pdf/briefing\\_813.pdf](http://www.cer.org.uk/pdf/briefing_813.pdf) (accessed February 6, 2011).

<sup>162</sup> European Union Law, "Amendments to the Treaty on European Union and to the Treaty Establishing the European Community."

common rules and conditions of immigration. The planned switch to qualified majority voting in the European Council of Ministers has furthered the ongoing, albeit gradual, progress of the communitarization of immigration policies.

However, as Jörg Monar mentions, this process in policymaking had to be bought at the price of extending the British and Irish opt-out in the former third-pillar matters. Moreover, the Treaty did not remove “the tension between common objectives on the one hand and the protection of national competences on the other as this is exemplified by the maintenance of national control of values of admission under the new common migration policy.”<sup>163</sup>

#### ***The Stockholm Program – 2010- 2014***

Building on the Tampere Summit, the Hague Program, and the European Pact on Immigration and Asylum, the recent Stockholm Program, which was adopted by the EU heads of state and government in December 2009, focused on the citizens' interests and needs and the added value that the European Union has brought to its citizens. According to the European Council, fighting illegal immigration is one of top priorities of the Stockholm Program. The EU should improve coordination of its efforts and work on active partnership with the countries of origin and of transit in order to encourage the synergy between migration and development.<sup>164</sup> It is noteworthy that the European Commission contributed greatly to the final framework of the Stockholm Program. In its Communication entitled *An Area of Freedom, Security and Justice Serving the*

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<sup>163</sup> Jörg Monar, “Justice and Home Affairs,” *Journal of Common Market Studies* 48, no. (supplement) 1 (September 2010): 158.

<sup>164</sup> “The Stockholm Program: An open and secure Europe serving the citizen,” *Statewatch*, October, 2010, <http://www.statewatch.org/news/2009/oct/stockholm-draft-presidency-programme.pdf> (accessed October 31, 2010)

*Citizen: Wider freedom in a Safer Environment*, the European Commission clearly emphasized that one of the challenges facing the EU would be a high number of illegal immigrants residing in Europe. The Stockholm Program incorporated such a concern with illegal foreigners and focused on “the citizens” as being the heart of Europe.<sup>165</sup> The document’s section entitled *Better Controls on the Illegal Immigration* mentions:

The European Council is convinced that effective action against illegal immigration remains an essential counterpart to the development of a common policy on legal immigration. The fight against human trafficking in particular must remain a key priority for this purpose. It will be important to ensure that the newly adopted instruments in the area of return and sanctions against employers, as well as the operation of readmission agreements, are closely monitored in order to ensure their effective application.<sup>166</sup>

According to Carrera and Merlino, the Stockholm Program used the term “illegal” throughout the body of the document, which ascribes undocumented immigrants to criminal status.<sup>167</sup> Moreover, the Stockholm Program focused on measures such as return, readmission and criminalization of solidarity. The final document omitted two recommendations by the European Commission’s June 2009 Communication: 1) the common EU standards on non-removable illegal immigrants and 2) the common guidelines for implementing regularization programs.<sup>168</sup> In other words, the outcome of the Stockholm Program would contribute to the ongoing fight with illegal immigration through stricter border

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<sup>165</sup> Carrera and Merlino, “Assessing EU Policy,” 3.

<sup>166</sup> “The Stockholm Program: An open and secure Europe.”

<sup>167</sup> I personally disagree with the scholars because I myself use the term ‘illegal’ in my research. Incorporation of this word should not have a political or ethical connotation.

<sup>168</sup> Carrera and Merlino, “Assessing EU Policy,” 4.

controls and better exchange of information on criminal and security issues increased police co-operation.

### *The 2000s- Further Restrictive and Gradual Harmonization*

With the millennium, new Europe entered into a more intensified discourse about the future supranationalization of immigration policy. Restrictive management of illegal immigrants and tightened external borders have topped discussions among the member states and EU officials. Major treaty-amending documents and official European Council meetings or proposals have clearly projected two trends: the gradual, albeit stagnant, development of a “common” immigration policy; and incrementally a more restrictive nature of the member states and the EU institutions’ approach to migration, supporting tight regulations against an illegal population. Despite increased power of the pro-immigrant European Commission, only those proposals restrictive in content managed to be adopted.<sup>169</sup> That said, most of the member states have not shared the European Commission’s liberal standpoint on immigration and thus lowered various proposals during negotiations in the European Council of Ministers.<sup>170</sup> Therefore, directive proposals have undergone a most rigid change after the “9/11” in favor of more security- and control-related nature of migration policies.<sup>171</sup> As Petra Bendel asserts, “communitarization of migration policies in the EU has, so far, concentrated excessively on the control of migration and on the combating of

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<sup>169</sup> Schain, “The State Strikes Back,” 204.

<sup>170</sup> Herz, “European Immigration,” 11.

<sup>171</sup> Petra Bendel, “Everything under Control? The European Union’s Policies and Politics of Immigration,” in “The Europeanization of National Policies and Politics of Immigration,” ed. Thomas Faist and Andreas Ette (Hampshire, UK: Palgrave Macmillan, 2007), 36.

irregular migration...”<sup>172</sup> Matters of integration of migrants and attraction of special groups of immigrants have been of secondary importance.

The 2000s opened more windows of opportunity for a comprehensive approach to the immigration management at the EU level due to such events as the “9/11,” the Madrid bombing in 2004, the Ceuta and Melilla incidents in 2005, and the London bombings in 2005. These particular events indisputably put immigration into the domain of security in Europe of the twenty-first century.<sup>173</sup> The process of creating a common area of freedom, security and justice at the EU level for all EU citizens has introduced distinction between “us” and “others.” In the minds of many policymakers, therefore, securitization of immigration is needed due to disharmony and chaos brought by migration.<sup>174</sup>

Albeit not discussed in the body of the chapter, the EU has introduced several updates to its border control mechanism. The Visa Information System (VIS) was adopted upon the (European) Council Decision from 2004 (2004/512/EC) in order to exchange visa data between member states which shall enable national authorities to enter and update visa data and to consult these data electronically.<sup>175</sup> Moreover, the update of Schengen Information System (SIS) I to Schengen Information System (SIS) II by the Regulation (EC) 1987/2006 in 2006 enhanced the goal to maintain “high level of security within the area of freedom, security and justice of the European Union by supporting the implementation of

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<sup>172</sup> Petra Bendel, “Immigration Policy in the European Union: Still bringing up the walls for fortress Europe?” *Migration Letters* 2, no. 1 (April 2005): 23, <http://www.migrationletters.com/200501/content.htm> (accessed November 17, 2009).

<sup>173</sup> Alessandra Buonfino, “Between Unity and Plurality: The Politicization and Securitization of the Discourse of Immigration in Europe,” *New Political Science* 26, no. 1 (March 2004): 23.

<sup>174</sup> *Ibid.*

<sup>175</sup> European Union Law, “Council Decision of 8 June 2004 establishing the Visa Information System (VIS),” *Official Journal of European Union*.

policies linked to the movement of persons that are part of ‘the Schengen acquis.’”<sup>176</sup> However, in June 2009, the European Council of Ministers formally gave up SIS II due to its failures and replaced it by an enhanced version of SIS I system.<sup>177</sup>

Further securitization of external border checks timely correlated with incidents in Southern Europe. EU officials and the European states began to pursue tougher border controls in the Mediterranean region, and linked the events to Islamic terrorism.<sup>178</sup> The twenty-first century has not only continued to label immigrants as an economic threat, but also as a socio-cultural one. In addition, the recent world economic downturn has caused even more selective resolution to immigration policy at the national level of policymaking.

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<sup>176</sup> European Union Law, “Regulation (EC) No 1987/2006 of the European Parliament and the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II),” *Official Journal of European Union*.

<sup>177</sup> Monar, “Justice and Home Affairs,” 150.

<sup>178</sup> Marvin Andrew Cuschieri, “Europe’s Migration Policy towards the Mediterranean: The Need of Reconstruction of Policy-Making.” *Center for European Integration Studies*, discussion paper (2007), [http://www.zei.de/download/zei\\_dp/dp\\_c168Cuschieri.pdf](http://www.zei.de/download/zei_dp/dp_c168Cuschieri.pdf) (accessed November 15, 2009).



## Chapter 4: The Spanish Immigration Law and the Regularization Programs

Following on the footsteps of the previous chapter, this section outlines national immigration laws and legalization acts introduced by the Spanish government in the period 1985-2010. First, I focus on legal documents, which are divided into three time periods: the 1980s, the 1990s, and the 2000s. Similarly to my chapter on the EU policy developments, I follow each subsection by a summary of activities undertaken in each decade. My objective is to shed light on Spain's alignment with EU objectives and the degree of influence that the EU has exercised on the Spanish government since the mid-1980s.

*Map 2 - Spain (with Ceuta and Melilla enclaves)*



Source: University of Texas Libraries

Historically, Spain has been categorized as an emigration country. It transitioned from a net emigration to a net immigration state in the 1980s. After

General Francisco Franco's death in 1975, the economic boom fostered unprecedented levels of expansion in the late 1980s and subsequently reduced high levels of unemployment.<sup>179</sup> The restoration of democracy in 1978 and accession to the European Community in 1986 notably contributed to a steady increase of legal and illegal immigration to Spain from less prosperous regions of the world, mainly North Africa, the Americas and Asia. Other factors that stimulated the growth of foreign population included the development of labor markets within informal sectors,<sup>180</sup> the geographical proximity with the Maghreb countries, and lax immigration control mechanisms.<sup>181</sup>

**Table 1- Foreign-born population in Spain – municipal registered (1985-2009)**

| <b>Year</b> | <b>Foreign-born population</b> |
|-------------|--------------------------------|
| 1985        | 241,975*                       |
| 1999        | 801,329*                       |
| 2000        | 923,879                        |
| 2001        | 1,370,657                      |
| 2002        | 1,977,946                      |
| 2003        | 2,664,168                      |
| 2004        | 3,034,326                      |
| 2005        | 3,730,610                      |
| 2006        | 4,144,166                      |

<sup>179</sup> Calavita, *Immigrants at the Margins*, 4.

<sup>180</sup> Gary P. Freeman, "Modes of Immigration Politics in Liberal Democratic States," *International Migration Review* 29, no. 4 (Winter 1995): 893.

<sup>181</sup> *Ibid.*; Lax immigration control mechanisms resulted mainly from the lack of immigration policies until the mid 1980s.

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|------|-----------|
| 2007 | 4,519,554 |
| 2008 | 5,268,762 |
| 2009 | 5,648,671 |

Sources: Francisco J. Duran Ruiz, “The Relationship between Legal Status, Rights and the Social Integration of the Immigrants,” *The Center for Comparative Immigration Studies* (October 2003); *Instituto Nacional de Estadística* [National Institute of Statistics]

In 2010, Spain was the eighth country in the world with the largest number of international migrants as a raw number of people.<sup>182</sup> The foreign-born population residing in Spain increased almost twofold in a ten-year period: from 241,971 in 1985 to 499,773 in 1995 respectively.<sup>183</sup> According to the Instituto Nacional de Estadística [National Institute of Statistics], the number of foreign-born immigrants reached 923,879 in 2000<sup>184</sup> and over 5.6 million in 2009, increasing almost six-fold and making up more than 12 percent of the country’s population.<sup>185</sup>

As Soern Kern affirms in his article, the final figures representing immigrants in Spain refer to *inscribed* individuals who register at the municipal level. Regardless of their legal status, foreigners have an incentive to register because, under the Spanish law, anyone who does so is entitled to emergency

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<sup>182</sup> “Migration Data Hub,” *Migration Policy Institute: Migration Information Source* (2010), <http://www.migrationinformation.org/datahub/charts/6.1.shtml> (accessed January 27, 2011).

<sup>183</sup> Francisco J. Duran Ruiz, “The Relationship between Legal Status, Rights and the Social Integration of the Immigrants,” *The Center for Comparative Immigration Studies* (October 2003), <http://ccis.ucsd.edu/PUBLICATIONS/wrkg84.pdf> (accessed March 13, 2009).

<sup>184</sup> Instituto Nacional de Estadística [National Institute of Statistics], *Municipal Register: Foreign Population (Thousands)*, <http://www.ine.es/jaxi/menu.do?type=pcaxis&path=%2Ft20%2Fe245&file=inebase&L=1> (accessed January 14, 2011)

<sup>185</sup> Tom Worden, “Spain Sees Sixfold Increase in Immigrants Over Decade,” *Guardian*, February 8, 2010, <http://www.guardian.co.uk/world/2010/feb/08/spain-sixfold-increase-immigrants> (accessed June 4, 2010).

medical care.<sup>186</sup> Therefore, one can register with the municipality and be effectively an undocumented immigrant. According to the Ministerio de Trabajo e Inmigración [Ministry of Labor and Immigration], only about 4.2 million out of 5.2 million *inscribed* immigrants in 2008 were legal residents.<sup>187</sup> Because illegal foreigners continue to distrust the government, many of them avoid registration. It is highly plausible that a number of undocumented immigrants is currently higher than one million.

### **The 1980s – Top-Down Influence**

Since the 1980s European countries have had their eyes on Spain regarding immigration issues, and especially after the country's accession to the European Community. Once this Southern European state joined the EC, it automatically became known as Europe's "gateway" for non-EC nationals. The Strait of Gibraltar's proximity to North Africa and the Canary Islands' geographical position were, and still are, portrayed as easy-access points for thousands of immigrants. Moreover, as Lydia Esteve González and Richard Mac Bride suggest, the second reason for the Community's worry about immigration to Spain was the ability of Latin American and some other nationals to obtain Spanish citizenship if they legally resided in Spain for a period of two years.<sup>188</sup> Thus, as I illustrate below, its first immigration law fulfilled EC obligations, whereas the first regularization measure compensated undocumented immigrants

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<sup>186</sup> Soeren Kern, "Spain's Immigration System Runs Amok- Spain's Decline." *The Brussels Journal*, September 17, 2008, <http://www.brusselsjournal.com/node/3527/print> (accessed March 17, 2009).

<sup>187</sup> *Ibid.*

<sup>188</sup> Lydia Esteve González and Richard Mac Bride, "Fortress Europe: Fear of Immigration? Present and Future of Immigration Law and Policy in Spain," *U.C. Davis Journal of International Law & Policy* 6, no.2 (Spring 2000): 158-160.

with working and/or living permit due to the restrictive nature of the initial legal code.

### *LO 7/1985*

Spain had no explicit immigration policy prior to 1985. There was no legislation regarding the treatment of non-national residents.<sup>189</sup> The Spanish Constitution of 1978 contained only one reference to migration movements embedded in Article 13, which specified the basic constitutional regulation of immigrants. Rosa Aparicio Gómez and José María Ruiz de Huidobro De Carlos note that “the precept formulates a principle of restricted equivalence between nationals and non-nationals vis-à-vis the entitlement to, and exercise of, fundamental rights and public liberties.”<sup>190</sup> The Spanish Constitution did not take immigration into account because at the time of its creation, immigration was a non-existing concern in Spain and the country was still an explorer of labor.

What revolutionized the legal aspect of migration was the first Spanish immigration law, or Organic Law (*Ley de Extranjería*) 7/1985. The lawmakers ignored the issue of integration of migrants and focused mainly on the control of immigrants and external borders. The law made a clear and formal distinction between legal and illegal immigrants. EC nationals gained all the rights to reside and work in Spain, whereas non-EC nationals faced very limited privileges.<sup>191</sup> For the first time in Spanish history, a legal framework introduced visa requirements for non-EC foreigners: those who intended to stay in Spain for longer than 90

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<sup>189</sup> Calavita, *Immigrants at the Margins*, 27.

<sup>190</sup> Rosa Aparicio Gómez and José María Ruiz de Huidobro De Carlos, “Report from Spain” in *Modes of Migration, Regulation and Control in Europe*, ed. Jeroen Doomernik and Michael Jandl (Amsterdam: Amsterdam University Press, 2008), 152.

<sup>191</sup> Calavita, *Immigrants at the Margins*, 28.

days needed to obtain residence and work permits.<sup>192</sup> The law did not recognize permanent permits and thus introduced a highly demanding set of requirements for the renewal of temporary ones.<sup>193</sup> This legal document, the first of its kind, placed emphasis on deportation and introduced the possibility of expulsion of illegal immigrants who did not have work permits and/or legal residence.<sup>194</sup>

Aparicio Gómez and Ruiz de Huidobro De Carlos assess the law as “short-sighted” by the Spanish legislators who were in charge of outlining the legal document.<sup>195</sup> The law narrative consisted of only five pages in the Federal Bulletin, leaving details to be worked out through administrative channels.<sup>196</sup> Moreover, in-depth analysis of the law reveals the contingent inability of the legislators to foresee the country’s transformation from a net emigration to a net immigration state. The unstable legal framework and insufficient resources for its management impacted the migratory flow in subsequent years.<sup>197</sup> Implementation of the law did not halt an increasing number of illegal immigrants. Moreno Fuentes asserts that LO 7/1985 was nothing more than placing Spain as a gatekeeper of the EC southern border. The document’s restrictiveness and focus on border controls did not correspond with the migratory processes that were affecting Spain at that time.<sup>198</sup>

### ***The Regularization Program of 1986***

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<sup>192</sup> Ibid.

<sup>193</sup> Moreno Fuentes, “The Evolution of Immigration.”

<sup>194</sup> Ibid.

<sup>195</sup> Aparicio Gómez and Ruiz de Huidobro De Carlos, “Report from Spain,” 152.

<sup>196</sup> Calavita, *Immigrants at the Margins*, 28.

<sup>197</sup> Aparicio Gómez and Ruiz de Huidobro De Carlos, “Report from Spain,” 150.

<sup>198</sup> Moreno Fuentes, “The Evolution of Immigration.”

There are various reasons behind endeavoring to undertake a regularization program. Some of them include reduction of the underground economy; increase in tax and social security contributions; improvement of social and economic situation of immigrants; and control over undocumented population.<sup>199</sup> Shortly afterwards, LO 7/1985 was followed by the first regularization program of 1986. Its primary objective was to solve the issue of a large number of undocumented immigrants living in Spain. It had little credibility in the eyes of illegal immigrants.<sup>200</sup> Allegedly, 38,100 applications were accepted. Furthermore, during the implementation of this program, there was a large number of detentions, expelling illegal immigrants, and leaving them without an opportunity to obtain permits.<sup>201</sup>

#### ***The 1980s- External Pressure with Weak Domestic Interests***

Although the 1980s symbolized Spain's unprecedented shift from an emigration to an immigration country, the inflow of immigrants was portrayed as a temporary phenomenon that filled in the bottom of occupational scale with cheap labor from abroad. Therefore, the low salience of immigration in the Spanish political agenda significantly contributed to "thoughtless acceptance of European policy objectives within the legislation implemented at the national level."<sup>202</sup> Many scholars writing on the history of the Spanish immigration law development have persuasively asserted that the accession to the European

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<sup>199</sup> Council of Europe, "Regularisation Programmes for Irregular Migrants," *Parliamentary Assembly*, July 6, 2007.

<sup>200</sup> Cornelius, "Spain: The Uneasy Transition," 412.

<sup>201</sup> Moreno Fuentes, "The Evolution of Immigration."

<sup>202</sup> *Ibid.*

Community pushed the Spanish government to pass its first immigration law<sup>203</sup> in order to comply with EC border controls and an overall concern with a swelling number of immigrants in the Mediterranean region.

*Table 2- Major illegal immigration-related policy steps in the 1980s*

| <b>Timeline</b> | <b>The European Community</b>      | <b>Spain</b>  | <b>National/international overlapping events/trends</b>                     |
|-----------------|------------------------------------|---|---|
| 1985            |                                    | LO 7/1985   | The Schengen Agreements- June   |
| 1986            |                                    | The first regularization Program  | Spain's Accession to the European Community                                 |
| 1987-1989       | The Single European Act- July 1987 | The Spanish Presidency of the European Council of Ministers – January-June 1988 | Spain - growing economy in the late 1980s – need for unskilled, cheap labor |

As mentioned, the European Community outlined its demands for the Spanish immigration law, which were not compatible with the realities of the migratory processes in Spain. Consequently, external rather than internal circumstances decisively impacted the content of the legal code. It is crucial to keep in mind that the Schengen Agreements, which obscured the interests of its signatory states,<sup>204</sup> pursued external border controls and fought against illegal immigration. Meantime, the EC signed a first treaty-amending document, the Single European Act (SEA) in 1987, which underlined similar restrictive measures. EC officials successfully maneuvered to transfer Schengen and the

<sup>203</sup> See Cornelius, "Spain: The Uneasy Transition.;" Pinyol, "Europe's Southern Border."

<sup>204</sup> The Schengen signatory states were the Netherlands, Belgium, Luxembourg, West Germany and France.



SEA objectives to the LO 7/1985 framework. Little understanding of the topic and lack of experienced domestic staff specializing in migration encouraged Europeanization of EC- defined restrictive policy direction.

The first regularization program of 1986 immediately succeeded LO 7/1985. As many have remarked, the legalization act came into effect due to shortcomings of the latter law. Laura Huntoon writes that “a tightening of immigration to Spain could decrease the supply of unskilled labor in Spain and put a damper on economic growth if higher wages are needed to move Spaniards into unskilled occupations.”<sup>205</sup> Such an undesirable impact on the job market was feared by those employers, who benefited from cheap labor in labor-intensive sectors, including tourism, construction, agriculture and industry. The regularization program was apparently an outcome of unfolding domestic demands. Despite a high unemployment rate among native Spaniards, the growing economy of the late 1980s generated jobs for unskilled workers, mainly filled by illegal immigrants. Many argue that the first amnesty aimed at getting statistical data on a number of foreigners living in Spain. As it turned out, the regularization program fulfilled national needs of private and public sectors.

In summary, it is difficult to argue against the suggestion that LO 7/1985 was almost entirely influenced by EC demands. In fact, the 1986 regularization program ran counter to the restrictive objectives of EC policies, because according to empirical and statistical data, such programs have usually led to further illegal migration. This statement challenges the strict nature of the Spanish

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<sup>205</sup> Laura Huntoon, “Immigration to Spain: Implications for a Unified European Union Immigration Policy,” *International Migration Review* 32, no. 2 (Summer 1998): 431.

immigration law and EC objectives, which at the same time began to pave a way to the process of the development of a “common” immigration policy. Diana Mata-Codesal adds that the regularization programs, seen as “exceptional” measures, have been a way to bypass EC demands.<sup>206</sup> Despite Spain’s weak stance on immigration issues and its passive transposition of EC objectives, its government managed to address concerns related to illegal immigration at the national level by introducing the regularization program and thus posing a challenge to the EC framework.

### **The 1990s – Top-Down and Bottom-Up Influences**

In the early 1990s, Spain recognized that immigration was not a temporary concern, as foreign visitors often chose the country as their permanent destination. Admitting that LO 7/1985 fell short of what a comprehensive immigration law should have looked like, implementation of visa requirements, two regularization programs, transposition of a few EU directives, and external border surveillance programs furthered the development of the Spanish immigration regime. As immigration became an increasingly discussed topic, many policymakers anticipated a new law in order to address the changing reality. By the end of the decade, the Spanish parliament began debating a bill that would revise the former immigration law through advocating integration as a way of incorporating immigrants into the Spanish society.<sup>207</sup>

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<sup>206</sup> Diana Mata-Codesal, “Regularisation Programmes in Spain, the account of a failure?” research paper (January, 2007), [http://www.migrationist.com/images/Mata-Codesal\(LegalisationsinSpain\).pdf](http://www.migrationist.com/images/Mata-Codesal(LegalisationsinSpain).pdf) (accessed January 14, 2010).

<sup>207</sup> Joaquín Arago, “Becoming a Country of Immigration at the End of the Twentieth Century: the Case of Spain,” in *Eldorado or Fortress? Migration in Southern Europe*, ed. Russell King, Gabriela Lazaridis, and Charalambos Tsardanidis (Hampshire, UK: Palgrave Macmillan, January 2000), 266.

### *The 1991 Visa Requirements*

The so-called update to LO 7/1985 took place in May 1991, when the Spanish government imposed visa requirements for the first time on entrants from Morocco, Algiers, and Tunisia.<sup>208</sup> Subsequently, in 1993, visitors from the Dominican Republic were also asked to obtain visas. At that time, these countries were recognized as sources of a large number of undocumented immigrants in Spain.<sup>209</sup> The visa policy coincided with the expiration of agreements with Morocco and Tunisia for mutual elimination of the required documents. Beforehand, Spanish authorities maintained a lax stand on the implementation of border control policies, already targeted by LO 7/1985. Again, the European Community became an influential player in the formation of immigration policies. Because Spain looked forward to joining the Schengen Agreements in June 1992, one of its preconditions included the tightening of borders with the Maghreb countries.<sup>210</sup> Consequently, the change in the visa policy led to reinforcement of borders around the Spanish enclaves of Ceuta and Melilla in Morocco.

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<sup>208</sup> Blanca Garcés-Mascareñas, "Migration Policy in Spain," *Migration Citizenship Education*, <http://www.migrationeducation.org/48.0.html> (accessed on January 10, 2011).

<sup>209</sup> Kitty Calavita, "Immigration, Law and Marginalization in a Global Economy: Notes from Spain," *Law & Society Review* 32, no. 3 (1998): 545.

<sup>210</sup> Moreno Fuentes, "The Evolution of Immigration."

### *Map 3- Ceuta and Melilla*



Source: Maps of Net

#### *The Regularization Programs of 1991 and 1996*

Shortly after, Spain implemented its second relevant act in June 1991, by granting three-year work and residence permits to 118,321 undocumented foreigners. This particular document targeted foreign workers who “were already in the country by May 15, 1991 and had an ongoing work contracts, or were self-employed in legitimate enterprise, or had previously had a valid residence and work permit.”<sup>211</sup> It is noteworthy that this measure was a product of domestic politics, which resulted in a pressure from pro-immigration groups for a broad amnesty.<sup>212</sup> Another rationale behind this second legalization was overwhelmingly based on the visa policy. Over 40 percent of applicants were

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<sup>211</sup> Moreno Fuentes, “The Evolution of Immigration.”

<sup>212</sup> Cornelius, “Spain: The Uneasy Transition,” 412.

Moroccans. This political leeway demonstrated that the document came from the domain of foreign policy toward Morocco.<sup>213</sup>

As a brief interface, it is important to mention again that the European Community transformed into the European Union in 1993. The creation of the Justice and Home Affairs (JHA), with its new competencies, remained a hybrid of intergovernmentalist and supranationalist pillars. Initially, the JHA was envisioned as substantially intergovernmental, allowing for any future communitarization of its activities. As early as in the first half of the 1990s, the Spanish parliament and the government articulated the need to join Schengen and to become an active player in migration politics at the EU level as a way to participate in the future communitarization of immigration policies.<sup>214</sup>

Following the second regularization process, another significant legalization act closely connected to the Regulations for Foreigners (the Royal Decree 155/1996), was introduced in 1996. According to Cornelius, this measure was a response to the February 1996 change in the rules concerning work permits, by extending their duration.<sup>215</sup> It legalized over 21,300 out of 25,128 applicants by issuing five-year residence permits.<sup>216</sup> It aimed at granting permits to those immigrants who lost them due to the restrictive character of the preceding acts. The Royal Decree 155/1996 took one of the most significant steps toward the permanent status of immigrants.<sup>217</sup> A foreigner who could prove that he had lived legally in Spain for six consecutive years, by renewing his temporary permits,

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<sup>213</sup> Moreno Fuentes, "The Evolution of Immigration."

<sup>214</sup> Fauser, "Selective Europeanization," 140.

<sup>215</sup> Cornelius, "Spain: The Uneasy Transition," 414.

<sup>216</sup> Aparicio Gómez and Ruiz de Huidobro De Carlos, "Report from Spain," 152.

<sup>217</sup> Calavita, *Immigrants at the Margins*, 29.

could apply for permanent residence status. This document advocated extended rights to foreigners and moved the Spanish immigration policies toward a more liberal approach, focusing on integration and immigrant rights. Thanks to the Royal Decree 155/1996, a parliamentary commission debated a new immigration law in 1998 that would substitute LO 7/1985 and contextualize the liberal spirit of the mid-1990s.

### ***The Integrated System of Exterior Vigilance (SIVE) - 1999***

In January 1998 a chief executive officer of the Spanish national police (from the Partido Popular) introduced implementation of an enforcement project called “Plan Sur.” The project aimed at “strengthening of border controls, a more intensive surveillance of air- and seaports, a tightening of deportation procedures and a closer cooperation with Moroccan and Algerian authorities.”<sup>218</sup> It invigorated a harsher stance on unlawful entrances of immigrants from North Africa. The following year, the Integrated System of Exterior Vigilance (SIVE) was approved as a mean to control the maritime border more efficiently. SIVE was launched with a budget of about € 150 million for the period 1999-2004. The funding supported maritime surveillance operations at a distance of 10 to 25 kilometers from shore.<sup>219</sup> At first, the only region under surveillance was the Strait of Gibraltar, which is the southernmost coastline of Spain. It was

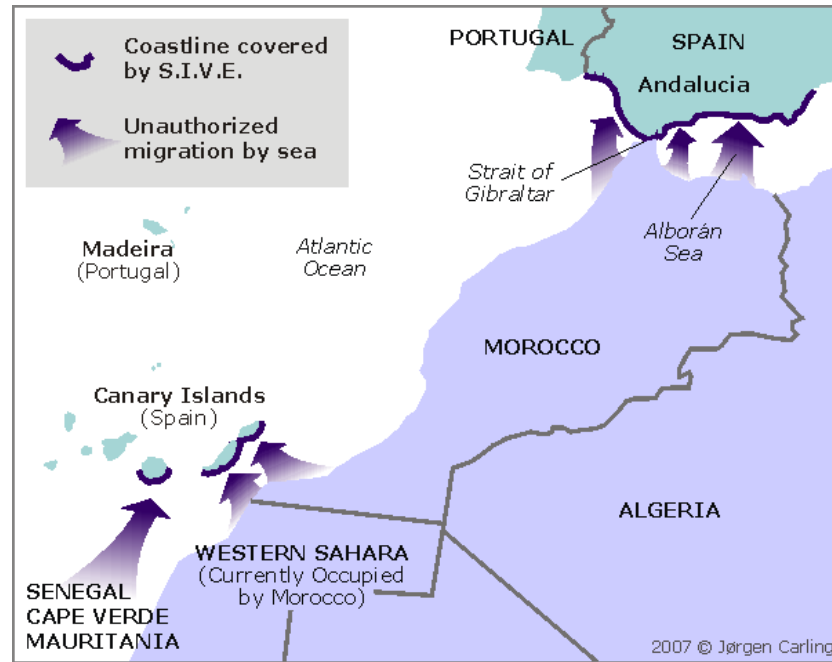
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<sup>218</sup> Stefan Alscher, “Knocking at the Doors of ‘Fortress Europe’: Migration and Border Control in Southern Spain and Eastern Poland, *Center for Comparative Immigration Studies* 126 (November 2005), <http://www.ccis-ucsd.org/PUBLICATIONS/wrkg126.pdf> (accessed January 20, 2011).

<sup>219</sup> Jørgen Carling, “The Merits and Limitations of Spain’s High-Tech Border Control,” *Migration Information Source* (June 2007), <http://www.migrationinformation.org/Feature/display.cfm?id=605> (accessed January 18, 2011).

subsequently extended to the east and west of the Spanish mainland. Today it covers the entire Andalusian coast and some parts of Canary Islands' coasts.<sup>220</sup>

**Map 4- Coastlines covered by SIVE**



Source: Jørgen Carling, “The Merits and Limitations of Spain’s High-Tech Border Control,” *Migration Information Source* (June 2007).

Moreover, the system has succeeded in slowing down the rate of increase of the number of boats in the controlled regions. According to Jørgen Carling, the total number of unauthorized migrants intercepted along the coasts of mainland Spain in the 1990s reached 17,000 in 2000. From 2002 to 2004, the number dropped to 9,000 -10,000 interceptions per year. Moreover, the number was less than 5,000 in 2005, and then jumped to 31,000 in 2006.<sup>221</sup> However, it did not stop immigrants from finding other ways of entering Spain. Critics of such a controversial system have voiced their concerns that immigrants have nonetheless found other routes to enter the coastal lines. Also, fatality figures have increased

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

since the installation of SIVE. Regardless of its unfulfilled promise to stop unauthorized immigration, its establishment pronounced a new position of the country in the European Union as an active proponent of the fight against inflowing undocumented immigrants and as a supporter of bilateral negotiations with the sending countries.

***The 1990s - Prevailing Mixture of European and Domestic Demands***

The early 1990s pronounced the ongoing Community and unfolding domestic pressure, which favored integration-oriented policymaking and stricter external border controls. The visa requirements were triggered by two factors: direct EC/EU influence and the Europe-wide economic downturn in the early 1990s. In the interim, the Schengen Agreements relied on strictly intergovernmental cooperation framework; they emphasized interests of the signatory countries that found fulfillment in Spain’s external border controls and visa policies. Namely, the EU had resolutely managed to promote Schengen objectives.

***Table 3– Major illegal immigration-related steps in the 1990s***

| <b>Timeline</b> | <b>The European Union</b> | <b>Spain</b>  | <b>National/international overlapping events/trends</b>              |
|-----------------|---------------------------|---|--|
| 1990            |                           |   | Fall of Communism  |
| 1991            |                           | Visa requirements (Tunisia, Morocco, Algiers) - May<br><br>The second Regularization program – June | Schengen II<br><br>Europe-wide economic recession of the early 1990s |



|           |   |  |   |
|-----------|---|--|---|
| 1992      |   |  | Spain signs the Schengen Agreements in June |
| 1993      | The Treaty of European Union (Maastricht Treaty) – November                 | Visa requirements – (the Dominican Republic)                                     |   |
| 1994-1995 | The Barcelona Conference – November 1995                                    | The Spanish Presidency of the European Council of Ministers (July-December 1995) |   |
| 1996      |   | The Royal Decree 155/1996<br><br>The third regularization program                |   |
| 1997-1999 | The Treaty of Amsterdam – May 1999<br><br>The Tampere Summit – October 1999 | “Plan Sur”<br><br>SIVE   |   |

Approval of “Plan Sur” and SIVE by the conservative government is a success story. The surveillance system not only aimed at tightening the Spanish maritime border, but also at fulfilling obligations vis-à-vis Europe.<sup>222</sup> Albeit a national innovative system, SIVE has emphasized Spain’s concern with the impact of the inflow of African immigrants to the European Union. Fauser pinpoints that the Spanish government had articulated the need to become a member of Schengen as a way to participate in the communitarization of

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<sup>222</sup> Carling, “The Merits and Limitations.”

immigration policies.<sup>223</sup> Visa requirements, “Plan Sur” and SIVE, could be described as official initiatives of support for the EU-wide policy. As I already remarked, Spain voiced its support for a “common” immigration policy as early as two decades ago, but only recently (in the late 1990s onward) turned ‘theory’ into ‘practice’.

Spain's compliance with EU policies was noticeable in the country's adaptation of many EU rules throughout the 1990s. Nonetheless, the two regularization programs and the 1998 parliamentary talks about a more liberal approach undermined the Partido Popular's enactment of “Plan Sur” and SIVE. Furthermore, such measures derailed from the EU vision of an overly restrictive “common” immigration policy that would, first and foremost, fight against illegal immigration and would favor social exclusion of illegal immigrants.

Esteve González and Mac Bride assert that the 1990s witnessed an overall attempt by the EU member states to reduce the rights of foreigners. Only such countries Italy, France and Spain intuitively aimed at extending such privileges.<sup>224</sup> In the early 1990s, the Spanish government under former Prime Minister Felipe González kept a low-profile immigration policy by avoiding public uprisings and inflated expectations.<sup>225</sup> Throughout years, the socialist government reflected support for less radical stance on immigration and more pro-integration policies.

The urgency to solve issues concerning undocumented immigrants appeared to have been a powerful incentive to introduce further reforms at the national level. The 1991 and 1996 liberal regularization programs antagonized

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<sup>223</sup> Fauser, “Selective Europeanization,” 140.

<sup>224</sup> González and Mac Bride, “Fortress Europe,” 168.

<sup>225</sup> Cornelius, “Spain: The Uneasy Transition,” 391.

certain European leaders. However, according to national supporters of legalization acts, their introduction was necessary at times because such programs fulfill certain demands of the public and private sectors which cannot be met by the EU.

### **The 2000s – More Pronounced Bottom-Up Influence**

The formation of national preferences has become more pronounced since the 2000s. The decade introduced new challenges, which have been defining the immigration policy framework at both the EU and national levels in restrictive terms. The mid-2000s economic boom attracted cheap labor from abroad, which rapidly increased the size of foreign population living in Spain. The 2000s initiated a more restrictive approach to illegal immigration. The first amendment to LO 7/1985 embodied a paradox. Subsequently, its further reforms, LO 8/2000, LO 14/2003 and LO 2/2009, focused on a more ferocious approach to illegal migration, tighter border controls, repatriation of illegal immigrants, and cooperation with third world countries in order to control the inflow of undocumented foreigners. Again, three Spanish regularization programs served as countermeasures to the restrictiveness of EU objectives.

#### ***LO 4/2000***

Despite the recent securitization of immigration issues, LO 4/2000 introduced “the most liberal law on the rights of foreigners in Europe.”<sup>226</sup> It formalized the long-envisioned goal to effectively integrate immigrants. The law’s objectives stemmed from the Royal Decree 155/1996, which initiated reforms of LO 7/1985. The document was an important landmark in the

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<sup>226</sup> Calavita, *Immigrants at the Margins*, 30.

construction of the liberal immigration legislation in Spain. It is crucial to note that both the Royal Decree and LO 4/2000 were advocated by the Partido Socialista Obrero Español (PSOE), a left-wing political party. In the months leading up to the approval of the new immigration law, the Spanish parliament hosted impassioned debates between socialists and conservatives. The right-wing political party, the Partido Popular (PP), introduced 112 amendments for the bill of 77 articles.<sup>227</sup> The group affirmed that the proposals were too liberal and did not follow restrictive EU objectives, mainly outlined in the spirit of the Tampere Summit of 1999. However, due to the lack of an absolute majority in the parliament, the PP failed to implement its revisions.

While the harmonization of immigration laws at the EU level was based on the laws of most restrictive countries, the socialist government in power, due to its integration-friendly approach to foreigners,<sup>228</sup> carried out reforms to deliver more rights to foreigners. LO 4/2000 extended certain privileges to illegal immigrants that were once reserved for legal residents only. This phenomenon meant that all immigrants, regardless of their legal status, who registered in the municipal census, gained the following rights: freedom to demonstrate, strike, and participate in associations; right to education; access to emergency and regular public health care; right to housing assistance and basic services.<sup>229</sup> Additionally, undocumented residence and work did not constitute substantial reasons for

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<sup>227</sup> Moreno Fuentes, "The Evolution of Immigration."

<sup>228</sup> It is noticeable that the socialist government (PSOE) has sided with NGOs, immigrant groups, non-profit organizations, and workers' unions in terms of extension of rights to immigrants. The European Commission and the European Parliament have also generally advocated expansive approach to immigration.

<sup>229</sup> Cristina Gortazar, "Spain: Two Immigration Acts at the End of the Millennium," *European Journal of Migration and Law* 4 (2002): 8.

expulsion from Spanish territory.<sup>230</sup> I can state it differently and assert that the new law excluded deportation of undocumented migrants.

### *LO 8/2000*

The premature death of LO 4/2000 occurred after the Partido Popular's electoral victory in March 2000. The conservative party, dissatisfied with the new law, revised it with LO 8/2000 before the end of the year. To many this transformation introduced a restrictive period of immigration. LO 8/2000 outlined several alternations to the previous legal framework. It continued to encourage measures that favored integration, but only concerning immigrants who had a legal status. The PP denied illegal immigrants the right to association, demonstration and strikes. Full access to education remained mainly unaltered, with one exception: non-obligatory education would only be guaranteed for resident immigrants. Moreover, the right to public health care also stayed unchanged. Unlike the grounds provided by LO 4/2000, illegal residence and work constituted sufficient reasons for expulsion.<sup>231</sup> LO 8/2000 reintroduced deportation as an effective tool to deal with undocumented immigrants. Calavita notes that the law was designed to "bring Spain into compliance with the EU agreement at Tampere in 1999 and the Schengen Agreements, which the PP claimed had been violated by the permissiveness of the LO 4/2000."<sup>232</sup> Meantime, the conservative government also approved a plan for integrating foreign immigrants called the Global Program of Regulation and Coordination of Immigration in Spain (GRECO), which was active throughout the period of 2000-

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<sup>230</sup> Ibid.

<sup>231</sup> Gortazar, "Spain: Two Immigration," 16.

<sup>232</sup> Calavita, *Immigrants at the Margins*, 33.

2004. Even though this plan emphasized the integration of immigrants as a fundamental element of a “healthy” immigration policy, it nonetheless aligned with the restrictive approach of LO 8/2000.<sup>233</sup> It limited integration services to immigrants who were paying social security and income taxes.<sup>234</sup> The plan clearly favored rhetoric of expulsion of illegal immigrants and reinforcement of external border controls.

### ***The Regularization Program of 2000***

The catalyst of the 2000 regularization program was restrictiveness of LO 8/2000. It opened doors to deportations *en masse*. This particular spike in expulsions fueled widespread protests by pro-immigration groups.<sup>235</sup> The extraordinary measure granted work and residence permits to 163,913 out of 247,598 applicants, a much higher number than the preceding programs.<sup>236</sup> Legalized immigrants received one-year temporary residence/work permits. One of the many conditions included proof of residency in Spain since June 1, 1999.<sup>237</sup> Again, despite the reticent attitude of EU officials towards national legalization acts, Spanish policymakers continued to perceive regularization as a way to answer domestic demands, including the fight against marginalization, exploitation of undocumented immigrants, and demand for unskilled labor.<sup>238</sup> As Calavita shows, integration policies in Spain have not been very effective and the

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<sup>233</sup> María Bruquetas-Callejo et al., “Immigration and Integration Policymaking in Spain,” *IMISCOE*, working Paper 21 (April 2008), <http://www.imiscoe.org/publications/workingpapers/documents/WP21-MigrationpolicymakinginSpain.pdf> (accessed June 20, 2009).

<sup>234</sup> Cornelius, “Spain: The Uneasy Transition,” 416.

<sup>235</sup> *Ibid.*, 414.

<sup>236</sup> Aparicio Gómez and Ruiz de Huidobro de Carlos, “Report from Spain,” 152.

<sup>237</sup> Moreno Fuentes, “The Evolution of Immigration.”

<sup>238</sup> *Ibid.*

immigrant's marginality is structured into the society. Thus, any political move toward extending immigrant rights, such as regularization programs, has been aimed at reducing the codified "otherness" of foreigners.<sup>239</sup>

### ***The Regularization Program of 2001***

Following LO 8/2000, the Partido Popular introduced an additional regularization program in 2001, mainly due to continuous protests on the streets and in the Spanish Parliament.<sup>240</sup> Qualifying applicants had to prove presence in Spain before January 23, 2001. The legalization process granted one-year temporary residence permits to about 243,790 out of 361,289 undocumented immigrants.<sup>241</sup> After the 2001 regularization program, the right-wing government announced that it would not offer any other legalization acts in order to avoid the "call effect,"<sup>242</sup> which was interpreted as a magnet for more undocumented immigration.

### ***LO 14/2003***

Despite the 2001 amnesty, the Partido Popular continued to make illegal immigration a top priority. An increasing number of migrants, instances of human trafficking, and smuggling networks had invigorated the party's reformative sentiment. To the bewilderment of many, the Partido Socialista Obrero Español signed the new law. LO 14/2003 did not change the hostility exhibited by the conservative government toward illegal foreigners. Some of the law's goals

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<sup>239</sup> Calavita, *Immigrants at the Margins*.

<sup>240</sup> Fauser, "Selective Europeanization," 148.

<sup>241</sup> Aparicio Gómez and Ruiz de Huidobro de Carlos, "Report from Spain," 152.

<sup>242</sup> Carmen González-Enríquez, "Active Civic Participation of Immigrants in Spain," *Carl Von Ossietzky University*, country report (2005), <http://www.uv.es/CEFD/12/Spain.pdf> (accessed July 20, 2009).

included the efficient expulsion of illegal residents, entry controls at airports, limited rights for the families of immigrants and inability to regularize status in case of continuous illegal permanence in the country.<sup>243</sup> Controversially, the document allowed the police to access information on foreign residents who registered in the municipal census. Such an extreme revision discouraged many immigrants from participating in the census, jeopardizing their access to health care and social benefits.<sup>244</sup> LO 14/2003 continued to target illegal immigration and exercise external border controls; its objectives correlated with a European view of a “fortress Europe.”

### ***The Regularization Program of 2005***

Following the terrorist bombings of Madrid mass transit, and the mishandling of that crisis by the conservative government, the 2004 general elections welcomed the Partido Socialista Obrero Español as the victorious political party. Although the socialist party did not push for a reform of the recent immigration law, it introduced another regularization program in 2005. The party in power decided to align with the needs of national employers.<sup>245</sup> The recent regularization act differed slightly from the preceding ones. Employers had to submit an application on behalf of undocumented workers. Once approved, a worker would get a one-year residence and work authorization permit that would

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<sup>243</sup> Cristina Fernández Bessa and José María Ortuño Aix, “Spanish Immigration Policies and Legislative Evolution in that Field as a New Exceptional Framework,” *Liberty and Security*, working paper 9 (May 2006), [http://www.libertysecurity.org/IMG/pdf/WP9-The\\_reforms\\_of\\_the\\_Immigration\\_.pdf](http://www.libertysecurity.org/IMG/pdf/WP9-The_reforms_of_the_Immigration_.pdf) (accessed February 20, 2009).

<sup>244</sup> Carlota Solé, “Immigration Policies in Southern Europe,” *Journal of Ethnic and Migration Studies* 30, no. 6 (November 2004): 1219.

<sup>245</sup> It is noteworthy that Spain, at that time, continued to experience an economic boom.



be renewed for up to two years.<sup>246</sup> Another main requirement stated that the applicant had to have lived in Spain as of August 2004. Similarly to the previous programs, immigrants needed to register in the municipal census. Also, as Table 4 shows, the 2005 regularization process constituted the largest one so far.

**Table 4— Extraordinary regularization programs, 1986-2005**

| <b>Year</b> | <b>Number of applicants</b> | <b>Number of regularized immigrants</b> | <b>Percentage of applications granted</b> |
|-------------|-----------------------------|---|---|
| 1986        | -                           | 38,100                                  |   |
| 1991        | 110,100                     | 108,321                                 | 98.4%                                     |
| 1996        | 25,128                      | 21,300                                  | 84.8%                                     |
| 2000        | 247,598                     | 163,913                                 | 66.2%                                     |
| 2001        | 361,289                     | 243,790                                 | 67.5%                                     |
| 2005        | 691,655                     | 575,827                                 | 83.1%                                     |

Source: Ministerio del Interior [Ministry of the Interior]; Ministerio de Trabajo e Inmigración [Ministry of Labour and Immigration]. Reproduced from Aparicio Gómez & Ruiz de Huidobro de Carlos, “Report from Spain.”

The regularization program did not avoid domestic and international criticism. Despite the terrorist attacks in Madrid (2004) and growing public discontent with a large number of immigrants, the socialist government went ahead and introduced this measure. The Partido Popular continued to emphasize on the “call effect.” International criticism came mainly from other member states and EU officials. Although the most recent legalization act was considered a

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<sup>246</sup> Amanda Levinson, “Why Countries Continue to Consider Regularization.” *Migration Information Source* (September 1, 2005), <http://www.migrationinformation.org/Feature/display.cfm?ID=330> (accessed June 1, 2010).

positive step by the Council of Europe and the United Nations, it was criticized by Brussels officials, as well as by Germany and France.<sup>247</sup> Because of the movement facilities afforded by the Schengen Agreements, they foresaw regularization as a magnet for illegal immigrants not only to Spain, but also to other states.<sup>248</sup> The fact that Spain did not consult with other EU countries prior to implementing the new regulation shocked many observers and EU policymakers. Even though there has not been a unified position on implementing regularization programs, attitudes towards such acts have varied from country to country,<sup>249</sup> which can largely be described as opposition and skepticism.

### *LO 2/2009*

As Spain experienced a shift from an economic boom to an economic bust in 2007-2008, the persistent inflow of immigrants pressured the socialist government to consider an immigration reform, which would align with socio-economic challenges facing the country. The Partido Socialista Obrero Español introduced a new, more restrictive law. LO 2/2009 came into force in December 2009. The document incorporated all EU directives, which were introduced since LO 4/2000 came into force. According to LO 2/2009, these directives were reflected in the Spanish legal system.<sup>250</sup> The amending document increased a period for detaining illegal migrants from 40 to 60 days before deporting them back to their home countries. Taking into consideration the Directive 2009/52

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<sup>247</sup> Tedesco, "Immigration and Foreign Policy," 4.

<sup>248</sup> Ibid.

<sup>249</sup> Council of Europe, "Regularisation Programmes."

<sup>250</sup> Gobierno de España, Ministerio del Interior [Government of Spain, Ministry of the Interior], *Preámbulo de la Ley Orgánica* [Preamble to the Organic Law 2/2009], <http://www.mir.es/SGACAVT/derecho/lo/lo04-2000.html#motivo3> (accessed November 20, 2010).

regarding sanctions applicable to employers of illegal immigrants, employers of undocumented workers or individuals encouraging illegal migration would be fined up to €10,000, whereas human trafficking would be fined up to €100,000.<sup>251</sup>

***The 2000s- Politicization of Immigration, Selective EU’s Influence and Spain’s Impact on the “Common” Immigration Policy Rhetoric***

Indisputably, socio-economic and political events influenced the development of more restrictive policies. The recent decade finally formed well-defined domestic interests with respect to illegal immigration and external border controls. Out of the steps of the immigration law development covered thus far, the short-lived LO 4/2000 was the only anomaly. Immigrant integration proved to be a priority for the socialist government in its effort to meet the interests of lobbying groups (NGOs, employer organizations, trade unions, churches, etc.) who benefited from the incorporation of foreigners into mainstream society. All further law amending documents had been more conservative due to the presence of acute socio-economic problems.

***Table 5 – Major illegal immigration-related steps in the 2000s***

| <b>Timeline</b> | <b>The European Union</b> | <b>Spain</b>  | <b>National/international overlapping events/trends</b> |
|-----------------|---------------------------|---|---|
| 2000            |                           | LO 4/2000<br><br>The fourth regularization program<br><br>LO 8/2000<br><br>The Global Program of Regulation and | El Ejido incident- February                             |

<sup>251</sup> Spain’s New Law on Foreigners Comes into Effect,” *Talk Radio Europe*, December 13, 2009, [http://www.talkradioeurope.com/news/publish/article\\_24315.shtml](http://www.talkradioeurope.com/news/publish/article_24315.shtml) (accessed June 20, 2010).

|      |  |  |   |
|------|--|--|---|
|      |  | Coordination of Immigration in Spain (GRECO)   |   |
| 2001 | Directive (D/2001/40)  | Visa requirements (Cuba, Peru)<br><br>The fifth regularization program   | The “9/11” bombings<br><br>Beginning of the war in Afghanistan- October |
| 2002 | The Seville Summit – June<br><br>Directive (D/2002/90)   | Visa requirements (Colombia)<br><br>The Spanish Presidency of the European Council of Ministers – (January-June) |   |
| 2003 |  | Visa requirements (Ecuador)<br><br>LO 14/2003  | The war in Iraq begins– March   |
| 2004 | The Hague Program (2004-2009)<br><br>Directive (D 2004/82)<br><br>The establishment of FRONTEX |  | The Madrid bombings   |
| 2005 |  | The sixth regularization program   | The London bombings<br><br>The Ceuta and Melilla incidents              |
| 2006 |  |  |   |
| 2007 |  | Visa requirements  |   |

|      |   |                                  |                                      |
|------|---|----------------------------------|--------------------------------------|
|      |   | (Bolivia)                        |                                      |
| 2008 | Directive (D/2008/115)<br><br>The European Pact on Immigration and Asylum – October | Slowdown of the housing industry | The worldwide economic crisis begins |
| 2009 | The Lisbon Treaty – December;<br>Directive (D/2009/52)                              |                                  | Economic/financial downturn          |
| 2010 |   | LO 2/2009                        | Economic/financial downturn          |

Decisively, recent circumstances and events have influenced the public opinion and the government’s stance on illegal immigration. Shortly after the introduction of LO 4/2000, violent riots broke out in El Ejido. This unfortunate event not only ignited anti-immigrant revolts, but also placed immigration on the socio-political agenda. As the general election approached, the Partido Popular politicized the event for its electoral value.<sup>252</sup> The conservative government capitalized on the public’s discontent with immigration and linked it to the upcoming elections and legislation. This publicized tragedy benefited the right-wing, which found solid ground to further restrict the immigration law.<sup>253</sup>

El Ejido represented a domestic issue that influenced the outcome of the immigration reform. Yet another factor that gave a green light to implement LO 8/2000 was the Tampere Summit. The latter official meeting of EU heads of state and government emphasized the need to develop a “common” immigration policy, which would strengthen border controls and expel illegal immigrants.

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<sup>252</sup> Zapata-Barrero, “Spanish Challenges,” 252.

<sup>253</sup> Ibid.

Former Prime Minister Aznar took advantage of the flexibility of European guidelines, which left room for interpretations, and of the so-called “escape to Europe” in order to justify his actions. This instance represented the Spanish government’s nature of selectiveness of EU objectives. The Tampere Summit document introduced a non-binding list of objectives that was used (due to domestic interests) as a legitimate excuse. Zapata-Barrero mentions that the PP abused the argument that the Tampere Summit “forced Spain to become more restrictive (something which was obviously false but that public opinion believed without any counter-argumentation by other actors).”<sup>254</sup> As Fauser asserts, “it [Tampere] gave a reason to act for a new bill and thereby to introduce the issue in the election campaign.”<sup>255</sup> The PP combined European demands with its domestic interests in combat against illegal migration.<sup>256</sup>

Despite Spain’s visible selection among EU objectives, the supranational institutions continued to sporadically influence the Spanish government. Several Council directives<sup>257</sup> in the area of immigration policies, such as recognition of decisions on expulsion among the member countries (D 2001/40) and a common definition on facilitating unauthorized entry, stay and residence (2002/90) were approved in the EU and then transposed within the Spanish legal code, as observed in the text of LO 14/2003.<sup>258</sup> Recently, the Spanish government supported the so-called Return Directive (D 2008/115) of 2008, standardizing the

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<sup>254</sup> Ibid., 253.

<sup>255</sup> Fauser, “Selective Europeanization,” 144.

<sup>256</sup> Ibid.

<sup>257</sup> Directives are legal acts, which require the member states to achieve the final result without dictating the means of achieving them.

<sup>258</sup> Fauser, “Selective Europeanization,” 148.

conditions for expelling illegal immigrants throughout Europe.<sup>259</sup> The Directive on employers' sanctions (D 2009/52) has prohibited the employment of illegal third-country nationals in order to combat illegal immigration. Nonetheless, "it lays down minimum common standards on sanctions and measures to be applied in the Member States against employers who infringe that prohibition."<sup>260</sup>

The 2001 Council Regulation (EC) 539/2001 introduced lists of "the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement."<sup>261</sup> Because EU regulations are law-binding documents, Spain applied visa requirements to Latin American countries: Cuba and Peru in 2001, Colombia in 2002, Ecuador in 2003,<sup>262</sup> and Bolivia in 2007,<sup>263</sup> just as outlined in the official document.

The Spanish Presidency of European Council of Ministers in 2002 (and also its Presidency in 2010) outlined the country's intention to place immigration issues at the top of the EU agenda.<sup>264</sup> The Presidency was used as a platform to coordinate the member states on issues related to this Spanish dilemma.<sup>265</sup> The Seville Summit in 2002 allowed the government to outline such objectives as illegal immigration, human trafficking, immigrant-related criminality and external border controls. Its conclusions were seen as a mere continuation of the Tampere

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<sup>259</sup> Tedesco, "Immigration and Foreign Policy," 4.

<sup>260</sup> European Union Law, Directive 2009/52/EC of the European Parliament and the Council of 18 June 2009 providing for minimum standards on sanctions and measures against of illegally staying third country nationals," *Official Journal of the European Union*.

<sup>261</sup> European Union Law, "Council Regulation (EC) 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," *Official Journal of European Union*.

<sup>262</sup> Moreno Fuentes, "The Evolution of Immigration."

<sup>263</sup> Garcés-Masareñas, "Migration Policy."

<sup>264</sup> Pinyol, "Europe's Southern Border," 53.

<sup>265</sup> Johansson-Nogués, "A Spanish Model."

objectives. As Fauser asserts, “this course for further development of restriction and control on migration in the EU was reflected in the Spanish initiative for a directive on the communication of passenger data by carriers.”<sup>266</sup> The Spanish proposal was turned into a directive (D 2004/82) at the end of April 2004. The Directive aimed at harmonizing carriers’ financial penalties provided for by the member states.

Furthermore, the establishment of FRONTEX in 2004 has its roots in Spanish advocacy. The central government has actively promoted FRONTEX by voicing the need for more resources and commitment from the EU member states. After unfortunate events in Ceuta and Melilla, Spain sought a European response to the crisis and encouraged measures to deal with sending countries. The Global Approach, approved by the European Council of December 2005, had a clear Spanish stamp on it, too. Its three premises were: “solidarity among member states, partnership with third countries and protection of emigrants, especially the most vulnerable groups.”<sup>267</sup> Spain pursued an agenda of measures, policies and instruments, already included in the Tampere Summit and the Hague Program, in order to advance the construction of a “common” immigration policy.<sup>268</sup> Moreover, since 2006, Spain’s multiple agreements with African sending countries have placed emphasis on the external dimension of a “common” immigration policy.

The convergence of Spanish-EU policies has been widely accredited to the Partido Popular as a major player in negotiating agreements. As Johansson-

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<sup>266</sup> Fauser, “Selective Europeanization,” 151.

<sup>267</sup> González Enríquez and Sorroza Blanco, “Working towards a European.”

<sup>268</sup> Pinyol, “Europe’s Southern Border,” 56.



Nogués writes, “the very success of the PP’s strategy is well illustrated by the fact that immigration now occupies a fairly central place on the European agenda as a security concern.”<sup>269</sup> The recent years have also shown the socialist government’s harsher stance on illegal immigration. Recent LO 2/2009 continues the restrictive pathway of the Spanish immigration stance. It was implemented shortly after the Lisbon Treaty, which brought in hope for a long-envisioned “common” immigration policy. The recent national immigration law converged with EU objectives. In other words, a “common” immigration policy might resemble the Spanish law in many of its aspects, considering the fact that the Spanish government has lately played a considerable role in outlining migration cooperation at the EU level.

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<sup>269</sup> Johansson-Nogués, “A Spanish Model.”

## **Chapter 5: Applicability of Theoretical Frameworks**

In this chapter, I begin with definitions of the birth and the process of the “common” immigration policy development within the lines of neofunctionalism and supranationalism. On the one hand, the neofunctionalist “spillover” mechanism, from economic integration to political integration, may help to explain the initiation of the interstate cooperation in the mid-1980s. On the other hand, supranationalism may help to understand the incremental delegation of the member states’ sovereign control over illegal immigration and border controls to the European Commission, the European Parliament, and the European Court of Justice. Furthermore, I introduce an intergovernmentalist critique of both theories. Ultimately, I test the relevance of liberal intergovernmentalism in the case study of Spain, by applying Moravcsik’s three-tier mechanism of EU negotiations. I examine Spain’s impact on EU initiatives through national preference formation, interstate bargaining and institutional choice.

### **Applicability of Neofunctionalism- Rationale behind Initiation of a “Common” Immigration Policy**

Many European integration students and experts persuasively suggest that the European immigration regime, which emerged in the mid-1980s, was a child of neofunctionalism. Many of them, including Mutimer, Neimann and Schmitter, claim that the Single European Act’s commitments to the abolition of internal borders and the free movement of EC citizens compelled the member states to subsequently coordinate their national migration policies,<sup>270</sup> which they have

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<sup>270</sup> Mutimer, “1992 and the Political,” 86; Niemann and Schmitter, “Neofunctionalism,” 55.

done only to a degree. By failing to harmonize immigration policies, the states would have jeopardized the EC developments in the economic sphere. Thus, in the neofunctionalist scenario, the states jumped on the bandwagon in the fear that abstaining from a future “common” immigration policy would negatively influence the Single Market.<sup>271</sup> Leticia Delgado Godoy asserts that “the objective of creating a unified market favored the consideration of immigration as a question that should be tackled at a European level.”<sup>272</sup> Moreover, Brochmann adds that “the enhanced freedom of movement within the Single Market has stimulated a tendency towards greater cooperation and coordination between EU member countries in this [immigration] field.”<sup>273</sup>

Another scholar, Lu, argues that the member states’ decision to cooperate on external border controls and migration policies followed from functional “spillover,” which started with the call for free movement of labor,<sup>274</sup> but was finalized with the internal market proposals. Lu further supports “spillover” by defining Articles 8A, 8B, and 100C of the Treaty of the European Union as representing “spillover” of problems from economic integration to visa policy and citizenship and then to the issue of migration.<sup>275</sup> Alan Butt Philip also recognizes supplementary instances of neofunctionalist “spillover.” A slow and reluctant association of the EU institutions with more and more immigration issues (visa

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<sup>271</sup> Lahav, *Immigration and Politics*, 54.

<sup>272</sup> Leticia Delgado Godoy, “Immigration in Europe: Realities and Policies,” *Unidad de Políticas Comparadas* [Unity of Comparative Politics], working paper 18 (2002): 4, <http://www.iesam.csic.es/doctrab2/dt-0218e.pdf> (accessed November 15, 2009).

<sup>273</sup> Brochmann, *European Integration*, 77.

<sup>274</sup> Lu, “Harmonization of Migration.”

<sup>275</sup> *Ibid.*

policy, illegal migration policy, etc.) has revealed instances of political and cultivated “spillovers.”<sup>276</sup>

From a neofunctionalist point of view then, the determinants behind the harmonization of these policies included a need to maximize success and benefits of removed internal borders and the freedom of movement.<sup>277</sup> Therefore, this observation has led many scholars to argue that functional “spillover” has been the root cause of further integration of immigration policies. To recall, functional “spillover” refers to a situation in which harmonization in one segment of policymaking spills over to cooperate activities in other sectors, which are closely linked to the former integrated sector.<sup>278</sup> The initial plan to demolish internal borders and apply the free movement of persons (SEA) coordinated one segment of policymaking at the EC level and spilled over to the immigration policy sector.

Anthony Messina and Colleen Thouez present three independent arguments picturing the linkage between the completion of the Single Market and the initiation of the immigration policy harmonization.<sup>279</sup> The first argument is that “the failure to harmonize national policies on non-EU immigration threatened to diminish the overall economic returns of the Single Market, as nationals of some member states were disadvantaged in seeking employment in the labor markets of other member states who pursue relatively permissive policies toward less costly non-EU labor.”<sup>280</sup> Differing immigration policies in the Single Market

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<sup>276</sup> Alan Butt-Philip, “European Union Immigration Policy: Phantom, Fantasy or Fact?” *West European Politics* 17, no.2 (April 1994): 168-191.

<sup>277</sup> *Ibid.*

<sup>278</sup> Cram, “Integration Theory,” 58.

<sup>279</sup> Messina and Thouez, “The Logics and Politics,” 105.

<sup>280</sup> *Ibid.*

would be against economic rationality. Another argument says that non-harmonized immigration policies threatened to distort trade competition within the internal market, where the member states with liberal immigration policies gained a competitive economic edge over the member states with more restrictive policies.<sup>281</sup> The last argument assumes that the abolition of internal borders and lack of cooperation to harmonize national immigration policies would endanger adequacy of the member states to protect them against international terrorism and drug trafficking.<sup>282</sup> Neofunctionalists take such arguments into consideration by asserting that absence of internal borders expanded “spillover” process into the immigration sphere.

Moreover, “spillover” from the Single Market into the “common” immigration policy rhetoric initiated years of the cooperative development of a harmonized approach to immigration. Neofunctionalists would argue that the above-described official documents have shown clear empirical evidence of functional “spillover” in a process. The latter type of “spillover” has gained credibility in additional instances of political and cultivated “spillovers.” Particularly, the theory of supranationalism accredits the phenomenon of the two latter “spillovers.”

With respect to functional “spillover,” once the member states understood the costs of national immigration policies, they began to push for harmonized policies, targeting external border controls and restrictive legislations against illegal migrants. The EU heads of state and government have incrementally and

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<sup>281</sup> Ibid.

<sup>282</sup> Ibid.

voluntarily upgraded control over these issues to the supranational level. Backed by selected data from the 1980s, neofunctionalists found rationale behind the puzzling question of why the member states began to harmonize their immigration policies.

### **Applicability of Supranationalism- Empowerment of the EU Institutions by the EC/EU Treaties**

Supranationalism has built its arguments on the neofunctionalist framework, mainly because neofunctionalism has endorsed supranational governance and has served as the basis theory for supranationalism. Once functional “spillover” affected integration of immigration policies, further developments in the field had enshrined more power to the EC/EU institutions with respect to policymaking at the EU level.

As argued by some, the Single European Act induced a neofunctionalist behavior, which was halted in the 1960s and the 1970s by unfavorable constituents. Again, neofunctionalists see the SEA as an engine of harmonization. Subsequently after neofunctionalism, supranationalism took the lead role in defining the evolution of a “common” immigration policy. Messina and Thouez mention that when an interstate cooperation grows, the member states engage in common strategies and plans to solve mutual problems.<sup>283</sup> In the case of immigration policies, one can argue that a failure to control the augmenting inflow of illegal immigrants and “porous” external borders has accredited the supranationalist approach, where technocratic EU authorities would, independently of the member states’ interference, resolve domestic problems of

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<sup>283</sup> Messina and Thouez, “The Logics and Politics,” 104.

the nation states. Anand Menon and Stephen Weatherill would agree with the latter statement. They assert that the supranational institutions have in fact helped to correct national efficiency failings and have served as supplementary aid to the member states.<sup>284</sup> National control over asylum and migration policies has presented challenges where the EU could offer effective arena for problem solving.<sup>285</sup>

The Single European Act introduced only minimized supranationalization in the sphere of migration policies. The White Paper's proposals, dealing with the free movement of people, fell under the European Commission and the European Court of Justice's competencies. However, the approval of an extended control over illegal immigration was still a subject to unanimity, where any EC head of state and government could veto a proposal. Some of the member states' disagreement with the European Commission's liberal *Guidelines for a Community Policy on Migration* revealed persisting reluctance to cede sovereignty over such sensitive areas. The EC member states preferred intergovernmental cooperation outside of the SEA framework, undermining the European Commission's enduring goal of a common approach at that time. Therefore it would be futile to attribute any meaningful supranational achievements to the SEA. Nonetheless, increased attention to the immigration field, presumably caused by functional "spillover," paved a way to the harmonization of national policies.

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<sup>284</sup> Anand Menon and Stephen Weatherill, "Transnational Legitimacy in a Globalising World: How the European Union Rescues its States," *West European Politics* 31, no. 3 (May 2008): 403.

<sup>285</sup> *Ibid.*, 402.

Unlike the SEA, the Treaty of the European Union formalized the development of a “common” immigration policy. The European Commission, the European Parliament and the European Court of Justice continued to exercise marginal role in decision making, while the European Council of Ministers emerged as a dominant actor, yet still with unanimous decision-making mechanism. The European Commission’s powers were also constrained.<sup>286</sup> Nonetheless, comparing to the pre-Maastricht period of no initiative power of the European Commission, the TEU awarded the institution with shared initiative under the third pillar (the Justice and Home Affairs).<sup>287</sup> The European Parliament continued to be an institution informed about discussions and sporadically asked for recommendations.<sup>288</sup> Although the European Parliament’s role did not change from consultation to co-decision, Brochmann notes that the institution has nonetheless become more active in the migration realm since the Treaty.<sup>289</sup> The European Commission’s weak authoritative structure was also compensated with increasing level of activity in the immigration policy regime,<sup>290</sup> mainly in in-between treaties’ periods.

To sum up, the legal basis for the harmonization of immigration issues introduced by the Treaty of the European Union continued to be weak; it did not involve any binding regulations or directives presented in the text. Three ‘soft’ policy instruments, characteristic for the third pillar, were available for the

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<sup>286</sup> Sandra Lavenex and Emek Ucarer, *Migration and Externalities of European integration* (Lanham, NY: Lexington Books, 2002), 23-25.

<sup>287</sup> Ibid.

<sup>288</sup> Brochmann, *European Integration*, 91.

<sup>289</sup> Ibid., 93.

<sup>290</sup> Ibid., 97.



member states. They included joint positions, which had no binding power; joint actions, which depended on unanimity; and conventions, which required ratification at the national level.<sup>291</sup>

Achievements of the Treaty of Amsterdam more noticeably fueled the “common” immigration policy development. The transfer of the JHA from the third to the first pillar formalized collective commitment to a potential, “common” immigration policy. The JHA pillar shift maintained unanimity in the European Council of Ministers as the basis of decision making for at least five years. Gebbes comments that “the member states imported the comfort blanket of intergovernmentalism and constrained the scope for supranational institutionalization.”<sup>292</sup> Referring to the European Parliament, the Treaty of Amsterdam gave it more expansive privileges. The institution gained a consultative power for the first five years after the document; after this time period, co-decision would follow. Similarly, the European Commission would increase its powers in 2004. It would gain a sole right to initiate legislations in the immigration realm. However, until then, the latter EU institution would share the legislative power with the European Council of Ministers.<sup>293</sup> The European Court of Justice would have “the jurisdiction to rule on the interpretation of Title III A on a request from the Council of Ministers, Commission, or a member state.”<sup>294</sup>

The Treaty of Nice harmonized Title IV by introducing qualified majority voting (QMV) in most decisions in the area of visa, asylum, and immigration.

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<sup>291</sup> Gebbes, *Immigration and European*, 97.

<sup>292</sup> *Ibid.*, 121.

<sup>293</sup> Messina and Thouez, “The Logics of Politics,” 102.

<sup>294</sup> *Ibid.*

According to *The Treaty of Nice and Seville Declarations 2002 White Paper*, more favorable Community procedures would apply. The right to initiate would rest with the European Commission, while the European Council of Ministers would take a decision to move to QMV and co-decision with the European Parliament.<sup>295</sup> It is important to state that qualified majority voting aimed at coming into force (if agreed by the European Council of Ministers) five years after the Treaty of Nice's implementation (2009). According to the previously mentioned document, the member states would unanimously decide, as of May 1, 2004, whether to extend qualified majority voting and co-decision to such sensitive measures as illegal immigration and the freedom of movement of third country nationals within the European Union.<sup>296</sup> As of today, QMV, promised by the Treaty of Nice in certain immigration areas, has not yet been implemented. Nonetheless, institutionalists have noticed significant achievements reflected in the Treaty of Nice, with respect to the illegal immigration area.

Some say that the recent Treaty of Lisbon moved forward the over two-decade-long process of the development of a “common” immigration policy. The Treaty clearly referred to an ultimately legally-binding “common” immigration policy. The document outlined a potential transfer of decision making in the migration sphere to qualified majority voting in the European Council of Ministers and to co-decision in the European Parliament. The Treaty concretized the “common” immigration policy rhetoric applied by the European Union and

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<sup>295</sup> "White Paper: Treaty of Seville Declarations," *Brandenburg University of Applied Sciences*, Dublin: Stationery Office, 2002, [http://www.fh-brandenburg.de/~brasche/EU/k1/treaty\\_nice\\_irish\\_white\\_paper\\_2002.pdf](http://www.fh-brandenburg.de/~brasche/EU/k1/treaty_nice_irish_white_paper_2002.pdf) (accessed November 15, 2009).

<sup>296</sup> *Ibid.*

shared by the member states. Additionally, it replaced the three pillars with a single legal framework. The planned substitution of unanimity with qualified majority voting would point to a partial power transfer. As a reluctant state loses its right to veto, a proposal passes in the European Council of Ministers by majority voting.

### *Intergovernmentalist Challenge to Neofunctionalism*

Albeit neofunctionalist explanations of the immigration harmonization pattern appear convincingly sound, what alternative answer to the 1980s events could confront the institutionalist assumption? Some scholars agree with the neofunctionalist “spillover” effect as the determinant of the immigration policy harmonization in the 1980s; others discredit it by pinpointing underlying intergovernmental patterns. Again, neofunctionalists perceive the rise of interest in the harmonization of immigration policies as functional “spillover” from the economic cooperation. Mutual effort in the immigration area stemmed from a “quasi-inevitable byproduct of the expanding Single Market’s rules.”<sup>297</sup> The persistent lack of harmonized immigration policies jeopardized any beneficial outcomes of the internal market.

Conversely, the state-centric approach emphasizes a different impetus for harmonization. Firstly, the initial commitment to the Single Market’s integration developed before the Single European Act. TREVI provided a security frame into which manifold immigration issues were inserted when they entered the political agenda in the 1980s.<sup>298</sup> TREVI focused on a factual understanding of migration as

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<sup>297</sup> Butt-Philip, “European Union Immigration,” 179.

<sup>298</sup> Gebbes, “The Politics of Migration,” 130; Bunyan, “Trevi, Europol.”

a security issue and, as early as the 1970s, linked security concerns and migration as closely related constituents. Interestingly, as mentioned above, immigration in the 1990s and the 2000s was linked with criminality and security threat. Because TREVI pinpointed the immigration-security concern paradigm before policy developments in the European Community, one may argue that the intergovernmental cooperation began to underline possible threats of uncontrolled international migration in an interstate, joint manner.

In a sense, the TREVI's objectives of a mutual combat against terrorism among the EC member states had "intergovernmentally" dispersed to areas of migration and border controls in a gradual process, long before the Single Market's proposals. In addition, Schengen sought to attain a speedier movement across frontier-free Europe. Both agreements indirectly brought up the need for the harmonized migration issues before the Single European Act. Therefore, skeptics of the "spillover" effect highlight the nature of both TREVI and Schengen as a way to demonstrate that "it is rather difficult to argue that the Single Market integration alone caused this co-operation, which had begun to develop prior to the SEA and was linked to attempts to consolidate control over international migration in the face of some domestic constraints."<sup>299</sup>

Guiraudon argues that developing awareness of legal and political constraints in France, Germany and the Netherlands led to a search for new European venues for policy development that were more shielded from these

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<sup>299</sup> Ibid.

domestic constraints.<sup>300</sup> In a sense, the market integration increased the salience of immigration concerns, but not caused them.<sup>301</sup> Analysis of the Franco-German initiative and its political will, which presumably initiated the European migration regime, posed an alarming challenge to the “spillover” logic. According to Herz, every step of economic and political integration has been made by the states involved.<sup>302</sup> To further confront the notion of the neofunctionalist approach, intergovernmental cooperation was noticed in the vetoes of Britain and Ireland to create a Community policy for immigration in the Single European Act.<sup>303</sup> Had the “spillover” mechanism motivated the migration cooperation in the mid-1980s, *all* member states would have followed the “common” immigration policy rhetoric. However, British and Irish vetoes and certain member states’ resistance to the European Commission’s pro-integration White Paper illustrated difficulties with mechanistic neofunctionalism.<sup>304</sup> With respect to the timing of European cooperation, Guiraudon finds neofunctionalism as an inadequate analytical tool and posed questions whether “spillover” truly directed the immigration harmonization in the 1980s. She argues that if “spillover” in fact played a decisive role in migration integration, it should have derived from earlier integration efforts.<sup>305</sup> It would have stemmed from integration efforts of the free movement of labor, introduced as early as in the 1960s. Although, as mentioned above, Lu asserts that the member states’ cooperation in the migration area spilled over from

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<sup>300</sup> Virginie Guiraudon, *La politique d’immigration en Europe* [Politics of Immigration in Europe] (L’Harmattan: Paris, 2000).

<sup>301</sup> Gebbes, “The Politics of Migration,” 130.

<sup>302</sup> Herz, “European Immigration,” 4.

<sup>303</sup> *Ibid.*

<sup>304</sup> Gebbes, *Immigration and European*, 71.

<sup>305</sup> Guiraudon, “European Integration,” 254.

the call for the free movement of labor and was finalized with the internal market proposals. This argument is rather weak due to the considerable time gap from the reference to the freedom of workers' movement in the late 1950s to its formalization in the texts of the SEA. Additionally, British opt out from the legally-binding immigration policy development weakens the practicability of neofunctionalism. The European Commission took a back seat in these matters, undermining the theory's focus on the institution's competence in agenda-setting sphere.<sup>306</sup>

Moreover, the recessions of the 1970s and the 1980s had created socio-economic, domestic distresses. Despite of new political incentives for the member states to crack down on illegal immigration, the influx of foreigners continued through family reunification, political asylum, and cheap labor.<sup>307</sup> As many state-centric scholars argue, the inability to solve the problem of a growing number of immigrants and asylum seekers in the EC had served as a key factor for increased cooperation among the member states.<sup>308</sup> The common problem of the 1980s engendered centrifugal tendencies among domestic groups for mutual resolution. Because of lack of incapacity to handle them unilaterally, joint socio-political issues at the domestic level, instead of "spillover" from economic integration and the SEA, pushed for the interstate harmonization of immigration-related policies.

### *Intergovernmentalist Challenge to Supranationalism*

As an institutionalist would argue, supranationalism has substantially accredited a rhetoric, which says that the establishment of international

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<sup>306</sup> Ibid., 255.

<sup>307</sup> Givens and Luedtke, "The Politics of EU Immigration Policy."

<sup>308</sup> Lu, "Harmonization of Migration," 2.

institutions centralizes power in the hands of supranational officials whose political entrepreneurship promotes integration.<sup>309</sup> The gradual supranationalization of a certain policy area, like immigration, leads to further empowering of the EU institutions. As I referenced above, the development of a “common” immigration policy has followed an incremental movement toward supranationalization in terms of empowerment of EU officials and policymakers.

However, such a gradual and limited harmonization may not necessarily indicate supranationalization. Some scholars point to a strong intergovernmental pattern noticeable in the harmonization process. National governments and the European Council have in fact overly influenced outcomes of treaty-amending negotiations, by outlining their priorities and deciding on proposals. Some scholars, including Moravcsik, attribute decisive powers of multilateral negotiations (treaties) to national governments, as opposed to informal technocrats. For example, during compromises leading to the Treaty of the European Union, governments and national groups drafted detailed proposals of the document. Moravcsik shows through empirical analysis that the European Commission arrived late with its provisions and the European Parliament’s reports were dismissed.<sup>310</sup>

In the case of the Single European Act’s negotiations, Moravcsik points out that the European Commission and the European Parliament had influenced the turn of the final draft of the SEA. However, their role in mediating was very

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<sup>309</sup> Moravcsik, *The Choice of Europe*, 10-12.

<sup>310</sup> Andrew Moravcsik, “A New Statecraft? Supranational Entrepreneurs and International Cooperation,” *International Organization* 53, no.2 (Spring 1999): 291.

minimal.<sup>311</sup> To the contrary, Moravcsik demonstrates the entrepreneurship of EC officials as futile and redundant, and even sometimes counterproductive.<sup>312</sup> The role of the legendary EC figures, including Jean Monnet, has been exaggerated by attributing leadership powers to them. Moravcsik states that negotiations initiated by national governments were efficient, while interventions of the EC institutions were minimally helpful.<sup>313</sup> The scholar tests several treaty-amending decisions and concludes that supranational actors did not enjoy formal powers and their presence was an “unintended coincidence” in negotiations.<sup>314</sup> In this case, Haas and Lindberg’s argument that the Community institutions have been powerful “midwives” in multilateral negotiations<sup>315</sup> runs counter to the state-centric approach. Similarly, Moravcsik’s observations neglect Sandholtz’s view of the EU institutions as players in defining paths of political influence.<sup>316</sup>

With respect to domestic preferences, Moravcsik emphasizes the role of “imperatives for global economic competitiveness, pressures from national export industries, Margaret Thatcher’s economic liberalism, Francois Mitterrand’s failed socialism in France and Helmut Kohl’s acquiescence in the Single Market.”<sup>317</sup> In other words, the scholar accredits economic (self) interest as the driving force of cooperation and power delegation.<sup>318</sup> Moravcsik and Kalypso Nicolaidis

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<sup>311</sup> Ibid., 296.

<sup>312</sup> Moravcsik, *The Choice of Europe*, 8.

<sup>313</sup> Ibid., 160.

<sup>314</sup> Moravcsik, “A New Statecraft?” 268.

<sup>315</sup> Tranholm-Mikkelsen, “Neofunctionalism,” 6.

<sup>316</sup> Sandholtz, “Membership Matters,” 405.

<sup>317</sup> Donald J. Puchala, “Institutionalism, Intergovernmentalism and European Integration: A Review Article.” *Journal of Common Market Studies* 37, no.2 (June 1999): 325.

<sup>318</sup> Moravcsik, *The Choice of Europe*, 4



emphasize that activity of the supranational actors does not infer influence.<sup>319</sup> Numerous Commission proposals in the 1980s, the 1990s and the 2000s had outlined ambitious objectives, many of which were oriented toward integration and the extended rights of migrants. As already referenced, Herz argues that the member states in the European Council of Ministers who have favored more restrictive and exclusive policies, rebuked majority of these liberal communications.<sup>320</sup> The sole power of influence and manipulation, Moravcsik argues, has not affected the outcomes of the treaties. Due to still-present unanimity in the majority of the immigration issues, fairly liberal proposals by the European Commission have been lowered down during negotiations in the European Council of Ministers.<sup>321</sup> The inability to attain qualified majority voting in the European Council of Ministers, outlined as early as in the Treaty of Amsterdam, has revealed persisting reluctance of some member states to cede more sovereignty over the immigration issues.

The extended role of the EU institutions in the policy initiation and the European Parliament's co-decision gave teeth to the further creation of an envisioned "common" immigration policy. To question applicability of the theory of supranationalism, many scholars have argued that the immigration policy development has followed a purely intergovernmental pattern, where empowerment of the EU institutions has not necessarily enhanced their role as initiators, mobilizers and mediators. The member states have, in fact, used the EU

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<sup>319</sup> Andrew Moravcsik and Kalypso Nicolaidis, "Explaining the Treaty of Amsterdam: Interests, Influence, Institutions." *Journal of Common Market Studies* 37, no.1 (March 1999): 69.

<sup>320</sup> Herz, "European Immigration," 11.

<sup>321</sup> *Ibid.*

as a venue to pursue their state interests. Pooling and delegation of power to the centralized institutions has aided the countries in reaching a superior outcome by reducing the transaction costs.<sup>322</sup> FRONTEX is an excellent example. Albeit not a supranational institution, but rather an independent agency, FRONTEX could be acclaimed as a successful leap forward with respect to collective, harmonized cooperation on external border issues. However, this independent body has very limited control over surveillance of national external borders, which stays with the member states.

The Treaty of Lisbon did not fully “supranationalize” immigration policies. While it reaffirmed qualified majority voting in the European Council of Ministers and co-decision in the European Parliament, it kept the area of freedom, security and justice under shared competence between the European Union and the member states. The EU did not gain exclusive competence over such sensitive matters. Moreover, Article 63A (5) of the Treaty states “this Article shall not affect the right of Member States to determine volume of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.”<sup>323</sup> Therefore the member states continue to pursue interest in maintaining the immigration quotas, regardless of their effect.<sup>324</sup> The EU would neither fix quotas nor grant right of admission to foreign workers. Additionally, the Treaty of Lisbon did not prohibit the EU member states from entering into agreements outside of the EU framework. If issues related to migration endanger national security, the European Council of

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<sup>322</sup> Moravcsik, *The Choice of Europe*, 74.

<sup>323</sup> European Union Law, “Amendments to the Treaty.”

Ministers, the European Commission and the European Parliament have no right in decision making procedure. As in the previous treaties, Britain and Ireland gained sole right to opt in or opt out in decisions in the area of freedom, security and justice. This flexibility has undermined the complete communitarization of immigration policies. Thus the gradual, yet limited, supranationalization of the immigration policy framework raises questions of whether the EU experience has followed footsteps of supranationalism, intergovernmentalism or perhaps a hybrid of both.

### **Applicability of Liberal Intergovernmentalism – Spain as a Case Study**

The major assumption of liberal intergovernmentalism is that integration serves as an outcome of international bargaining with governments as the main actors. Contrary to the neofunctionalist and supranationalist arguments, intergovernmentalist scholars argue that national governments initiate, mediate and mobilize negotiations. Liberal intergovernmentalism explains the communitarization of immigration policies through processes of Spain's national preference formation, interstate bargaining and institutional choice. This state-level approach provides the empirical evidence of how a member state, through active advocacy, has influenced creation of the immigration regime at the EU level. Even though Moravcsik uses his approach to describe official negotiations between the member states, this section nonetheless looks at Spain's ongoing push for a "common" immigration policy, in a bottom-up manner. In a way, the Spanish government's support for a unified policy could be considered as a negotiation with other member states and EU officials. Additionally, I limit the

chronological scope of this section to the sole time period of the last decade (2000-2010). As I illustrate above, Spain officially began to advocate for a “common” immigration policy in the late 1990s, thus the liberal intergovernmentalist approach mainly deals with the first decade of the 2000s.

### *National Preference Formation*

Moravcsik’s theory of liberal intergovernmentalism emphasizes that national preferences shape state’s behavior in international politics. As intergovernmentalists assert, the state is a major player. However, in reality, the state is not an actor in itself, but a representative institution for national preferences. These preferences are developed by social and private groups who seek to promote differentiated interests.<sup>325</sup> Groups or institutions, including employers, trade unions, civil rights associations, and the Catholic Church, voice their demands, which then exert influence on politicians and are fulfilled by governments. Why do national governments accept the role as “transmission belts”?<sup>326</sup> Moravcsik inclines to the view that governments in power want to be re-elected or are captured by the presented issues.<sup>327</sup> As governments’ actions revolve around self- interest, their preferences still depend on the preferences of social actors.<sup>328</sup> Although Moravcsik does not attribute the voting public as an influential social actor, there is a need to see unorganized civil society as an important tool in national preference formation. The focus on the Spanish

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<sup>325</sup> Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics,” *International Organization* 51, no. 4 (Autumn 1997): 516.

<sup>326</sup> *Ibid.*, 518.

<sup>327</sup> Moravcsik, “Preferences and Power,” 483-484.

<sup>328</sup> Christiane Kraft-Kasack and Mariya Shisheva, “The Communitarization of Asylum and Immigration Policy at Amsterdam: A Liberal Intergovernmental Account,” *Hertie School of Governance*, working paper 31 (April 2008): 4, [www.hertie-school.org/binaries/addon/539\\_hsog\\_wp\\_no.\\_31.pdf](http://www.hertie-school.org/binaries/addon/539_hsog_wp_no._31.pdf) (accessed April 10, 2010).

immigration laws cannot neglect the voting public's concern with the issue, as it is turned into demands for toughened immigration stance.

National preference formation finds applicability in the development of Spanish domestic demands concerning uncontrolled immigration. Spain entered the decade of 1990s as a new immigration state. This period could be explained as an intermediate one from the low to the high magnitude of migration issues among political and social actors in the immigration area. Players who seemed to influence administrative actions of the government were mainly the employers who favored regularization programs as a tool to fight with labor shortages,<sup>329</sup> hence the acts of 1991 and 1996. Spanish labor unions supported legal immigration over illegal and thus promoted amnesties, family reunification and employment-based migration quotas.<sup>330</sup> Focus on immigrant integration grew among the public and civil rights actors. As I discuss below, the Spanish government's stance on the fight against illegal immigration became pronounced during the Barcelona Conference of 1995. Moreover, the late 1990s and the 2000s witnessed significant socio-economic events that decisively impacted public opinion and furthered the government's stance on illegal immigration. Undoubtedly, the 2000s decade had shown national preference formation. Ever since, the voting public and politicians have become the major players in shaping policies in this particular field.

As I already referenced, El Ejido became a scene of collective conflict with political and social consequences. This event can be seen as an initiative to

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<sup>329</sup> Calavita, *Immigrants at the Margins*, 29.

<sup>330</sup> Julie Watts, 'Italian and Spanish Labor Leaders' Unconventional Immigration Policy Preferences.' *South European Society and Politics* (Spring 1999): 129-148.

shape national preferences, overwhelmingly based on the voting public. It is important to mention that people’s negative opinion on illegal immigration has been greatly influenced by right-wing media coverage and political campaigning. Immigrants became defined not only as foreigners, but also as criminals. The public, infuriated by a criminal act in El Ejido, became a target of media-fed anti-immigration propaganda. Right-wing politicians shaped their approach to the event based on the dominant attitudes and views of the public. After the incident, Juan Enciso, mayor of El Ejido and a member of the Partido Popular, supported violent acts of Spaniards against immigrants. Enciso emphasized that the PP stood for the Spanish people (the voters); consensus would thus mean heightened support for the PP.<sup>331</sup>

El Ejido became a politicized playing field through which the opposition party not only aimed to fulfill national preferences for restrictive immigration, but also to secure its own self-interest of being elected. The PP won the March 2000 elections with an increase of six percent on results from 1996 to 2000.<sup>332</sup>

***Table 6 – Electoral gain of the Partido Popular in 2000 (as compared to 1996)***

|          | PP results<br>(General Elections<br>1996) | PP results<br>(General Elections<br>2000) | Difference 1996-<br>2000 |
|----------|---|---|--------------------------|
| El Ejido | 46.2%                                     | 63.6%                                     | +17.4%                   |
| Spain    | 38.6%                                     | 44.2%                                     | +5.6%                    |

Source: Zapata-Barrero, “Spanish Challenges,” 252.

<sup>331</sup> Zapata-Barrero, “Spanish Challenges.”

<sup>332</sup> Ibid.

As the table shows, citizens expressed their support for the PP, which targeted increasing insecurity and delinquency.<sup>333</sup> In other words, the public's fear of augmenting crime among immigrants was projected on the decisions undertaken by the government. I could argue that El Ejido sped up the Spanish government's push for the forthcoming restrictive immigration law in Spain. Its objectives to tighten up external border controls and to fight against undocumented immigrants already found agreement with EU demands.

Other external and internal factors that stimulated negative attitudes of the population were the "9/11" terrorist attacks, the Madrid bombings in 2004, the Ceuta and Melilla events in 2005 and the London bombing in 2005. Playing on fears generated by the "9/11," former Prime Minister Aznar declared, "Immigration and terrorism not properly dealt with have generated radicalism."<sup>334</sup> Similarly to "9/11," the terrorist attack from March 11, 2004, near Atocha railway station in Madrid, turned the world's eyes on the Spanish capital.<sup>335</sup> Even though not all suspects of the attack were illegal immigrants, this terrible event, which left 191 casualties, became highly politicized by the Spanish government in order to legitimize further securitization of immigration politics. Moreover, the media focus on Ceuta and Melilla amplified in September and October 2005, when several hundred sub-Saharan African migrants attacked the border of the enclaves. This act led to the death of more than a dozen migrants who desperately

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<sup>333</sup> Ibid.

<sup>334</sup> Fabrizio Finzi, "Immigrazione: Aznar-Berlusconi, Insieme per Norme Severe [Immigration: Aznar-Berlusconi: Together to Strict Rules]," *Notizie ANSA*, June 5, 2002, quoted in Calavita, *Immigrants at the Margins*, 137.

<sup>335</sup> María Soledad Saux, "Immigration and Terrorism: A Constructed Connection: The Spanish Case," *European Journal on Criminal Policy and Research* 13 (2007): 62.

searched a more prosperous life.<sup>336</sup> It further cultivated the widening gap between “us” and “others” within the Spanish society.

The recent economic crisis has also attributed to national preference formation due to the rise of unemployment among both Spaniards and immigrants. The official 20 percent unemployment figure has frightened concerned politicians and the public.<sup>337</sup> During a recession, employers curtail search for cheap labor, and civil rights groups are not strong enough to lobby for more expansive immigration policies. Theoretically, the costs of immigration become more pronounced and include a drain of the social security system.<sup>338</sup> Immigrants are seen as scapegoats, targeted by the public, media, and politicians. Despite Prime Minister José Luis Rodríguez Zapatero’s long proclaimed support for equal social rights for immigrants, the recent LO 2/2009 is, in fact, the latest attempt by the socialist government to assuage the growing discontent in a society hurt by the economic crisis.<sup>339</sup>

### *Interstate Bargaining*

Another step in Spain’s negotiations for a “common” immigration policy is interstate bargaining. Moravcsik’s three-part model of EU negotiations specifically focuses on Intergovernmental Conferences (IGCs), which lead to treaty amendments. Interstate bargaining refers to agreements and compromises

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<sup>336</sup> Jørgen Carling, “Unauthorized Migration from Africa to Spain,” *International Migration* 45, no. 4 (2007): 23-24.

<sup>337</sup> Ben Rooney, “Spain Suffers 20% Unemployment,” *CNN Money*, 30 April 2010, [http://money.cnn.com/2010/04/30/news/international/Spain\\_unemployment/index.htm](http://money.cnn.com/2010/04/30/news/international/Spain_unemployment/index.htm) (accessed July 20, 2010).

<sup>338</sup> Kern, “Spain’s Immigration System.”

<sup>339</sup> Jelena Kopanja, “Spain Considers Immigration Reform That Would Make Things Harder for the Undocumented,” *Feet in 2 Worlds*, July 7 2009, <http://news.feetintwoworlds.org/2009/07/07/spain-considers-immigration-reform-that-would-make-things-harder-for-the-undocumented/> (accessed April 3, 2010).



gained at such meetings. Closa and Heywood devote a chapter of their book, entitled *Shaping the Union and Defending National Interests*, on the Spain's intergovernmentalist approach to policymaking at the EU level.<sup>340</sup> One of the dimensions through which Spain has pursued its national interests at the EU level is IGCs and enlargement negotiations. Similarly to Moravcsik's argument, the Spanish government has used such official gatherings as a way to secure its standpoint on various issues. With respect to the Justice and Home Affairs, Spain played a very active role during the Treaty of Amsterdam's negotiations in 1996. For instance, its negotiators stressed the need to "communitarize" the third pillar and to incorporate the Schengen Agreements into the Treaty of Amsterdam.<sup>341</sup>

As the member states defend their national interests at the IGCs, a study of a country's cooperation with the other EU member states and of numerous agreements outside of the IGC realm can also yield outcomes lined with liberal intergovernmentalism. Assumably, when national preference formation creates a majority consensus among the domestic actors, the Spanish government may proceed and pursue a policy based on a consensus at the intergovernmental level. Negotiations depend on relative power of the states involved.<sup>342</sup> The pattern of policy interdependence becomes a crucial instrument. As Moravcsik argues, "the power of each government is inversely proportional to the relative value it places

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<sup>340</sup> Closa and Heywood, *Spain and the European Union*, 105-134.

<sup>341</sup> *Ibid.*, 127.

<sup>342</sup> Moravcsik, *The Choice of Europe*, 62.

on an argument compared to the outcome of its best alternative.”<sup>343</sup> If a government wants to achieve something, it is willing to compromise.<sup>344</sup>

There is no doubt that the Spanish government and the political parties (on left and right of the ideological spectrum) have heavily depended on agreements and mutual cooperation, which address border controls and illegal immigration. Its geographical location and historical/cultural links to sending countries have shaped attitudes of other EU member states as facilitators in the fight against unwanted immigration. Spain’s position as a gatekeeper has made it more vulnerable to favorable agreements reached with other states, mainly France or other Mediterranean countries. One of the main arguments that the Spanish government has used is that immigration is not a Spanish problem, but a European one. The southern borders of Spain are no longer national borders; they are also European frontiers.

Closa and Heywood’s second dimension of pursuit of national interests is the use of the EU Presidency to steer policies in a particular dimension.<sup>345</sup> As already emphasized, the Spanish Presidency of the European Council of Ministers in 2002 underscored the Partido Popular’s stance on a “common” immigration policy with the emphasis on combating terrorism and illegal immigration and fortifying border controls. Many can observe the conservative government’s success in promoting a restrictive stance on the “common” immigration policy regime. Prime Minister Aznar and Italian Prime Minister Silvio Berlusconi formed a coalition at the Seville Summit against “permissive” immigration

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<sup>343</sup> Ibid.

<sup>344</sup> Kraft-Kasack and Shisheva, “The Communitarization of Asylum,” 7.

<sup>345</sup> Closa and Heywood, *Spain and the European Union*, 105.

proposals of their EU neighbors.<sup>346</sup> The officials favored restrictive immigration measures that targeted undocumented foreigners, living in Spain and Italy illegally. Being of vulnerable geographical locations, both member states have endorsed the “common” immigration policy rhetoric based on their national interests.

Albeit not referenced in this research work, Closa and Heywood’s third dimension refers to “insider policies” - placing nationals in key positions in Brussels in order to shape policies from the inside. Such a venue to influence national interests is incorporated into Moravcsik’s interstate bargaining part due to national representatives’ role as middle men in intergovernmental negotiations. The Spanish government, in relation to its advocacy for a “common” immigration policy, does not solely constitute a body of politicians and bureaucratic administration within national borders. It also includes personnel hired by the Permanent Representation (REPER) in Brussels, European Commission employees, and national officials in top ranking positions. As Closa and Heywood add, “presence in EU institutions does not necessarily equate to real influence- although it is likely that control over top positions helps to exert some influence on those areas which are deemed sensitive issues for Spain.”<sup>347</sup>

Moreover, Spain’s bargaining power was in the spot light at the informal meeting of the EU heads of state or government in Lahti, Finland, in October 2006. Zapatero urged fellow EU leaders to finance boats, planes and money in order to help the Mediterranean countries to deal with the influx of undocumented

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<sup>346</sup> Calavita, *Immigrants at the Margins*, 137.

<sup>347</sup> Closa and Heywood, *Spain and the European Union*, 105-112.

immigrants from Africa. According to the Prime Minister, a growing problem with uncontrolled migration has drained the Spanish government's resources.<sup>348</sup>

While some EU member states showed their willingness to support Spain, others voiced their discontent, blaming Spain for using the EU and its member states as a venue to fulfill its domestic goals.

Spain has also undertaken bilateral agreements with other EU member states (i.e. Italy and France) in order to strengthen its position in a battle against uncontrolled inflow of immigrants. As an outcome, the country has effectively persuaded many states that a unilateral approach is impotent in resolving an immigration problem. Spain's nearly desperate position in dealing with illegal migration issues at the domestic level puts it in a situation of willing to compromise certain interests in order to distribute the burden among other participating states. Henceforth, if a "common" immigration policy becomes finalized, Spain may find itself in a deadlock position with respect to its legalization acts, despite executive competence of national states over regularization programs. European politicians from Austria, the Netherlands and Germany voiced their discontentment to the Spanish government for performing the large-scale regularization program in 2005.<sup>349</sup> Previous processes also fell under a spell of voluminous criticism at the national and international levels.

Unlike the United Kingdom and Ireland, Spain has supported the full harmonization of immigration policies at the expense of its veto power. Spanish legislators clearly have understood the potential cost of instituting the legally-

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<sup>348</sup> Constant Brand, *The Malta Independent Online*, October 21, 2006, <http://www.independent.com.mt/news2.asp?artid=40641> (accessed June 2, 2010).

<sup>349</sup> Zapata-Barrero and De Witte, "The Spanish Governance," 89.

binding policy. The European Parliament would gain co-decision; the Council of Ministers would have the power of qualified majority voting. Such a compromise is worthwhile if Spain is to receive financial aid and effectively influence EU objectives with its domestic interests.

### *Institutional Choice*

The central institutional choice in the EU is whether and how to pool and delegate sovereignty to the EU level. Pooling refers to the application of majority decisions in the European Council of Ministers; delegation concerns the powers given to the European Commission and the European Court of Justice.<sup>350</sup> According to Moravcsik's conclusions, states pool and delegate sovereignty to obtain more credible commitments. Spain is a part of a group of European states that have viewed this institutional choice for the immigration regime as a guarantee to future decisions, cooperation and improved implementation of agreements.<sup>351</sup> Spain's active participation in the construction of a "common" immigration policy officially dates back to its 2002 EU Presidency.<sup>352</sup> Ever since, the Spanish government has demonstrated its support to put immigration issues on the European agenda.<sup>353</sup>

The socio-economic issues of the 2000s not only mobilized the formation of national preferences, but also led to the realization that national and bilateral controls over external borders and illegal immigration are unfeasible. Both the Partido Popular (early 2000s) and the Partido Socialista Obrero Español (2004

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<sup>350</sup> Laursen, "Theory and Practice."

<sup>351</sup> Moravcsik, *The Choice of Europe*, 73.

<sup>352</sup> Pinyol, "Europe's Southern Border," 53.

<sup>353</sup> Ibid.

onward) pursued the communitarization of policies not only to get more credible commitments, but also for economic interests at the national level. The Spanish government has advertised illegal immigration as not just a Spanish problem, but also a European one. While the 1980s and the 1990s were characterized by the unfolding EU's pressure on Spain to control its external border, recently it is Spain who has pushed the EU to acknowledge reinforcement of external border controls as a European task.<sup>354</sup> Spain's inability to solitarily deal with undocumented immigrants leaves no other option but to turn to Europe for financial and material resources. As I already stated, the EU has served as a supplementary aid to the member states.<sup>355</sup> Additionally, the Spanish government has emphasized immigration as an EU problem mainly as an effective venue to distribute the immigration burden across the EU member states. It has also called for joint EU operations in the Mediterranean Sea and the Atlantic coast of Africa, especially after the 2005 Ceuta and Melilla crisis.<sup>356</sup> The latter event decisively influenced Spain's active role in the drafting of the Global Approach in 2005.

It is important to mention that Spain's advocacy for strengthened external policy dates back to the 1990s. In 1995, former Spanish foreign minister Javier Solana organized the Barcelona Conference, which gathered ministers for foreign affairs from 15 EU member states and 12 non-EU member countries, mainly from North Africa.<sup>357</sup> The EU incorporated the ten-year program of the Barcelona

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<sup>354</sup> Zapata-Barrero and De Witte, "The Spanish Governance," 89.

<sup>355</sup> Menon and Weatherill, "Transnational Legitimacy," 403.

<sup>356</sup> Pinyol, "Europe's Southern Border," 57.

<sup>357</sup> Europa, "Barcelona Declaration and Euro-Mediterranean Partnership," November 27-28, 1995.

Declaration, often referred to as the Euro-Mediterranean Partnership, as a major external policy of the EU.<sup>358</sup>

The Barcelona Process was initiated to address Europe's concerns and challenges faced with its back-door neighbors in the Mediterranean basin. Its work program focused on a myriad of issues, including "cooperation in the field of illegal immigration, the fight against terrorism, drug trafficking, international crime and corruption."<sup>359</sup> Many have declared the ten-year initiative as mainly ineffective due to its failure to meet the outlined agenda. The "9/11" incidents and the subsequent terrorist attacks in Europe diverged economic development and prosperity to national security.<sup>360</sup> In 2008, French President Sarkozy re-launched the Barcelona Process under the new name of the Union for the Mediterranean. Thus far, the latter program has aimed at promoting stability throughout the Mediterranean region.

According to Joslyn R.Q. Osten's conclusions, the Barcelona Process was an initiative based on Moravcsik's assumption that "each state seeks to realize its distinctive preferences under varying constraints imposed by the preferences of other states."<sup>361</sup> Therefore, Spain and its Southern European counterparts saw the Barcelona Process as a venue to alleviate national issues, supporting Moravcsik's system of institutional choice.

To sum up, the EU member states have approved restrictive communitarization of highly-contested issues in order to enhance national control

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<sup>358</sup> José M. Magone, *Contemporary Spanish Politics* (London: Routledge, 2009), 20.

<sup>359</sup> *Ibid.*

<sup>360</sup> Joslyn R.Q. Osten, "The Euro-Mediterranean Partnership: What Kind of Policy Is It and What Did It Accomplish?" MA Thesis (DePaul University, Chicago, IL: 2007), 102.

<sup>361</sup> *Ibid.*; Moravcsik, "Taking Preferences," 518.

over them.<sup>362</sup> As seen, the Spanish government has advocated pooling and delegation for such reasons as mutual commitments, financial benefits, fulfillment of domestic demands by application of EU restrictive objectives, and gradual projection of its domestic policies onto the EU level. In a sense, the financially-based reasons behind advocacy have aimed at enhancing national control and sovereignty over immigration.

Furthermore, if a “common” immigration policy is implemented at the EU level, Spain will not only introduce minor changes to its legal framework, but it will attain its goal of restrictive stance on illegal immigration and external border controls. Pooling and delegation of sovereignty would represent more of a reinforcement and redefinition of the state’s control over immigration issues. Therefore, national sovereignty would not be fully eroded. To the contrary, Spain would strengthen its domestic control by circumventing institutional constraints. Legislators in support of more restrictive policies will be able to address the EU as a body, which would excuse (controversial) domestic law updates.

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<sup>362</sup> Givens and Luedtke, “The Politics of EU Immigration Policy.”



## Chapter 6: Analytical Conclusions

Neofunctionalism, supranationalism and (liberal) intergovernmentalism have left a mark on our understanding of over a half-a-century-long European integration. The study of European integration would be far from advanced without their theoretical contribution. After examining the historical evolution of a “common” immigration policy at the EU level and the simultaneously evolving Spanish immigration laws, a number of interpretations emerge from my analysis.

To briefly summarize, neofunctionalists accredit the Single European Act as a precursor to the harmonization of immigration policies at the EU level. Functional “spillover” from the creation of the Single Market into the “common” immigration policy rhetoric likely initiated years of cooperative development of the single migration regime. Like intergovernmentalists, neofunctionalists assert that once the member states understood the costs of non-EC immigration policies, they began to lobby for a harmonized regime, targeting external border controls and restrictive legislations against illegal migrants. Neofunctionalists accredit functional “spillover,” whereas the state-centric students praise interstate cooperation (mainly the Franco-German partnership) as an impetus of the immigration harmonization. Basing my analyses on secondary texts and empirical evidence, I argue that the political power behind French and German cooperation in the 1980s markedly influenced the harmonization of the migratory regime.

Initial commitment to the Single Market developed before implementation of the Single European Act’s text. The intergovernmental TREVI provided a security frame into which migration issues as inserted when they entered the

political agenda in the 1980s.<sup>363</sup> The TREVI's objectives of combating terrorism among the European governments had influenced the areas of illegal immigration and border controls in a gradual process, long before the Single Market proposals. After TREVI, the Schengen Agreements were concluded outside of the framework of the European Community. Both agreements indirectly referenced the need to harmonize migration policies before the implementation of the SEA. The two heads of state, German Chancellor Helmut Kohl and French president François Mitterrand, actively promoted the project.<sup>364</sup> As Douglas Webber also states, "It was the French and German governments' decision to dismantle the reciprocal border controls, reached at Saarbrücken in 1984, that paved the way for the adoption of the Schengen Accord less than a year later."<sup>365</sup>

Although the Franco-German political and economic interests are not a cornerstone of my argument, it is noteworthy that the outcome of such a close collaboration, along with other Northern European states, has weakened the position of the neofunctionalist theory as a viable explanation to the initiation of the harmonization process of immigration policies. As a matter of fact, I identify the first Spanish immigration law, LO 7/1985, and its timing as a crucial key. In reality, the so-called EC pressure on the Spanish government to implement restrictive policies clearly embedded Franco-German interests. As LO 7/1985 closely aligned with Schengen objectives, it calmed Northern European states'

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<sup>363</sup> Gebbes, "The Politics of Migration," 130;  
Bunyan, "Trevi, Europol."

<sup>364</sup> Herz, "European Immigration," 3.

<sup>365</sup> Douglas Webber, "Successful and Genuine Failures: France, Germany and the Others in the History of 'Multi-speed' European Political Integration," *European Consortium for Political Research – Riga*, conference paper (2008), <http://www.jhubc.it/ecpr-riga/virtualpaperroom/125.pdf> (accessed June 24, 2010).

fears of a potential, sudden chaos fueled by incoming immigrants, who would use Spain as a convenient gateway. Even though Spain was not yet a part of Schengen in 1985, France, Germany and the Benelux countries aspired to influence the Southern country's immigration policies for future security benefits, regardless of the law's inadequacy with Spain's domestic demands. I can thus argue that national interests of the member states, as noticeable in interstate cooperation, serve as a more plausible explanation than a coincidental "spill over" from economic integration (the Single Market) to political integration. Moreover, British and Irish opt out from the Schengen Agreements and from a further harmonization accredits the powerful role of the state. I am inclined to the view that (liberal) intergovernmentalism is a more likely explanation of the initiation of the European immigration policy regime. It is impossible to escape the prevalent importance of the states as political players in the domain of European integration.

With regards to supranationalism, it would be fallacious to state that the EU member states have not moved toward the communitarization of the migration regime. According to the above examined legal documents, the unification of immigration policies has followed a very slow and gradual route. Only since the Treaty of Lisbon have the member states released more powers to the EU institutions. The most recent treaty could be seen as a culminating act in the creation of a "common" immigration policy. However, it is noticeable that a moderate movement toward the final objective has unfolded in an intergovernmental fashion. The states have continued to be the major players with

shared knowledge, problems, and identities, for which they have constructed European solutions. Such a dense cooperation of governments at various levels has opened doors to further policy implementation in a much smoother manner.<sup>366</sup> As Moravcsik argues, the European Union is a series of intergovernmental negotiations.<sup>367</sup> In support of the latter argument, Moravcsik describes the Single European Act as a union of elites between EU officials and the European business interest groups. Its negotiating history is more consistent with an explanation that the EU reform rested on interstate bargains between the Community's superpowers: the United Kingdom, France and Germany.<sup>368</sup>

The gradual harmonization of the immigration regime can be understood through scrutiny of countries that have been capable of achieving goals via intergovernmental negotiations and bargaining, rather than via a central authority in charge of making and enforcing decisions.<sup>369</sup> Pooling and delegation of control to the supranational institutions helps states to reach a superior outcome by reducing transaction costs. Additionally, domestic actors who benefit from common policies and consensus have favored such an institutional choice.<sup>370</sup>

In my opinion, the theory of supranationalism partially explains the process of the development of a “common” immigration policy. Unlike supranationalists, I argue that the EU institutions are not the major powerhouses of European integration. Instead, I would accredit the states as the leaders in deciding upon the degree of further cooperation. Therefore, a “common”

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<sup>366</sup> Herz, "European Immigration," 15

<sup>367</sup> Moravcsik, "Preferences and Power," 473.

<sup>368</sup> Moravcsik, "Negotiating the Single European Act," 20-1.

<sup>369</sup> Ibid.

<sup>370</sup> Moravcsik, *The Choice of Europe*, 74.

immigration policy would not necessarily resemble a pure state of supranationalism *per se*; rather, it would reflect incomplete supranationalization, with strong intergovernmentalist characteristics. This statement leads me to incorporate Lahav's argument that a hybrid of supranationalism and intergovernmentalism defines power over a (restrictive) "common" immigration policy.<sup>371</sup>

The prevailing goal of national governments does not have to be protection of sovereignty at all times. As Donald J. Puchala emphasizes, "European governments by and large favor European integration, and they are certainly less preoccupied with sovereignty than they are interested in deriving benefits from international collaboration."<sup>372</sup> The latter argument supports Moravcsik's third part of the EU negotiations scheme - institutional choice. National governments benefit more from pooling and delegation of decisions to the EU level, assuring that such decisions would reflect their interests.

Presumably, if a "common" immigration policy becomes constituted, the role of the state will diminish at the expense of increasing importance of the European Commission and the European Parliament. However, the states will continue to have decisive impact on this issue. Puchala's comment perfectly portrays this EU-member state symbiotic relationship:

the governing of Europe, most of which already is or predictably will be within the EU, has a great deal to do with the functioning of the EU institutions. But the origins of this governance and its future evolution certainly have much to do with the explicit interest of Member States, their initiatives and influence and asymmetries in power among them. If Europe is still the 'bag o marbles' that

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<sup>371</sup> Lahav, *Immigration and Politics*, 9.

<sup>372</sup> Puchala, "Institutionalism, Intergovernmentalism," 232.

Andrew Shonfield likened many years ago, the bag has over the time become increasingly important and the individual marbles perhaps less so. But without the marbles the bag would be empty.<sup>373</sup>

The Spanish government has actively and successfully influenced the EU framework with national interests. While in the mid-1990s it was the EU who pressed Spain for enforced external border surveillance, it is currently Spain who has promoted tightened frontier controls since its “Plan Sur” and SIVE enactment. The country developed its national approach into a mainstream European problem,<sup>374</sup> fulfilling its domestic (economic) demands. The 2010 Spanish Presidency of the European Council of Ministers urged for more financial resources, clearer rules and specialist offices for FRONTEX.<sup>375</sup> Spain, as one of the Shonfield’s marbles in the bag, has blatantly emphasized its geographical position and thus its opinion has considerably contributed to the construction of a “common” immigration policy.

I have examined the case study of Spain through the prism of liberal intergovernmentalism. As I already stated, Moravcsik’s three-tier scheme concentrates on official negotiations, such as Intergovernmental Conferences (IGCs). However, I distance myself from this approach and introduce his method within the lines of the Spanish government and its relation to other national, international and supranational players. As I already demonstrated, national preference formation, interstate bargaining, and institutional choice are

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<sup>373</sup> Puchala, “Institutionalism, Intergovernmentalism,” 330.

<sup>374</sup> Zapata-Barrero and De Witte, “The Spanish Governance,” 89

<sup>375</sup> “Spain asks for more resources, clearer rules and specialist offices for FRONTEX,” *Presidencia Española* [Spanish Presidency], February 3, 2010, [http://www.eu2010.es/en/documentosynoticias/noticias/feb3\\_rubalcaba\\_frontex.html](http://www.eu2010.es/en/documentosynoticias/noticias/feb3_rubalcaba_frontex.html) (accessed January 10, 2011).

mechanisms present at national and international levels in periods between treaty negotiations. Moravcsik is right in insisting that the treaties are building blocks of the European Union and treaty amending documents are usually induced by well-defined national preferences. Such preferences are nurtured over time. Internal issues, especially socio-economic and political, are necessary to shape government's preferences, which are then discussed and bargained via the interstate manner, and eventually pushed in a bottom-up way to the EU level.

With respect to national preferences, I argue that liberal intergovernmentalism does find (perhaps partial) applicability to the case study of Spain and its immigration law evolution. I include the word "partial" because I have taken the voting public into consideration. Citizens are often the architects as to who influences governmental decisions. In a democratic country like Spain, the people vote for politicians, who promise to satisfy some of the public's expectations solely for re-electoral benefits. In the case of illegal immigration and external border controls, the government in power has not only fulfilled some of the public concerns, but also awarded itself with economic self-interest.

Moravcsik would agree that interstate cooperation leads to economic gains at the national level. As I remarked, one of the reasons for pooling and delegation of sovereignty has been an economic gain of financial support to fight uncontrolled immigration. Moravcsik writes, "When domestic policy instruments remain effective, governments will continue to maintain them; but where governments have exhausted all cost-effective domestic means of achieving domestic policy targets, they have an incentive to turn to international

coordination."<sup>376</sup> In this sense, the Spanish government has not been able to deal with such a large number of illegal (and legal) immigrants with respect to social services costs, deportation, surveillance of border controls, etc. Therefore, joint gains (economic cooperation and financial aid) and expected utility (more restrictive policies envisaged by the EU) have been high.

I agree with Ramin Shafagatov and Aygun Mirzayeva who infer that liberal intergovernmentalist theory fits well the explanation of the process of the development of a “common” immigration policy because domestic political factors and national governments play a decisive role in its development.<sup>377</sup> That said, Givens and Luedtke argue that when the political salience is high (like in the case of immigration issues), national governments either block harmonization, or allow only a restrictive pathway of harmonization at the EU level.<sup>378</sup> Schain makes a similar observation. He asserts that, although the progress has been noticeable with regards to the fight against illegal immigration and border control, failure to harmonize immigration policies stems from the fact that if cooperation takes place, it tends to support control and exclusion, rather than expansion and harmonization. He adds that the emphasis on exclusion and restriction reflects preferences of the ministries (of interior and justice) that are in charge of the process and that dominate the institutional space.<sup>379</sup> Therefore, national

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<sup>376</sup> Moravcsik, "Preferences and Power," 492.

<sup>377</sup> Ramin Shafagatov and Aygun Mirzayeva, "Immigration Policy as a Challenging Issue in the EU Policy-making Process: A Study of Immigrant Integration Policy," MA thesis (Linköpings University, Sweden:2005): 20, <http://www.temaasyl.se/Documents/Forskning/C%20&%20D-uppsatser/Immigration%20Policy%20as%20a%20Challenging%20Issue%20in%20the%20EU%20Policy-Making%20Process%20A%20Study%20of%20Immigrant%20Integration%20Policy.pdf> (accessed October 20, 2009).

<sup>378</sup> Givens and Luedtke, "The Politics of EU Immigration Policy."

<sup>379</sup> Schain, "The State Strikes Back," 102-103.



governments decide on the degree of the policy development at the EU level. Liberal intergovernmentalists argue that states pursue domestic preferences (such as the harmonization of immigration policies) at the supranational level because it serves as an extension of their domestic politics.

Therefore, according to my above analyses, paradoxically, supranationalism and (liberal) intergovernmentalism are both plausible theories applicable to the process of the development of a “common” immigration policy. Arguably, the latter framework appears to be the driving motor of a future, unified policy. This process of “intergovernmentalist supranationalization,” as demonstrated at the EU and the national levels, has shown that Spain continues to play a leading role in shaping a “common” immigration policy. The EU institutions have indeed gained more power over the last decade or so. Nevertheless, the nature of the power upgrade has solely depended on decisions undertaken by national actors. As Gebbes mentions,

Member states now share power- that much is clear- but this does not mean that their relevance is waning. Instead, EU responsibilities provide new international venues for the pursuit of policy objectives. Cooperation has thus far tended to strengthen the hands of the executive branches of national governments...<sup>380</sup>

Examination of the three theories of European integration points to different mechanisms, which can be applicable to the explanation of the policy creation. According to my observations, initiation of the immigration policy harmonization seemed to follow planned interstate cooperation rather than the “spillover” process of neofunctionalism. External negotiations and agreements had ignited over-two-decades-long movement toward the harmonization of

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<sup>380</sup> Gebbes, “International Migration,” 22.

migration policies, thus supporting an argument that intergovernmental talks have in fact been powerful tools in igniting the communitarization of the migration regime at the European level.

Supranationalism is a persuasive theory, which, interestingly, appears to be a continuation of neofunctionalism. If ever reached, the communitarization of immigration policies would ultimately reflect an "intergovernmentalist supranationalization," with shared power between the nation states and the EU institutions. The establishment of the policy would support supranationalist sentiments; however, the real powerhouses - the member state, indisputably including Spain – would continue to monitor and direct its development from “behind the curtains.”

### **Concluding Remarks**

One can observe that the phenomenon of the European Union and its policymaking has bred two camps of nation states: laggards and leaders. Spain, with respect to the “common” immigration policy development, has undoubtedly been the latter. Through processing and analyzing primary and secondary sources, I conclude that, in the late 1990s, Spain has emerged as one of the few major voices in the non-monolithic process of shaping a “common” immigration policy. By using the EU as an effective arena to resolve domestic issues, the Spanish governments (socialist and conservative) have been able to constitute ideas and concepts, which are now embedded in the EU immigration rhetoric. The country’s geopolitical location has allowed its central government to edge out as a powerful state, which sits behind drafting of a “common” immigration policy along with

countries like Germany, France, the Netherlands and Belgium. Thanks to successful lobbying activities of the Spanish conservative government, immigration has become a Europe-wide securitized and criminalized topic.

Thus, the development of the “common” immigration policy regime supports an “intergovernmentalist supranationalization.” I received affirmative results from the application of Moravcsik's liberal intergovernmentalism to the case study of Spain. The description of the Spanish regularization programs supports an argument that the country has held the steering wheel, thus posing a challenge to Sandholtz's assertion that the EU institutions are the powerhouses in defining paths of political influence.<sup>381</sup>

The case study of the Spanish legalization acts has unraveled a limited scope of the EU control over the field of illegal immigration. National governments secured the power to deal with immigrant statuses at the domestic level. As Elizabeth Collett from Migration Policy Institute mentions, early drafts of the Stockholm Program had proposed that the European Commission would in fact draft a common approach to legalization processes in order to ensure that immigrants are treated similarly across the EU.<sup>382</sup> However, due to a politically sensitive issue that this policy area has played, the member states successfully safeguarded exclusive competence over this subject. As we observe, Spain took advantage of this ongoing privilege and introduced several regularization programs since the mid-1980s. Despite discontent voiced by several EU heads of

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<sup>381</sup> Sandholtz, “Membership Matters,” 405.

<sup>382</sup> Elizabeth Collett, “The European Union's Stockholm Program: Less Ambition on Immigration and Asylum, but More Detailed Plans,” *Migration Policy Institute: Migration Information Source* (2010), <http://www.migrationinformation.org/Feature/display.cfm?ID=768> (accessed February 4, 2011).

government or state, the Spanish government has so far legalized over one million undocumented immigrants in order to address domestic demands.

How do these recurring instances apply to the concluding findings? They certainly demonstrate that Spain's national interests undermine the EU's pressure in certain areas. The state's importance is once again noticeable when rationalizing regularization programs. So far, these countermeasures have challenged the EU restrictive objectives despite the fact that the Spanish government has recently favored more toughened laws. A potential "common" immigration policy would have a limited scope, thus leaving many of its parts within exclusive competence of the states.

#### ***Recent Economic Downturn - Challenge?***

Undoubtedly, the current economic downturn has played a significant role in migratory inflows to the European continent. Numerous newspaper headlines have confirmed that immigration to Europe has slowed down due to effective enforcement of external border patrols and the extensive impact of the economic stagnation. I would refrain from absorbing such generalized information at a face value. The 2011 Arab revolutions in Tunisia, Egypt and Libya have accelerated an upsurge of illegal immigration not only into Southern Europe, but also the whole old continent. Moreover, the 2010-2011 Greece's incident with uncontrolled inflow of foreigners (mainly from Turkey) has shown that undocumented migrants continue to find effective routes to cross the gates of the prosperous world. With regards to a "common" immigration policy, what is the future of the unified migration regime? Is it more of a feasible, or an obsolete, goal?

According to Demetrios G. Papademetriou et al from the Migration Policy Institute, public expectations about immigration's impact may become more acute due to an economic recession. Undoubtedly, an economic turmoil has a potential to fuel anti-immigrant sentiments, which are then harmful to community integration.<sup>383</sup> One can only briefly study public reactions to immigrant population residing in the EU to find a grain of truth in the above statement. More restrictive measures have also been undertaken by the EU heads of state or government (i.e. the Netherlands, Denmark, and France) regarding illegal immigration. Emphasis on the costs of immigration is a common tactic; foreigners are blamed for draining of the social security system.<sup>384</sup> Immigrants are turned into scapegoats, so easily targeted by the public, media, and politicians.

In my opinion, the development of a "common" immigration policy will face either one of the two scenarios: ultimately come into effect as a very restrictive community law (fighting against illegal immigration, reducing family reunification, reducing the number of labor visas, and amplifying external border patrols); or stagnate (similarly to the integration slowdown caused by the 1970s oil crisis and its economic downturn) and continue to serve as a mere rhetoric, postponed for future years to come. In the latter case, the member states will continue to exercise control over their national immigration laws, with reluctant transposition of any forthcoming EU directives and regulations. It is plausible that intergovernmental cooperation would pave the way.

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<sup>383</sup> Demetrios G. Papademetriou et al, "Migration and the Economic Downturn: What to Expect in the European Union," *Migration Policy Institute: Transatlantic Council on Migration* (January 2009), [http://www.migrationpolicy.org/transatlantic/EU\\_Recession\\_backgrounder.pdf](http://www.migrationpolicy.org/transatlantic/EU_Recession_backgrounder.pdf) (accessed January 27, 2011).

<sup>384</sup> Kern, "Spain's Immigration System."

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